CASE NO: 2602857/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms Eva Nyota-Froggatt**

Respondent: **Mahason Ltd T/A The Lion Garage**

Heard at: **Nottingham**

Heard on: **13, 14 December 2023 & 21, 22 February 2024**

Before: **Employment Judge McTigue**

Members: **Ms D Newton**
Ms L Lowe

Appearances:

Claimant: **Litigant in person**

Respondents: **Mr M Ramsbottom, Consultant**

JUDGMENT having been sent to the parties on 29 February 2024 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:

REASONS

Introduction

1. The Claimant commenced employment with the Respondent on 8 August 2015 as a Customer Sales Assistant. Her employment ended on 23 October 2021 by reason of misconduct. The Claimant brought several claims against the Respondent. Those claims are detailed below. ACAS was notified using the early conciliation procedure on 1 November 2021 and the certificate was issued on 3 November 2021. The ET1 was presented on 10 November 2021.

Claims and Issues

2. The Claimant brought claims for race discrimination, specifically direct discrimination and harassment related to race. She also claimed unfair dismissal, breach of contract, unpaid holiday pay and deductions from wages. There was also a mention of a claim for redundancy in the claimant's ET1. However, we note that the case was case managed previously on 12 April 2022 by Employment Judge Blackwell and the claim for redundancy payment was not mentioned as a live issue at that hearing.

3. At the start of the hearing, the Tribunal spent time with the Claimant clarifying the acts that she relied on in relation to her claims for race discrimination. As a consequence of that, it was apparent to us that the issues were as follows:

4. Time limits

   4.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 2 August 2021 may not have been brought in time.

   4.2. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

      4.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
      4.2.2. If not, was there conduct extending over a period?
      4.2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
      4.2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
         4.2.4.1. Why were the complaints not made to the Tribunal in time?
         4.2.4.2. In any event, is it just and equitable in all the circumstances to extend time?

5. Unfair dismissal

   5.1. Was the Claimant dismissed?

   5.2. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

   5.3. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

      5.3.1. there were reasonable grounds for that belief;

5.3.2. at the time the belief was formed the Respondent had carried out a reasonable investigation;
5.3.3. the Respondent otherwise acted in a procedurally fair manner;
5.3.4. dismissal was within the range of reasonable responses.

6. Remedy for unfair dismissal

6.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

6.1.1. What financial losses has the dismissal caused the Claimant?
6.1.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.1.3. If not, for what period of loss should the Claimant be compensated?
6.1.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
6.1.5. If so, should the Claimant's compensation be reduced? By how much?
6.1.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.1.7. Did the Respondent or the Claimant unreasonably fail to comply with it?
6.1.8. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
6.1.9. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
6.1.10. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
6.1.11. Does the statutory cap of fifty-two weeks' pay apply?

6.2. What basic award is payable to the Claimant, if any?

6.3. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

7. Wrongful dismissal

7.1. What was the Claimant's notice period?

7.2. Was the Claimant paid for that notice period?
7.3. If not, did the Claimant do something so serious that the respondent was entitled to dismiss without notice?

8. Direct race discrimination (Equality Act 2010 section 13)

8.1. The Claimant's race is Black African and she compares herself with other non-Black African employees of the Respondent.

8.2. Did the Respondent do the following things:

8.2.1. On 4 March 2021 did Mr Balamyuran change the Claimant's working hours?
8.2.2. On 17 Nov 2021 did Claire Lewis send the Claimant a warning letter?
8.2.3. On 8 April 2021 did Mr Balamyuran terminate the Claimant's employment?
8.2.4. On 10 April 2021 did Mr Balamyuran terminate the Claimant's employment?
8.2.5. On 16 June 2021 did Claire Lewis swear repeatedly at the Claimant?
8.2.6. On 23 June 2021 did Mr Balamyuran send the Claimant a text message?
8.2.7. On 9 August 2021 did Mr Balamyuran phone the police and allege the Claimant had mental health difficulties?
8.2.8. On 18 August 2021 was Mr Balamyuran rude and abrupt to the Claimant, and did he film the Claimant?
8.2.9. On 20 August 2021 did Mr Balamyuran say to the Claimant, "You don't' know how to do your job. You're stupid. You've got mental health issues". Did Mr Balamyuran video the Claimant and behave in an aggressive manner towards the Claimant.

