EMPLOYMENT TRIBUNALS

Claimant: Mr S Kahsay
Mr Y Tesfamariam
Mr R Arya

Respondent: Greggs PLC

Heard at: Newcastle Civil & Family Courts & Tribunal, Barras Bridge, Newcastle upon Tyne NE1 8QF

On: 24th & 25th July 2023
Deliberations: 2nd October 2023

Before: Employment Judge AEPitt
Mr S Moules
Ms K Fulton

Representation
Claimant 1: Mr MJ Uddin
Claimant 2: In Person
Claimant 3: In Person
Respondent: Mr S Liberadzki, of Counsel

RESERVED JUDGMENT

Claimant 1
1. Injury to Feelings for harassment £7,000
2. Interest on award £1,278.02
3. Award for Unfair Dismissal £13,086.75
4. Total award £21,354.75
5. The respondent shall pay the sum of £21,354.75 to the claimant.

Claimant 2
1. Award for Unfair Dismissal £648
2. The respondent shall pay the sum of £648 to the claimant.

Claimant 3
1. Award for Unfair Dismissal £1620
2. The respondent shall pay the sum of £1620 to the claimant.

The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to these awards.

REASONS

1. This is a remedy hearing for each of the above claimants following a finding of unfair dismissal in relation to each and a finding of harassment on the grounds of race in relation to Claimant 1.

2. The Tribunal had before it a small bundle of documents relating to each claimant and their situations since they were dismissed from Greggs. We read witness statements from each and heard evidence from them. We also heard evidence from Greggs about the possibility of the claimants being re-employed.

3. The claimants seek reemployment or reinstatement or a financial remedy. In relation to the financial remedy the claimants seek loss of earnings, loss of benefits including colleague share scheme and

<u>The Evidence From The Respondent</u>

4. The Tribunal heard evidence from Claire Murray Senior Supplies People Manager for the respondent. She gave evidence on several topics including the availability of employment within the respondent and the availability of comparable work within the Newcastle/Gateshead area.

5. At the time Ms Murray prepared her statement the respondent had roles available for four engineers and an engineering supervisor. The maintenance engineer role required a number of skills as set out in paragraphs 3 (a) and (b) of her statement, such as a requirement to be electrically biased and trained at a minimum to apprentice level. The Supervisor role required mechanical and Electrical skills and experience in Computerised Maintenace Management Systems. It has not been suggested that any of the claimants are able to undertake such roles.

6. Following the claimant's dismissal, the roles they were employed in, Production Operatives, Hygiene Department were not immediately filled by the respondent. New persons were employed on the same contract and shift pattern as Claimants 1 and 2 in January 2022 and the same contract as Claimant 1 in November 2022. There are currently no requirements or recruitment ongoing for Production Operatives in the Hygiene department.

7. At the time of writing the statement, it was likely that the respondent was likely to recruit Production Operatives into the manufacturing department. The shift system is different to that worked by the

claimants, it will operate a shift rotation as follows dayshift 6 am – 2 pm; backshift 2 pm – 10 pm, nightshift 10 pm 6 am. The rota requires approximately 7 Sundays per year. The salary is £25,850 increasing following successful completion of probation. The respondent will not offer Saturday and Sunday only working in these roles.

8. In addition, if the claimants were reemployed or reinstated, there is a likelihood that there would be that they would come into contact with Craig Dixon, John Murphy and Simon Long, the employees who dealt with the disciplinary procedure. Whilst it is not unusual that such a situation occurs frequently in the workplace, the Tribunal recognises that Mr Dixon has been found to have used racist language and behaviour toward Claimant. Ms Murray expresses concern as to how the relationships would work and her opinion is that it would be irresponsible to put the claimant into a situation where any contact would occur.

9. The respondent operates and offers several different benefits to its employees. First, is a staff discount policy. This is set at two rates 50% for standard products, such as sausage rolls and 25% for non-standard products, for example celebration cakes. The discount was subject to a maximum of £25 per week. Claimant 1 is claiming £3 per week, which Ms Murray is prepared to accept. However, Claimants 2 and 3 both claim for the full £25 per week. Although Ms Murray is unable to provide details of actual usage the claimants have not adduced any evidence of it. She states that the policy is offered on the assumption that staff use about 75% of the maximum per week which is £18.75.

10. There are two share plans operated by the respondent which are open to its employees. The Share Save Scheme, also known as Sharesave or SAYE. As the name suggests is a savings plan, this scheme allows employees to save a fixed sum per month for three years, at the end of the period the employee may request the total sum be returned or buy shares in the company. The price for the shares is fixed at the commencement of the agreement. Claimant 1 did not participate in the scheme. Claimant two was paying into two schemes, one from 2020 and saving £35 per month until his dismissal, the second from 2021 again a monthly sum of £35. The sums paid in have been refunded to claimant two.

11. Claimant three joined the 2021 scheme and was paying £35, there is still a balance of £105 to be returned to the claimant.

12. The respondent also operates a Share Incentive Plan, SIP. An employee is given the opportunity to buy shares from the respondent. The benefit is that the sum invested is deducted before the employee's tax and National Insurance are paid. The operation of the SIP scheme is dependent upon the respondent's profit or loss in any one year.

There was no SIP offered in 2021. If an employee leaves the shares are removed from the Scheme and, depending on how long the employee has had them invested may be subject to tax and national insurance. All three claimants had invested in SIP Claimant 1 and Claimant 2 have been reimbursed the value of their shares. Due to an apparent error, Claimant 2 shares are still held in the scheme and need to be reimbursed.

13. Finally, the respondent operates a Profit Share Scheme under which it distributes 10% of its profit amongst its employees. The exact sum is dependent upon the number of years of service and the actual earnings of an employee. There was no profit in 2021. The claimant received the following sums in March 2020. Claimant 1 £902.09; Claimant 2 £206.29; claimant three £617.40.