8.3. Was that less favourable treatment?

8.4. If so, was it because of race?

9. <u>Harassment related to race (Equality Act 2010 section 26)</u>

9.1. Did the respondent do the following things:

9.1.1. On 4 March 2021 did Mr Balamyuran change the Claimant's working hours?
9.1.2. On 17 Nov 2021 did Claire Lewis send the Claimant a warning letter?
9.1.3. On 8 April 2021 did Mr Balamyuran terminate the Claimant's employment?
9.1.4. On 10 April 2021 did Mr Balamyuran terminate the Claimant's employment?
9.1.5. On 16 June 2021 did Claire Lewis swear repeatedly at the Claimant?
9.1.6. On 23 June 2021 did Mr Balamyuran send the Claimant a text message?
9.1.7. On 9 August 2021 did Mr Balamyuran phone the police and allege the Claimant had mental health difficulties?
9.1.8. On 18 August 2021 was Mr Balamyuran rude and abrupt to the Claimant, and did he film the Claimant?
9.1.9. On 20 August 2021 did Mr Balamyuran say to the Claimant, "You don't' know how to do your job. You're stupid. You've got mental health issues". Did Mr Balamyuran video the Claimant and behave in an aggressive manner towards the Claimant.

9.2. If so, was that unwanted conduct?

9.3. Did it relate to race?

9.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

9.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. Remedy for discrimination or victimisation

10.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

10.2. What financial losses has the discrimination caused the Claimant?

10.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

10.4. If not, for what period of loss should the Claimant be compensated?

10.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

10.6. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

10.7. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

10.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

10.9. Did the Respondent or the Claimant unreasonably fail to comply with it?

10.10. If so is it just and equitable to increase or decrease any award payable to the Claimant?

10.11. By what proportion, up to 25%?

10.12. Should interest be awarded? How much?

11. Holiday Pay (Working Time Regulations 1998)

11.1. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

12. Unauthorised deductions

12.1. Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

Procedure, documents and evidence heard

13. In terms of the procedure the Tribunal had a bundle of documents which initially ran to 213 pages. At the hearing itself the Respondent's disciplinary procedures were then added to that bundle and the bundle subsequently ran to 217 pages.

14. For the Claimant the Tribunal heard witness evidence from the Claimant and her ex-partner, Mr Christopher Froggatt. For the Respondent, evidence was given by Mr Balamyuran. Mr Balamyuran was the Director and owner of the respondent. All individuals had prepared statements, gave evidence under oath or affirmation and were cross-examined.

15. At the start of the hearing on 13 December 2023, the Claimant made an application to amend her claim to include a complaint of religion or belief discrimination. We refused that amendment on day one and gave oral reasons in respect of the same. We considered **Selkent Bus Company Limited v Moore [1996] ICR 836** and **Abercrombie v Aga Rangemaster Ltd [2013] IRLR 953**. Effectively we felt that this was a substantial amendment introducing a new complaint. The amendment had also been made very late in the course of the proceedings and was not in writing. We considered the balance of hardship and prejudice to both parties and were content that the Respondent would suffer greater hardship than the Claimant if the amendments were allowed. We therefore refused to allow the amendment.

Fact-findings

16. On 8 August 2015 the Claimant started work for the Respondent. A copy of the Claimant's contract of employment appears in the bundle and can be found at page

67. It is clear to us that at the start of her employment, the Claimant was a very good employee and had a positive working relationship with the Respondent.

17. On 7 November 2020, the Claimant was issued with a warning from the Respondent. The warning was given to her by Claire Lewis. A copy of that warning, in the form of a letter, appears in the bundle at page 92. The letter clearly informed the Claimant that any reoccurrence of the alleged behaviour could result in the termination of her employment and that the warning would remain on her file for a period of one year.

18. On 4 April 2020 the Claimant was placed on a period of furlough leave.

19. On 8 April 2021 the Claimant received a letter from Mr Balamyuran. That letter appears in the bundle at page 79. The letter stated that the Claimant was to return to work on 12 April 2021. It also incorrectly stated that the Claimant's employment would be terminated. The inclusion of those words was a mistake on Mr Balamyuran's part.

20. On 12 April 2021 the Claimant did return to work. It is therefore clear that the Claimant's employment was not terminated by Mr Balamyuran at this point in time. Her hours were however changed at this point in time. Her new working hours were 10.00pm to 6.00am, Monday to Friday. Previously, the Claimant had been working the morning shift between the hours of 6.00am and 2.00pm.

21. On 16 June 2021 the Claimant and Claire Lewis had an altercation. Claire Lewis lost her temper with the Claimant and Claire Lewis shouted and swore at the Claimant. The following day, 17 June 2021, the Claimant sent her first grievance letter to the Respondent. A copy of that letter can be found in the bundle at page 93.

22. On 22 June 2021 the Claimant wrote a second grievance letter. That letter appears in the bundle at page 96.

23. On 23 June 2021 the Claimant received a text message from Mr Balamyuran. It appears in the bundle at page 88 and states *"what basically do you expect me to do anyway I have now listened to both sides*". The reason we mention that is that the Claimant pleads this text message as an incident of less favourable treatment and also as unwanted conduct relating to race.

24. On 9 August 2021 Mr Balamyuran phoned the Police as a result of the claimant's behaviour at work. We find that on that day Mr Balamyuran had genuine concerns about the Claimant's mental health.

25. On 11 August 2021 the Claimant wrote and sent a third grievance letter to the Respondent. That letter appears in the bundle at page 99 and it raises the issue of Mr Balamyuran calling the Police on 9 August.

26. On 18 August 2021 Mr Balamyuran and the Claimant were both present in the workplace. The claimant and Mr Balamyuran had an argument. It resulted from the Claimant not being prepared to show a new member of staff how to operate the cash

registers. Both the claimant and Mr Balamyuran ended up filming each other on their mobile phones.

27. On 20 August 2021 Mr Balamyuran and the Claimant had a further argument at work. We find that Mr Balamyuran criticised the Claimant's ability to do her job and in addition he filmed the Claimant on her mobile phone. We do not however accept that Mr Balamyuran said that the Claimant was stupid or that he said she had mental health issues on that day. On that day the Police were again called to the Respondent's working place. They were called on that day by the Claimant. The Claimant was sent home from work on that day. Later that day, the Claimant sent her fourth grievance letter to the Respondent.

28. On 22 August 2021 the Claimant was invited to a grievance hearing in respect of the grievances she had previously raised. A letter showing that she was invited to that meeting appears in the bundle at page 113. In that letter she was informed by the Respondent that she could be accompanied to the grievance meeting by a fellow employee.

29. That same day, 22 August 2021, the Claimant sent a fifth grievance letter to the Respondent. We have a copy of that letter at page 114 or the bundle. We also find that after 23 August 2021 the Claimant never returned to work.

30. On 25 August 2021 the Claimant had her grievance meeting with a Ms Magda Bowskill of Peninsula.

31. On 26 September 2021 the grievance outcome report was produced. We have a copy of that report at page 116 of the bundle.

32. On 5 October 2021 the outcome of that grievance hearing was communicated to the Claimant by means of a letter. The letter appears at page 152 of the bundle. The letter informed the Claimant that her grievance had been partially upheld in relation to three points that she had raised. Notably her grievance had been upheld in respect of the allegation of Ms Lewis shouting at the Claimant.

33. On 7 October 2021 the Claimant sent a sixth grievance letter. This letter effectively outlined to the Respondent why the Claimant disagreed with the outcome of the grievance hearing.