14. Miss Murray speaks at length about the disciplinary procedure, some of which is her opinion, for example in paragraph 12 'It is my belief that the findings of Mr Murphys show that on the balance of probabilities the claimants did commit gross misconduct' she goes on 'It is also my belief that notwithstanding any issues identified with the process followed for each of the three claimant, any failings would not have made any difference to the overall outcome, as they would have been dismissed in any event. In this regard she points to, the seriousness of the offence itself, and the past briefing, which she states was only a week before the events, plus Mr Kahsay, was already subject to action short of dismissal.

15. Finally, Ms Murray gave evidence in her statement in paragraphs 64-67 about the job market, including searches made for similar positions which are in the bundle, she produced a report compiled by The Best Connection recruitment agency, pages 92-96 of the bundle. The report concludes 'the number of job vacancies in July to September 2021 was a record high of 1,102,00 an increase of 31,8000 from pre-pandemic (January 2020-March 2020) level…All industry sectors were above or equal to the January to March 2020 pre-pandemic levels in July to September 2021 with accommodation and food service activities increasing the most by nearly 59%.

16. At the date of the report, October 2021, there were 705 Warehouse operative adverts currently posted online, an increase of 496% since January 2021. The average pay for a Warehouse Operative was £10.37 in the local area. Although the range was from £9.90 to £11.50

17. She also produced correspondence from Talent 84 a recruitment agency which confirmed the 'abundance' of work available for Warehouse Operatives from July 2021 – December 2022. It concludes 'Any experienced worker should not have an issue finding employment'. The Tribunal notes that Claimant 1 submits in his statement we should not rely upon this evidence because this company failed to pay his holiday pay when he was placed at Greggs

by them. Other than the assertion there is no evidence to support this argument and nothing else has been raised which would cast doubt upon the reliability of the information.

Claimant One Solomon Kahsay

18. Claimant 1 was born on 10th September 1970 and at the effective date of termination he was 36 years of age, He had been employed by the respondent from 7th June 2015 until 3rd July 2021. He had 6 years of continuous service. His gross annual salary was £28,232, equating to a gross weekly salary of £543, and a net salary of £444. There have been 117 weeks since his dismissal. The claimant seeks reinstatement as a primary remedy.

19. Previously in his employment, the claimant had been disciplined and dismissed as a result. However, he appealed that decision, and he was reinstated. As a result, the claimant was hopeful he would succeed in his appeal on this occasion and be reinstated again. He therefore did not start applying for any jobs until after the appeal had been heard and the outcome communicated to him on 29th September 2021.

20. His appeal having been unsuccessful, the claimant states in his witness statement that 'he made strenuous efforts to secure alternative employment' but he does not give further details. Although the claimant states he did use agencies such as Blue Arro, Hy and Central Jobs, he has produced no evidence of that fact. He believes that he was unable to secure a job because of his age, being dismissed and the economic climate following dismissal.

21. During evidence, the claimant stated he had not claimed state benefits because he had savings of £6,000.

22. On 1st October 2021 he applied for a position with a delivery company named Stuart. He commenced employment with Stuart as a food delivery driver on 3rd November 2021. The Tribunal has seen pay slips for the period November 2021 – January 2023 plus accountants and tax returns. The position was advertised on Facebook.

23. The claimant's evidence was that he had to book available working hours every Wednesday, if he could not book slots, he was unable to work. The documents show that the claimant never booked any slots and only ever worked 'on demand'. The Tribunal does not accept that the claimant throughout the period was unable to secure any working slots. The Tribunal concluded that the claimant did not attempt to secure the slots and was content to work 'on demand' only.

24. The sums he earned varied from £40.97 up to £2253 over 16 months. Which is an average of £971 per month. To work for Stuart the claimant had a number of expenses for car repairs and buying a new

car; car Insurance fuel and tyres. Plus, he had to supply his delivery bag. His 'profit' was £6377.

25. In January 2023 the claimant made an application to become a taxi driver but was unsuccessful because he was not medically fit for the role. He continued with his role at Stuart.

26. In relation to the impact of the harassment upon him, the claimant states he was depressed and his IBS became worse. His life was completely damaged. He goes on to say that his relationship with his wife broke down and they were divorced. The Tribunal does not accept this as during the liability hearing the claimant gave evidence that he was stressed because of problems at home. The breakdown of the marriage cannot be attributed solely, if at all, to dismissal or harassment.

27. The claimant also stated he travelled to Ethiopia for cultural treatment for his stress and depression. He first did this in 2021 following a disciplinary hearing. He also went in February 2022 for 4 weeks and seeks reimbursement of £1850. He also went to Ethiopia in February or March 2023. Other than going for a holiday, which may well help with depression or stress there is no evidence of the cultural treatment the claimant received. Indeed, the Tribunal see a pattern that the claimant travels to Ethiopia at the same time every year. The Tribunal concluded that this was nothing more than an annual holiday.

28. Having reviewed the medical evidence which has been provided information the Tribunal concluded that neither the claimant's stress nor his IBS became worse following his dismissal and the harassment. There is a brief statement about work-related stress in July 2021 but no treatment was given.

29. The claimant gave evidence about going back to work for Greggs. His view is that there are vacancies and that anyone in his role should be moved to accommodate him. In addition, the claimant has not accepted the Tribunal's decision that the dismissal was not because of his race. Indeed, he said 'they' the managers should be sacked. He doesn't trust Ms Howe or Mr Jones, in fact, Mr Jones would need to move. He does not want to work for the respondent unless it can be guaranteed that Mr Murphy will not manage him. Although he does not trust Mr Career he can still work with him.