34. On 7 October 2021 the Respondent sent the Claimant a letter inviting her to a disciplinary meeting. That letter informed her of her right to be accompanied by a fellow employee. The letter stated that there were five matters of concern with the Claimant's work. The first took place on 26 July 2021. The others took place in August 2021. There were alleged incidents on 4 and 6 August 2021, plus two further alleged incidents on 18 August 2021. We can find no evidence of there being any investigation by the Respondent into the matters mentioned in that letter prior to the Claimant being invited to the disciplinary meeting.

35. On 14 October 2021 the Claimant sent a seventh grievance letter to the Respondent.

36. On 18 October 2021 the Claimant's disciplinary meeting was held. The Claimant chose not to attend that meeting and following the meeting on 23 October 2021 the Respondent sent a dismissal letter to the Claimant by means of a text message. The Claimant received that message. It initially appeared strange to us that a dismissal letter be sent by means of a text message but we understand that by that point in time, i.e. October 2021, the Claimant had some personal difficulties with providing an address to the Respondent and so sending the message via text was a reasonable means of contacting her. The dismissal letter informed the Claimant that she could appeal the decision to dismiss her. The right of appeal was to Mrs Balamyuran, the Claimant's wife. The right to appeal was not exercised by the Claimant.

37. On 1 November 2021 the Claimant sent another letter of complaint stating that she had not received payments that she alleged were due and owing to her.

38. The other finding of fact that we should make is that is on or around 14 December 2023 the Claimant was paid the sum of £1,780.70 by the Respondent in respect of unpaid wages for October 2021 and her accrued but untaken holiday pay.

Law

Discrimination – Time Limits

39. The Tribunal now turns its attention to the law relevant to the time limit issues for the race discrimination complaints. Section 123 of the Equality Act 2010 (EA) provides:

> **(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 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.**

40. The 3-month period allowed by section 123(1)(a) is extended by the legislation governing the effect of Early Conciliation (see section 140B of EA Act 2010). The period from the day after "Day A" (the day early conciliation commences) until "Day B" (the day the Early Conciliation certificate is received or deemed to be received by the claimant) does not count towards the 3-month period, and the claimant always has at least one month after Day B to make a claim.

41. There is no presumption that time will be extended. In respect of this, we note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:-

> *"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so." (para 23)*

"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule." (para 25).

42. These comments have been supported in **Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT** and **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA**.

43. The words "just and equitable" give the Tribunal a broad discretion in deciding whether to extend the time allowed for making a claim. A summary of the case law and was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

*"11. A useful starting point is the judgment of Smith J in **British Coal Corpn v Keeble [1997] IRLR 336**. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment tribunal, suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.*

*12. However, as the Court of Appeal made clear in **Southwark London Borough Council v Afolabi [2003] ICR 800**, in deciding the just and equitable extension question, a tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in **Neary v Governing Body of St Albans Girls' School [2010] ICR 473**, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal tribunal authority requiring a tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following Afolabi it is sufficient that all relevant factors are considered.*

*13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time. However, Smith J referred to the balance of prejudice in Keeble, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of **Dale v British Coal Corpn**, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in*

considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits, were not, but ought to have been, considered by this tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.

*14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see **Hutchison v Westward Television Ltd [1977] ICR 279**) involves a multi-factoral approach. No single factor is determinative."*

44. The Court of Appeal considered the discretion afforded to Tribunals in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** at paragraphs 18 and 19, per Leggatt LJ:

*"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see **British Coal Corporation v Keeble [1997] IRLR 336**), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see **Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800,** para 33. […]*

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

45. Underhill LJ commented in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, that a rigid adherence to any checklist of factors (such as the list in section 33 of the Limitation Act 1980) can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37:

"The best approach for a tribunal in considering the exercise of the "discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular…"The length of, and the reasons for, the delay".

46. A lack of evidence from the Claimant about any delay is a relevant factor to consider in deciding whether or not to exercise discretion, but a not necessarily decisive one as seen in the case of **Owen v Network Rail Infrastructure Ltd [2023] EAT 106**.

Burden of Proof

47. The burden of proof for Equality Act complaints is referred to in s.136 of the Equality Act. It is applicable to all the contraventions of the Equality Act as per the allegations in this action. S.136 states in part that:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(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.**

In other words, it is a two-stage approach. At the first stage the tribunal considers whether the tribunal has found facts (having assessed the totality of the evidence from both sides) from which the tribunal could potentially conclude in the absence of an adequate explanation and that the contravention has occurred. At this stage it is not sufficient for the claimant to simply prove that the facts that she alleges did happen. There has to be some evidential basis from which the tribunal could reasonably infer from the facts it has found that there was a contravention of the Equality Act. However, the tribunal can look at all the relevant facts and circumstances when considering this part of the burden of proof test and it can make reasonable inferences where appropriate. If the claimant succeeds at the first stage, then that means the burden of proof shifted to the respondent and the claim has to be upheld unless the respondent proves the contravention did not occur.

Direct Discrimination

48. In respect of the claim for direct discrimination, section 13 of the Equality Act states:

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

Direct discrimination under section 13 is about less favourable treatment. It requires comparison. Where a claimant does not have an actual comparator to rely on, then it is possible to rely on a hypothetical comparator, one who resembles the claimant in all material respects, except for the relevant protected characteristic. In making this comparison section 23(1) of the Equality Act 2010 provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

Harassment

49. Section 26(1) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

50. Section 26(2) provides that tribunals, when deciding whether conduct has the effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, must take each of the following factors into account:

    50.1. the perception of B;

    50.2. the other circumstances of the case;

    50.3. whether it is reasonable for the conduct to have that effect.

51. Guidance on how tribunals should approach cases where harassment is alleged has been set out in the context of racial harassment by Underhill P in **Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336**, paras 7-16). In summary, the relevant principles are as follows:

    51.1. the various elements of the definition give rise to overlapping questions that are likely to be answered by reference to the same findings of fact (para. 11);

    51.2. the breakdown of subsection 1(b) into 'purpose' or 'effect' means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose (para. 14);

    51.3. in determining whether the consequences set out under subsection 1(b)(i) or (ii) have occurred, the tribunal should apply an objective test bearing in mind all the circumstances of the case (para. 15).

<u>Breach of Contract</u>

52. In respect of the breach of contact claim, which relates to unpaid notice pay, section 3 of the Employment Tribunal's Extension of Jurisdiction (England & Wales) Order 1994 provides:

    Extension of jurisdiction

    Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England Wales would under law for the time being in force have jurisdiction to hear and determine; (b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on termination of the employee's employment.

53. An employee cannot be summarily dismissed unless they have committed a repudiatory breach of contract, or if the employer had a contractual right to make a payment in lieu of notice. The rule that only repudiatory breaches by employees will justify summary dismissal can be traced back to the Court of Appeal's decision in **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA.**

Deductions from wages

54. The general prohibition on deductions from wages is set out at section 13 ERA which provides, as far as is relevant:

> **(1) An employer shall not make a deduction from wages of a worker employed by him unless –**
>
> > **(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
> >
> > **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section "relevant provision" in relation to a worker's contract, means a provision of the contract comprised –**
>
> > **(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
> >
> > **(b) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**

55. Under section 27 of the Employment Rights Act 1996, 'wages' means any sums payable to the worker in connection with his employment and covers any fee, bonus, commission, holiday pay or other emolument referable to the employment. For a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question - **New Century Cleaning Company Limited v Church [2000] IRLR 27, CA**. To determine whether any sum is properly payable to an employee as part of an unlawful deduction from wages claim, the Tribunal can resolve any dispute as to the meaning of the contract relied on - **Agarwal v Cardiff University and anor [2018] EWCA Civ 2084**.

Legal Submissions

56. Both the claimant and respondent made oral submissions at the hearing in relation to both liability and remedy. The Tribunal gave these submissions careful consideration before reaching its decisions on both liability and remedy.