Claimant 2 Yonas Tesfamariam

30. Claimant Two was employed between 8th October 2018 and 6th July 2021. At the effective date of termination, he was 29 years of age and had two years of continuous service. His annual gross salary was £16,822 giving a gross weekly wage of £324 and a net of £291. He worked 20 hours per week.

31. Whilst he was employed, he also claimed Universal Credit with his partner, before his dismissal this was £550 per month, this rose after his dismissal to over £1000 per month. The Tribunal has seen the refund of the SIP monies owed by the respondent of £1460.99.

32. Claimant 2 has requested that the Tribunal consider reinstatement, 'I want to return to the old job I did.' He told the Tribunal that he still thought there was discrimination in the workplace but accepted that the Tribunal had concluded that the dismissal was not because of his race. Even though the alleged perpetrators all work for the respondent, claimant 2 hopes they have all learnt their lesson and they can work together.

33. The claimant gave evidence that his wife has health problems which means he can only work on Saturdays and Sundays, this was clarified that the problems occurred after the birth of his first child. Whilst the Tribunal can empathise with his wife's poor health, the claimant did not produce any evidence that it prevented him from working during the week. Indeed, he failed to explain how he could work on Saturdays and Sundays. The Tribunal noted that he was only prepared to work Saturdays and Sundays if he returned to the respondent's employment although he did go on to say he would have to consider all the facts including the shifts in any employment.

34. In relation to seeking new employment, he told the Tribunal he contacted many agencies such as MTrec, Talent 84, Central Employment and some takeaways and restaurants. The evidence was he did this in person so there is no documentary evidence. He asserted at the job centre they always asked him about the jobs he applied for but again he has adduced no evidence of this.

35. The Tribunal's attention was drawn to emails between the claimant and the respondent's solicitors concerning evidence such as bank statements, evidence of benefits received which has not been supplied. We draw an adverse inference from the failure to provide all the relevant evidence requested.

36. The claimant decided in April 2022 to commence self employment as a taxi driver, he states his income was £5,600 until February 2023, after all his expenses but before tax. Although he has produced his tax return, he has not produced any evidence of the income he received or the expenses he incurred. Whilst giving evidence he conceded that he did not work as much on weekdays, and he worked more on weekends.

Claimant 3 Robeil Araya

37. Claimant Three was employed between 25th June 2015 and 20th September 2021. At the effective date of termination, he was 32 years of age and had 5 years of complete service. His gross annual salary was £16,822 which gave a gross weekly pay of £324 and a net of

£291. He worked 20 hours per week. He has requested reinstatement. He also believes his dismissal was because of his race but assured the Tribunal he could go back and work with them again. He told the Tribunal 'they have to learn from their wrongdoing'. He cited the issue of the grievance about pay following which he was able to continue working alongside the managers.

38. The claimant already worked as a self employed taxi driver whilst also working for the Respondent. His tax return for the year ending 2022 shows his income from the respondent. It also shows his turnover, as a taxi driver, for that year as £14,000 with a net profit of £7404.

39. He did not start looking for a job to replace the job at the respondents because he had a lot of stress from the dismissal. He actually did less work as a taxi driver. He did not produce any medical evidence about this, but he told the Tribunal he found it stressful, but he was not saying he could not work because of the proceedings.

40. In June 2022 he had to stop his work as a taxi driver because of an injury to his left hand; he has lost part of a finger. He is right handed so whilst he cannot work as a taxi driver he can return to work at the respondents. He is currently signed off 'sick' but he is hopeful he will improve and be able to return to work.

The Law.

41. Under Rule 29 Employment Tribunals Rules of Procedure an application to amend may be made at any time. The Tribunal was assisted by the guidance in Selkent Bus Co Ltd v Moore ICR 836 EAT to take account of all the relevant factors, whilst balancing the injustice and hardship of allowing or refusing the amendment.

42. Section 112 Employment Rights Act 1996 sets out the remedies available if a complaint of Unfair Dismissal is well founded. The Tribunal shall explain to the claimant what orders may be made under Section 113 of the Act and in what circumstances they may be made and ask if the claimant wishes the Tribunal to make such an order. If the claimant expresses a wish for an order under section 113 the Tribunal May make such an order. If the Tribunal does not make such an order, it SHALL make an award of compensation.

43. Section 113 Employment Rights Act 1996 provides for a claimant to be reinstated or reengaged. An order for reinstatement 'is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, section 114 of the Act. An order for re-engagement is 'an order, on such terms as the tribunal may decide that the complainant be engaged by the employer….in employment comparable to that from which he was dismissed or other suitable employment.' Section 115 of the Act.

44. If the claimant has expressed a wish for one of the above orders the respondent is obliged to adduce evidence about the availability of the

job from which the claimant was dismissed or of comparable or suitable employment .

45. If a Tribunal orders reinstatement, it shall be on the same terms and conditions as the claimant had before they were dismissed. This shall include any benefit the claimant might reasonably have expected to have received between the date of dismissal and his reinstatement, for example back pay. In addition, the claimant is entitled to benefit from any improvement in their terms and conditions they would have had, for example, a pay rise.

46. Re-engagement is an order for comparable employment. The terms of the order must be specified with a degree of precision Lincolnshire County Council v Lupton UKEA0328/15.

47. In determining whether to make either of the above orders the Tribunal shall take into account whether the claimant wishes to be reinstated, whether it is practicable for the employer to comply with an order for reinstatement, where the claimant caused or contributed to some extent his dismissal whether it would be just to order his reinstatement or engagement section 116(1) & (2) Employment Rights Act 1996.

48. Practicable means more than merely possible, Coleman v Magnet Joinery 1975ICR 46CA. 'capable of being carried into effect with success. An employer is not required to make employees redundant in order to give effect to an order for reinstatement nor should it be required to be overstaffed. Freemans plc v Flynn 1984 ICR 874 EAT.

49. One relevant factor is the personal relationships in the workplace. This includes a loss of trust and confidence between the parties. Oasis Community Learning v Wolff EAT 0364/12. This may be particularly so where there was a genuine belief by the dismissing officer in the guilt of the employee. Wood Group Heavy Industrial Turbines Ltd v Crossan [1988] IRLR 680 EAT.

50. It is only after the Tribunal has rejected the above orders that it should consider compensation. Under section 118(1)(a) &(b) Employment Rights Act 1996 the Tribunal has the power to order a Basic Award and a compensatory award. The Basic Award is calculated by determining the number of complete years of continuous service and multiplying it by one week's pay section 119(1).

51. The Basic Award may be reduced 'where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent. Section 122(2).

52. The compensatory award 'shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of his dismissal

in so far as that loss is attributable to action taken by the employer.' Section 123(1). Section 123(4) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.

53. Care must be taken when dealing with the issue of mitigation. The Tribunal should start with the assumption that the claimant has mitigated their loss. The burden is then on the employer as the wrongdoer to establish that the claimant has not guidance given by the EAT in Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498 (i)what steps were reasonable for the claimant to have to take to mitigate his or her loss;(ii)whether the claimant did take reasonable steps to mitigate loss; and (iii) to what extent, if any, the claimant would have mitigated his or her loss if he or she had taken those steps. Singh v Glass Express Midlands Ltd 2018 ICR D15, EAT.

54. If the Tribunal is satisfied that the claimant has failed to mitigate their losses it should attempt to identify a time when the claimant would have got a suitable job and reduce the compensation accordingly. In determining the issue of mitigation, the Tribunal must look at the claimant's circumstances, the question to be posed is whether this claimant has taken reasonable steps to minimise his losses. In Austin v Leeds Teaching Hospitals NHS Trust ET Case No.1801339/17 it was suggested that the question to be asked 'Was it unreasonable for the claimant to make the choices he or she did in his or her particular circumstances'

55. Section 123 Employment Rights Act 1996 states that the compensatory award 'shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributed to the action taken by the employer.

56. The Tribunal may consider the circumstances of the dismissals, in particular the procedure which was followed. One of the main aspects of this is the 'Polkey' reduction. Polkey v AE Dayton Services Ltd 1988 ICR142 HL. Where the issue is raised by a respondent a Tribunal must consider, as part of a remedy hearing, whether there should be a reduction in the compensatory award because the lack of a fair procedure would not have altered the outcome, i.e. if a fair procedure had been followed the claimant would still have been dismissed.

57. Section 123(6) permits the reduction of an award 'where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'. This is a distinct reduction from the Polkey reduction. Hollier v Plysu Ltd 1983 IRLR 260 EAT suggested the following scale for reductions. Employee wholly to blame 100%; employee largely to blame 75% employer and employee equally to blame 50% slightly to blame 25%.

58. Section 124 Employment Rights Act 1996 limits the amount of any compensatory award to either 52 weeks multiplied by a week's pay or £105,707.

59. Under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 a Tribunal may, where the ACAS code of Conduct applies and an employer has failed to comply with the Code and that failure is unreasonable increase the amount of an award by up to 25%.

60. In Lawless v Print Plus EAT 0333/09, Underhill J observed that whilst there is a broad discretion the circumstances should in some way relate to the failure to comply with the statutory procedures, which were then in force. The Tribunal equates this to mean that the failure should relate to a breach of the ACAS Code of Conduct.

61. Monetary Compensatory awards are subject to recoupment of benefits by the DWP Regulation 3(1)(b) Employment Protection (Recoupment of Benefits) Regulations 1996

Remedy for harassment based on Race

62. Section 124 Equality Act 2010 sets out the remedies for a breach of the provisions of the Act. The Tribunal may make a declaration as to the rights of the complainant in relation to the matter to which the proceedings relate, order the respondent to pay compensation; make an appropriate recommendation.

63. In relation to compensation the Tribunal, there are several heads of claim including loss of earnings and injury to feelings and personal injury but the aim is to put the employee in the same position 'as best as money can do it….before the unlawful conduct' Greig v Initial Security Ltd 0036/05.

64. The purpose of an award of compensation for injury to feelings was set out in Prison Service & others v Johnson 1997ICR. They are designed to compensate the injured party but not punish the guilty party. An award should not be increased as a result of displeasure at the guilty party's conduct. However, nor should it be so low as to diminish respect for the public policy on discrimination. Neither should they be excessive as they might be seen as untaxed enrichment. An award should be broadly similar to awards in personal injury cases and tribunals should bear in mind the need for public respect for the level of award.

65. The leading authority on the level of awards is to be found in Vento v Chief Constable of West Yorkshire Police 2003 ICR 318 CA Mummery LJ identified three bands for injury to feelings. The top band is to be applied in the most serious of cases, for example, a lengthy campaign of harassment; A middle band for serious cases that do not merit an award in the top band; and the lower band for less serious cases for

example an isolated one-off incident. The monetary value of the awards is regularly adjusted for inflation and currently stands at a lower band of £900-£9000; a middle band of £9,100 - £27,400, an upper band of £27,400- £45,00 exceptional cases may exceed £45,600.

66. The Tribunal was also guided by the quantum to be found in Harvey on Industrial Relations and Employment in paragraph 995 ff.

Submissions

67. All parties submitted written submissions following the conclusion of the hearing.

Respondent

68. The respondent contends that none of the claimants should be reinstated. First, there are no positions available at their grade at present. It also relies on the breakdown in trust and confidence between the management and employees. that all loss of earnings should be confined to 12 weeks as there is ample evidence that all three claimants would have been able to obtain a similar position in that time. It also relies on the Polkey principle and argues that the claimants would have been dismissed even if the flaws identified had been rectified. Further, it argues that the claimants contributed to their dismissals and that any award should be further reduced to reflect that.