Conclusions

57. We now turn to our conclusions. In order to reach our conclusions, the Tribunal returns to the issues it set out at the start of these written reasons. These were the pertinent issues that the Tribunal had to determine.

58. Firstly, there was an issue with regard to time limits in this case and given the date the claim form was presented and the date of early conciliation any complaint about something that happened before 2 August 2021 may not have been brought in time. We find that anything that happened before 2 August 2021 was not in time and we also find that there was not conduct extending over a period of time. The actions of Claire Lewis were independent of the actions of Mr Balamyruan. In addition, the actions of Mr Balamyuran prior to 2 August were distinct from his actions after that date. We also feel it is not just and equitable to extend time in relation to any complaints that occurred before 2 August 2021. The Claimant provided no reason why the claim was not presented earlier in relation to her discrimination complaints. It was also apparent that extending time would prejudice the claimant. Claire Lewis was not available to provide evidence as she was no longer employed by the respondent. However, if the Tribunal is wrong on that we now go on and address the merits of those claims in any event.

59. With regard to the complaint of unfair dismissal, the Claimant was dismissed on 23 October 2021. We accept that the reason was conduct, however we also have to consider whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. We feel that in relation to the dismissal the Respondent did not act reasonably in all the circumstances. We do not feel that there was a sufficient investigation. On 7 October 2021 the Respondent sent the Claimant a letter inviting her to a disciplinary meeting. That letter stated that there were five matters of concern with the Claimant's work. The first took place on 26 July 2021. The others took place in August 2021. There were alleged incidents on 4 and 6 August 2021, plus two further alleged incidents on 18 August 2021. There was no investigation by the Respondent into the matters mentioned in that letter prior to the Claimant being invited to the disciplinary meeting or being dismissed. The allegations in the letter also went back some considerable time. Although the letter was sent in October 2021, the incidents of alleged misconduct dated back to July and August 2021. We also find it somewhat curious that the letter inviting the Claimant to a disciplinary hearing was sent 2 days after the grievance procedure had concluded.

60. Given the absence of any investigation, we are also unable to conclude that the Respondent had reasonable grounds for believing the Claimant had committed misconduct as no investigation into the alleged incidents had taken place. This was

clearly an unfair dismissal.

61. We next consider the issue of wrongful dismissal i.e. the Respondent's failure to pay notice pay. By looking at the Claimant's contract of employment we have determined that the Claimant's notice period was 6 weeks. We also find that the Claimant was not paid for that notice period. So we therefore asked ourselves had the Claimant done something so serious that the Respondent was entitled to dismiss her without notice. We conclude that the answer to that is no. The allegations raised in the disciplinary letter as we have said dated back to incidents in July and August 2021 and the letter inviting the Claimant to a disciplinary hearing was sent in October 2021. If the Respondent thought that the allegations were so serious that they amounted to gross misconduct, it would have dismissed the Claimant without notice in July or August 2021. It flies in the face of logic to suggest that the Respondent considered those acts to be gross misconduct but then waited several weeks before dismissing the Claimant. The complaint of wrongful dismissal therefore also succeeds.

62. We now go on to consider the complaint of direct race discrimination. We shall also consider the complaint of harassment related to race as the same incidents are relied on in relation to that complaint. The Claimant described her race as Black African and she compared herself with other non-Black African employees of the Respondent. We have to consider whether or not the Respondent did the following things. Firstly, did Mr Balamyuran change the Claimant's working hours on 4 March 2021? It is clear to us that Mr Balamyuran did change the Claimant's working hours on that date. However, we do not consider that to be less favourable treatment because of race or indeed related to race. There was no connection to race on the evidence we heard and indeed clause 4.12 of the Claimant's contract of employment permitted Mr Balamyuran to change the Claimant's working hours to the required extent.

63. We go on and consider the next allegation, that being on 17 November 2020 Claire Lewis the Claimant's Manager sent the Claimant a warning letter. There is no dispute that a warning letter was sent to the Claimant by Claire Lewis. We have that letter in the bundle of documents at page 92. However, the Tribunal can find no evidence that the letter was sent because of the Claimant's race, or was related to race. We conclude Claire Lewis was acting legitimately when she sent that letter.