69. In relation to the ACAS uplift sought by Claimant 1, the respondent argues that he has failed to identify which parts of the Code are alleged to have been breached and therefore there should be no uplift. Finally, in relation to any claims relating to the Share Scheme, the respondent states that any such award would be too speculative to calculate. Indeed, the claimants could have made a loss.

70. The respondent has not asked that any basic award be reduce under section 122(2).

Claimant 1

71. Seeks reinstatement with the respondent. He argues that he could work with the management team. As a result of the harassment and dismissal he has been caused stress and his health has been damaged. He considers an award for the Discrimination should be in excess of £40,000.

Claimant 2

72. He also seeks reinstatement. One of his primary arguments is that he can only work weekends because he needs to help his wife with their 2 year old daughter. He also cites the impact of the dismissal on his mental health, his dignity and his pride. In his submissions but not in his Schedule of Loss he claims a breach of the ACAS Code. Claimant

Two denies there is any contributory fault and asks the Tribunal to consider not reducing because of Polkey.

Claimant 3

73. Seeks to get his old position back. He denies he contributed to his sacking in any way. He also cites that he was caused humiliation and as a result, he has been scarred. In his submissions, he also claims for a failure to follow the ACAS Code. In addition, he wishes to claim interest.

Conclusions

The Application to Amend/Adjourn

74. In so far as Claimants 1 and 3 have made applications to amend their claims to include a free standing claim for holiday pay, such applications are refused. The Tribunal considered the timing of the applications to be very late. These claims were commenced by Claimant 1 on 30th September 2021 and by Claimants 2 and 3 on 30th October 2021. The case was Case Managed in two case management hearings conducted by experienced Judges which included orders for further information and an amended response and to join the cases together. The first time holiday pay is raised is when the schedules of loss were provided.

75. There was no proper explanation for the lateness of the claims, it appears to be 'tagged on' as part of the remedy for the unfair dismissal claim. This is not the proper way to deal with freestanding claims. Documentary Evidence should be disclosed and then evidence heard and tested at a Tribunal. This has not happened here. It is not appropriate to adjourn this remedy hearing and list the holiday pay claim at another time, that will incur more costs and is contrary to the Overriding Objective in the Rules of Procedure.

76. The Tribunal bore in mind that all three claimants speak English as a second language with a varying degree of competence, for example, Claimant 1 has a good understanding of English whereas Claimant 3 understanding is more limited. All three were assisted at every hearing by an appropriate interpreter. However, the Tribunal also noted that all three claimants were competent in their questioning of the respondent's witnesses and where appropriate their written submissions.

77. The Tribunal did hear some brief evidence from the claimants about the holiday pay claims. The evidence was poor and of little value, for example, Claimant 1 said 'I can't remember taking any holiday'. The Tribunal observes that the burden of proving such a claim lies with the claimant. From the evidence the Tribunal heard it appeared there was little chance of them reaching the required standard of proof in doing that.

78. The Tribunal considered the issue of hardship and prejudice. The respondent has been taken unawares by this application coming as it did after a lengthy substantive hearing on the dismissal and race discrimination claim. The hardship to the respondent is that it has not had a proper opportunity to examine the claims and check its records, as noted above, incurring further costs for them to do so manifestly unjust to them.

79. Whilst the Tribunal noted that in not allowing such an application the claimants may lose their entitlement to claim monies owing to them, it concluded that the balance of hardship was such that the application would be refused. The claimants have had a substantial period of time to ensure that all their claims were before the Tribunal; they have, with some hitches, on the whole, presented their claims, including obtaining witness statements from others, competently. There has been no valid explanation as to why the claims were not advanced earlier.

General Points

80. The Tribunal has no power to award interest on an award for unfair dismissal.

81. The Tribunal has no power to make an award for stress, problems with mental health, humiliation or injury to feelings in ascertaining compensation for unfair dismissal. It may only be an award for economic loss.

82. In relation to any claims for compensation from the Share Scheme. The Tribunal accepts the respondent's argument that any compensation is far too speculative to be considered. As a Public Company, the share fluctuates greatly, and it will be impossible to assess with any accuracy how they have performed since the claimant's dismissal.

83. For the reasons stated below under each claimant, the Tribunal has accepted many of the arguments in relation to how the compensatory award for unfair dismissal should be calculated.

84. In particular, although the Tribunal found the dismissals unfair because of procedural flaws. The respondent did carry out a procedure, unlike some employers. The failure was in the way the investigation and hearings were conducted. To that extent, the respondents complied with the Code. The Tribunal did not consider it just and equitable to impose an increase under section 207A TULR(C)A.

85. Each of the claimants' awards is subject to the statutory cap; claimant 1 of £28,232; claimant 2 £16,822; claimant 3 £16,822. The claims made by each individual exceed the cap.

86. The Tribunal has not taken into account any benefits received when calculating any figures. As claimant 2 and 3 claimed benefits their

awards are subject to recoupment from by the DWP. However, as no monetary award has been made the Regulations do not apply.

Claimant 1: Soloman Kahsay

Reinstatement/ re-engagement

87. In considering the issue of practicability the Tribunal having heard the evidence of Ms Murray, in particular in relation to the working relationship between this claimant and the managers and how this may be managed. This is of particular concern because this claimant not only was subject to harassment because of his race but he has not accepted the Tribunal's decision that the dismissal, although unfair, was not because of his race. Indeed, he went so far as to say that the managers should be sacked. Despite his assertions that he will have very little to do with the relevant people, having heard from Ms Murray there is a substantial chance that they will come into contact. The Tribunal considered the impact upon both this claimant and the relevant managers and the rest of the workforce. If this claimant maintains his stance, the Tribunal concluded that it would be impossible for this claimant to work in his previous role. There is a potential for conflict, and it is not appropriate for a tribunal to place an employee into a position where he might be subject to further discrimination.

88. It is not lawful for this Tribunal to order someone to be dismissed, nor should this Tribunal order that other employees be moved or disciplined to accommodate a reinstatement order.

89. Although the Tribunal disapproves of the behaviour of Mr Dixon it is also dismayed that despite the respondent's wrongdoing the breakdown in the relationship can prevent the claimant from being reinstated. The Tribunal was forced to the conclusion that allowing this claimant back into this workplace is not practicable. It will place both the claimant and his managers into a potential conflict which in turn may lead to harassment from either one or other behaviour which should not be permitted.

90. This claimant does not want to be considered for any other position.

Mitigation

91. The claimant did not start looking for new employment until after his appeal had been dealt with. The claimant was dismissed on 3rd July 2021, with formal notification being sent on 6th July 2021. The appeal process was concluded on 29th September 2021, and he was informed of the outcome on 20th August 2021. Although this was seven weeks the Tribunal considered such a course of action was not unreasonable. In considering this we looked at the delay at every stage of the appeal. Following receipt of the outcome, the claimant appealed the decision on 13th July 2021 and a hearing was set for 21st July 2021. The claimant was unable to attend that hearing because he

was unwell so the hearing was re-scheduled to take place on 4th August 2021. This hearing was also rescheduled because of his health. The hearing took place on 16th August. Mr Nicholson did not make an immediate decision but took time to consider the appeal. An outcome letter was sent on 20th August 2021. The respondents offered a second appeal and the claimant availed himself of that opportunity, he appealed on 25th August 2021, and this was received by the respondent on 1st September 2021. This second stage of appeal is dealt with in writing. Mr Long, who dealt with this appeal notified the claimant of his decision on 29th September 2021.

92. The Tribunal does not consider there was any deliberate delay by either party, especially in relation to the two adjourned hearings as the respondent accepted at the time the claimant was not fit enough to attend. The time taken at the second stage complies with the respondent's policy of issuing a response within a month.

93. That leaves the question of the claimant's belief that he would be reinstated. The claimant had previously appealed a dismissal decision and been successful. It was reasonable for him to hold the belief that he may succeed on this occasion and therefore wait until he sought new employment.

94. The claimant thereafter sought new employment. Although he gave evidence as to the efforts, he made to secure employment such as contacting agencies there is no evidence of this within the bundle. It is the tribunal's experience that when joining agencies there is some form of communication to confirm you have been accepted, whether this is by email or confirmation on an 'App'. None of these have been supplied. The tribunal doubts whether they exist. It is unclear at what stage the claimant was accepted by Stuart as a driver, but it must have been before 3rd November which was his start date. Again, no evidence was produced about this.

95. The Tribunal considered the evidence from the claimant about the availability of work with Stuart with care. The evidence from the pay slips is that the claimant only ever completed 'on demand' deliveries. He never booked slots when he was available to work. The Tribunal does not accept that the claimant was unable to secure 'delivery slots'. The Tribunal concluded that the claimant did not attempt to book 'slots' but rather relied on the 'on demand' aspect of the work. The highest sums he earned were in December and January 2021.

96. Having seen the net figure the claimant earned, which does not provide for sickness or holidays, the claimant's income was substantially below that he earned at Greggs. Indeed, he was not even earning the Minimum Wage. Using the hours, he worked for the respondent on the minimum wage the claimant could expect to receive £8.36 per hour during 2021-2022. There was an increase the following year to £9.18. Having looked at the hours the claimant worked for the respondent and using the lowest figure contained in the Report, the

claimant would have an income of £10,296. Using the highest he would earn £11,960.

97. If the claimant worked a 40 hour week, he would be able to earn a salary commensurate with that of the respondent.

98. Having seen the evidence produced by the respondents, in particular the job adverts, this particular sector appears to have been buoyant at this time, possibly because it was improving following the COVID-19 pandemic. The Best Connection report is also positive in terms of wage increases in the sector.

99. The Tribunal concluded that the claimant was unreasonable in the steps he had taken to secure an income commensurate with the salary paid by the respondent. It would be clear to the claimant from December 2021, especially if he was unable to secure 'slots' for a second month in a row that his earning capacity with Stuart was severely limited.

100. The Tribunal concluded that the claimant wanted to have a position which offered the same working hours, shifts and salary as that offered by the respondent. This is unrealistic and unreasonable. The terms offered by the respondent appeared to this Tribunal to be very good.

101. Reasonable steps would have included signing on with the relevant agencies; and producing a C.V. to send out to possible employers such as Cooplands and Lowering his expectations on salary and working hours.

102. The Tribunal is unable to conclude on the balance of probabilities if the claimant chose this course of action to minimise his income for the divorce proceedings or to maximise any award from the Tribunal proceedings or because he was confident, he would return to work following the Tribunal proceedings. However, the Tribunal is satisfied that as a result, he acted unreasonably in mitigating his loss.

103. The Tribunal concluded that the claimant would have been able to secure a position with a commensurate rate, albeit working a 40 hour week in 12 weeks of the outcome of the appeal process. It has assessed his losses to the end of December 2021 because at this stage the claimant would be aware of his inability to earn an commensurate income with Stuart.

Polkey

104. The Tribunal concluded that claimant 1 was in a different position to claimants 2 and 3. His was the first hearing held and he was the first person dismissed. However, on the evidence we heard there was a potential reason or explanation for this claimant's lengthy absence from the shop floor. The explanation put forward was that this claimant

had a bowel condition which sometimes necessitates a lengthy lavatory break. This was not investigated by the respondent. We noted that during the substantive hearing, evidence was given that there was an occupational health facility at the site and it was the failure to engage with this that was part of the procedural irregularity. The Tribunal considered the likelihood of this claimant being dismissed if this option had been followed and whilst we note the comments from the respondent as to the medical evidence that it did receive; the evidence was that the GP had been told by the claimant he had an issue; it may be that further investigation would have clarified the position.