64. We next consider the letter from Mr Balamyuran which he sent on 8 April 2021. We had that letter in the bundle at page 79. Although the letter indicates that the Claimant's employment is going to end, her employment did not end on that date and instead she continued to remain in employment for a period of time afterwards. Mr Balamyuran when giving evidence accepted the wording of this letter was a mistake and apologised. We conclude that this was a genuine error by Mr Balamyuran and that there is no evidence that this was less favourable treatment because of race, or indeed related to race.

65. We now consider the alleged letter from Mr Balamyuran terminating the Claimant's employment which was allegedly sent on 10 April 2021. The Tribunal can find no

evidence of that letter in the bundle of documents. We have also not been provided with a copy of that letter by the Claimant. We have insufficient evidence to find that such a letter was sent.

66. Moving to the next allegation of race discrimination i.e. that on 16 June 2021 Claire Lewis swore repeatedly at the Claimant. It is clear to us that on that date Claire Lewis did swear at the Claimant and did shout at the Claimant. This matter was covered in the grievance hearing. Claire Lewis expressed that she had been in the wrong about this and told the investigator she had snapped on that day due to the way in which the Claimant had behaved at work. There is no question this event happened but we do not find that Claire Lewis's treatment of the Claimant was because of her race, or related to her race. No racial language was used of any sort by Claire Lewis and we conclude that Ms Lewis's treatment of the claimant was because of the fractious working relationship that existed between her and the Claimant at that point in time caused in part by the Claimant's unwillingness to follow reasonable instructions at work. Claire Lewis's treatment of the claimant was not because of the Claimant's race or related to race.

67. We now turn to the text message that Mr Balamyuran sent the Claimant on 23 June 2021. It appears at the bundle at page 88. The text message itself reads *"What you basically expect me to do anyway I have now listened to both sides"*. To put that message into context, at this point in time Mr Balamyuran felt he was somewhat in the middle between complaints which the Claimant had been raising and complaints which Claire Lewis had been raising about the Claimant. When examining the text message in isolation there are no overt racial overtones but even when we consider the message in the context in which it was sent, we can find no evidence that this was less favourable treatment because of the Claimant's race or indeed related to race.

68. The next allegation is that on 9 August 2021 Mr Balamyuran phoned the Police and alleged the Claimant had mental health difficulties. It is clear to us that on that day Mr Balamyuran did phone the Police and the Police attended at the Respondent's premises. The Tribunal finds that at that point in time Mr Balamyuran had concerns about the Claimant's mental welfare. Mr Balamyuran gave evidence, which we accepted, that he had experience of mental health difficulties within his own family and that he was sympathetic to mental health difficulties. We feel that Mr Balamyuran was acting out of genuine concern for the Claimant at that point in time and we do not find that amounts to less favourable treatment because of race. It was also not related to race. That allegation also fails.

69. The next allegation is that on 18 August 2021 Mr Balamyuran was rude and abrupt and filmed the Claimant. It is clear to the Tribunal that by this point in time there had been a significant deterioration in the working relationship between the Claimant and Mr Balamyuran. On the date in question Mr Balamyuran filmed the Claimant but the Claimant filmed Mr Balamyuran as well. On balance we accept Mr Balamyuran was rude and abrupt to the Claimant but the reason for that was because of the now very difficult working relationship which the two had. We can find no evidence that Mr

Balamyuran's treatment of the Claimant was because of her race. It was simply because of the extremely poor working relationship between the two of them. Mr Balamyuran's conduct was also not related to race.