105. The Tribunal went on to consider the impact if this claimant had been dealt with separately to the others. The respondent relied heavily on inconsistent statements by and between the three employees. This claimant's explanation was consistent throughout.

106. The Tribunal concluded that these two factors may have led to a different outcome for this claimant, if his hearing had been dealt with in isolation it may have led to a different outcome. The Tribunal concluded therefore that it is not just and equitable to reduce the compensatory award under this heading.

Contribution

107. In considering this claimant's position, the Tribunal noted that he had not been present at the briefing in relation to leaving the shop floor given by Ms Howe, nor had he previously acted in the manner alleged. To this Tribunal it is the fact that he was an associate of claimants 2 and 3 and the misconduct alleged against him was in close proximity in time to the others that led to his dismissal. Unlike claimants 2 and 3, as discussed below, the Tribunal did not conclude that this claimant was not using the lavatory. It maybe he was. His dismissal was because the respondent failed to follow through on medical evidence and in assessing his conduct alongside claimants 2 and 3. The Tribunal having examined the evidence did not conclude that there was any culpable behaviour on behalf of this claimant which led to his dismissal.

Remedy for Harassment

108. The Tribunal, in looking at the claim for injury feelings note a marked contrast, even a conflict between the claimant's attitude between his return to working for the respondent and his claim for injury to feelings.

109. That is to say, the Tribunal concluded that if the claimant was gravely affected by the incident with Mr Dixon, as he appears to state in his claim for injury to feelings it is unlikely, he would want to return to work for the respondent at all as his evidence is that he was not protected from racism by it for a substantial period of time.

110. The Tribunal looked at the medical evidence produced, and this does not support such a shattering impact as the claimant would have us believe. The Tribunal concluded that the truth lay somewhere in the middle.

111. The claimant seeks an award in the Highest Vento band, citing a lengthy campaign of harassment against him. The Tribunal is unable to compensate the claimant for any such campaign, even if it does exist. The Tribunal can only compensate the claimant for the allegation it found proven.

112. This was a single incident which although the Tribunal concluded was unpleasant, would only justify an award in the lowest Vento band. The Tribunal bears in mind the purpose of the award is not to punish the respondent rather it is to compensate the claimant. The Tribunal concluded that any award would fall in the upper half of the band and concluded that a sum of £7000 was commensurate with the injury sustained.

Claimant 2

Re-employment/reinstatement

113. The Tribunal concluded that the view of this claimant that his dismissal was because of his race, places him in a similar position to claiamnt1. He is not so entrenched in his view but again there is potential for conflict.

114. However, when looking at the issue of contribution the Tribunal concluded that this claimant did contribute to his dismissal, see discussion below. The Tribunal concluded there was a 100% contribution and in such circumstances, it is not just to order re-employment or re-engagement.

Mitigation

115. Whilst the Tribunal has sympathy for the position that this claimant finds himself in in relation to his wife's health. It did not accept his evidence on this point. He was reluctant to discuss it, whilst that is understandable, he raised the matter and the Tribunal must be satisfied that it prevented him from seeking employment. In particular, the Tribunal concluded that this claimant only wanted to work weekends as he had for the respondent and had no intention of seeking any employment which did not offer him weekend work. The Tribunal concluded he was relying on his wife's health as an excuse for this. In particular, it seems odd to this Tribunal that the claimant was probably working weekend shifts of some length immediately following the birth of his daughter. She was 2 and half years old at the date of the remedy hearing. There was a lack of any medical evidence, or evidence from his wife or other members of the community to support his assertion.

116. The claimant produced no evidence that he made any efforts to obtain employment save for his assertions. In fact, during his evidence, he stated he only wanted to work weekends. This appears to be a lifestyle choice rather than an economic decision. He did not decide to try employment as a taxi driver until April 2022.

117. It would be reasonable to allow the claimant sometime to find new employment. He should have considered after a reasonable period of time lowering his sights in terms of the type of contract and hours he would accept. He could have considered the option of becoming a taxi driver earlier, especially with the flexibility this has given him. He should have signed on with agencies, rather than simply trying to find work by visiting restaurants.

118. The question therefore is what period is reasonable. Having considered the evidence produced by the respondent the Tribunal concluded that this claimant should have been able to obtain new employment within 12 weeks of his dismissal. The Tribunal considered it just and equitable to award loss of earnings for a period of 12 weeks following his dismissal.

Polkey

119. A particular flaw was the failure to take a statement or speak to Tony Jones who was the person who was said to checked the lavatory but also stood accused of not liking the claimants and being a racist. It was his account to the manager that the claimants were not in the lavatory which appears to have clinched the matter. It had been raised that Mr Jones did not like the claimants and was a racist. If this had been investigated it may have made a difference.

120. In addition, this claimant had already been involved in an incident where he was found in the locker room when he should have been on the production floor. This incident led to the briefing where the employees were told that such behaviour could be a disciplinary matter.

121. The Tribunal noted the inconsistencies of the claimant's accounts during the disciplinary hearing and concluded that if these inconsistencies and the inconsistencies of claimant three had been put to him during the process he may have struggled to explain his actions.

122. The Tribunal concluded that there was a possibility that he may have been dismissed if the procedural irregularities were corrected.

123. The Tribunal then considered whether it is just and equitable to reduce the award because of this and if so by how much. The tribunal concluded that it would be just and equitable, because whilst the respondent is liable to pay a financial sum to the claimant, we give credit to them for the fact that is a serious disciplinary offence, if the procedure had been conducted correctly it would not have had a

finding against it. The Tribunal does consider that such an offence would lead to dismissal, if the claimants had been honest it may be that they would have received a sanction short of dismissal, however, the chances of this are small. We assess the possibility of a fair dismissal as 80%. The compensatory award shall be reduced accordingly.

Contribution

124. The Tribunal did not accept the account given by claimant two, it was entirely satisfied that he was not using the lavatory at the time he was meant to be in the production area. We based this partly on his previous conduct but also on the inconsistencies in his account during the disciplinary hearing. Similar to the respondent's witnesses we do not know where he was, he may have been outside the premises.

125. We also take account of the fact that he had been warned that such behaviour may amount to disciplinary offence. His behaviour was the direct cause of his dismissal. There is a clear link between his behaviour and his dismissal. His behaviour was the direct cause of his dismissal and therefore he contributed to it.

126. The Tribunal is therefore obliged to consider reducing the compensatory award. The Tribunal considered Hollier and considered that this claimant was wholly to blame for his dismissal and therefore there should be a 100% reduction in his compensatory award.

Claimant 3

Re-employment/re-engagement

127. The Tribunal concluded that the view of this claimant that his dismissal was because of his race, places him in a similar position to claimants 1 and 2. He does not accept the Tribunal's findings. Whilst his views are not so strong as those of claimant 1 it is still of concern and a matter to consider. There is the potential for conflict with managers and it would not be practicable to order any type of reinstatement or re-employment.

128. However, as for claimant 2, when looking at the issue of contribution the Tribunal concluded that this claimant did contribute to his dismissal, see discussion below. The Tribunal concluded there was a 100% contribution, and, in such circumstances, it is not just to order re-employment or re-engagement.

Mitigation

129. This claimant told the Tribunal he did not look for another job following his dismissal, he did less work as a taxi driver because of the stress of the dismissal. He has not produced any evidence of this. There are no medical notes or evidence of counselling. He did not even produce evidence from family members to support him. Whilst not as

compelling as medical evidence it would have given the Tribunal some evidence to consider.

130. The Tribunal is unable to conclude on the evidence available to it that the claimant was unable to work because of any health conditions immediately following his dismissal especially where he already had the opportunity to increase his income from his taxi driving business. Whilst the Tribunal has heard of the circumstances which led him now to be unable to work, for which he did produce medical evidence, this injury occurred in June 2022.

131. The evidence from the respondent is that there was a substantial number of positions for which this claimant was qualified. In particular, there was a position as a Part time cleaner at Nuffield Health offering a salary of £22, 755 per annum plus numerous positions for Production Operatives.

132. The Tribunal therefore concluded that this claimant has not acted reasonably in mitigating his losses. He should have signed up with agencies, he could have sent a C.V. to other companies such as Cooplands. He could have increased his hours as a taxi driver.

Polkey

133. This claimant is in the same position as the claimant two. The Tribunal has taken care to ensure we reviewed the evidence separately to ensure we did not fall into the same error as the respondent. However, we have had the benefit of seeing the evidence against both and seeing the claimant's person before we decide on either of them.

134. We concluded that claimant three had also been involved in a similar incident not long before the incident which led to his dismissal. He was present at the briefing and so was aware of the seriousness of the misconduct. Again, he was inconsistent in his account. Although the Tribunal cannot be certain he would have been dismissed there was a high probability he would have been. We assessed that probability as 80% and will reduce the compensatory award accordingly.

Contribution

135. The Tribunal did not accept the account given by claimant two, it was entirely satisfied that he was not using the lavatory at the time he was meant to be in the production area. We based this partly on his previous conduct but also on the inconsistencies in his account during the disciplinary hearing. Similar to the respondent's witnesses we do not know where he was, he may have been outside the premises.

136. We also take account of the fact that he had been warned that such behaviour may amount to disciplinary offence. His behaviour was the direct cause of his dismissal. There is a clear link between his behaviour and his dismissal. His behaviour was the direct cause of his dismissal and therefore he contributed to it.

137. The Tribunal is therefore obliged to consider reducing the compensatory award. The Tribunal considered Hollier and considered that this claimant was wholly to blame for his dismissal and therefore there should be a 100% reduction in his compensatory award.

Awards
Claiamnt One Soloman Kahsay

Harassment	
Injury to Feelings	7000
Interest	1268.02
Unfair Dismissal	
Basic Award	3,258
Compensatory Award	
Loss of Earnings to Date of Hearing 117 x 440	51,480
Loss of Earnings to December 31st 2021 £440 x 25	11,000
Minus Earnings	2,532
	8467
Pension £21.72 x 25	543
Staff Discount 18.75 x 25 weeks	318.75
Loss of Statutory Rights	500
Compensatory Award	9,828.75
Total Award for Unfair Dismissal	**13086.75**
TOTAL AWARD	**21354.75**
Claimant two	
Basic Award	648
Compensatory Award	
Potential Loss of earnings to date of hearing117 x 324	37,908
Loss Confined to 12 weeks For Failure to Mitigate	3,888

Loss of Pension 12 x £12.96	155.52
Loss of Staff Discount 12 x 18.75	350
Loss of Statutory Rights	500
Total	4893.52
ADJUSTMENTS	
Polkey Reduction minus 80%	(3914.81) 978.71
Contribution Reduction 100%	(978.71) 0
Total Compensatory Award	0
TOTAL AWARD	**648**

Claimant 3

Basic Award	1620
Compensatory Award	
Loss of earnings to date of hearing 117 x 291	34,047
Loss Confined To 12 Weeks for Failure to Mitigate	**3492**
Loss of Pension 12 x 12.96	155.52
Loss of Staff Discount 12 x 18.75	350
Loss of Statutory Rights	500
Subtotal	4,949.22
ADJUSTMENTS	
Polkey Reduction minus 80%	(3,597.77) 1351.45
Contribution Reduction 100%	(1351.45)
Compensatory Award Total	0
TOTAL AWARD	**1620**

Employment Judge AE Pitt

Date 15th February 2024