70. In relation to the discrimination complaints, we finally consider the incident of 20 August 2021 where the Claimant alleges that Mr Balamyuran says, *"you don't know how to do your job. You're stupid. You've got mental health issues"*. We accept that on this day Mr Balamyuran did criticise the Claimant's work, however, we do not accept that Mr Balamyuran said that the Claimant was stupid or used words to that effect. We also do not accept that he said the Claimant had mental health issues. There was insufficient evidence before the Tribunal to support those allegations. We do accept that Mr Balamyuran videoed the Claimant on his mobile phone on that day. He admitted during evidence that he would openly film the claimant on his mobile phone. However, we have insufficient evidence to show that he behaved in an aggressive manner towards the Claimant on the day in question. His behaviour was inappropriate but not aggressive. In addition, his actions were because of the fractious working relationship between the Claimant and him. They were not because of the Claimant's race or related to race.

71. It is for the reasons above that the claims relating to direct race discrimination and harassment related to race are not well founded and are dismissed. Any events before 2 August 2021, it should be stated, are also out of time.

72. We finally consider the complaints of unpaid holiday and unauthorised deductions from wages. In relation to both those complaints we find that they are not made out at this point in time. The reason being is that any sums relating to those two complaints have now been paid to the Claimant by means of a payment that was made by Mr Balamyuran on or around 14 December 2023. Mr Balamyruan paid the Claimant £1,780.70 in respect of her unpaid wages for October 2021 and her accrued but untaken holiday pay. For that reason, the claim for unpaid holiday and the claim for unauthorised deductions fails.

Remedy

73. In respect of compensation for unfair dismissal, the Claimant had worked for the Respondent for six complete years at the effective date of termination. She was born in October 1987; her gross weekly earnings were £328.64 and her net weekly earnings were £275.91. On that basis, we calculated the Claimant was entitled to a basic award of £1,971.84.

74. In respect of the compensatory award, the Respondent put to us that the Claimant should not be entitled to any loss of earnings beyond her 6 weeks' notice period. We rejected that argument and awarded compensation for loss of earnings for a 6-month period following the effective date of termination i.e. 23 October 2021. The Respondent had not presented us with evidence that the Claimant had failed to mitigate her loss. In addition, the Claimant gave evidence that she had attempted to find alternative employment but the work she found was temporary in nature and located a considerable distance from her home. The Tribunal relied on the specialist

experience of its members to make this finding and their knowledge of the local jobs market. In respect of loss of earnings, we therefore awarded the Claimant a figure of £7,173.66.

75. In addition to that we also awarded a sum to compensate the Claimant for the loss of her pension contributions. Based on the figure taken from the Claimant's payslips, we calculated that 6 months of pension contributions from the Respondent would equate to a sum of £170.22. So the parties are aware as to the maths used in relation to the pension contributions, it appeared to us that the average pension employer contribution was £28.37 a month and obviously multiplying that figure by 6 gave us a sum of £170.22.

76. In addition to that we awarded a figure of £500.00 for loss of statutory employment rights. That gave us a figure of £7,843.88 before we considered any deductions.

77. In terms of deductions the Tribunal decided to make a 20% deduction in respect of Polkey i.e. a sum to reflect the possibility that the employee would have been dismissed fairly had a fair procedure been followed in this case. The Respondent did not deduct any sum for Polkey in its counter schedule of loss which it submitted to the Tribunal. In oral submissions however, the Respondent's representative submitted that there should be a 50% reduction due to the breakdown in the relationship between the Claimant and Mr Balamyuran. We accept there should be a deduction but assessed this as 20%. Our reason for doing so is the events referred to in the Respondent's letter to the Claimant, detailing her alleged acts of misconduct, took place quite some time prior to the disciplinary hearing. As a consequence, the lack of investigation by the Respondent means there may potentially be little information to support a finding of misconduct. With that in mind, we made a deduction of £1,568.77 from the compensatory award.

78. We have not decided to make any deduction for failure to follow the ACAS Procedures. We note that the Claimant did not appeal her dismissal but the Respondent's procedure here allowed for a right of appeal to Mr Balamyuran's wife. We do not feel that is an acceptable right of appeal, or procedure.

79. So that gives us a compensatory award after the deductions have been made of £6,275.11.

80. Finally, we awarded a sum of 6 weeks' net pay to the Claimant in respect of her successful breach of contract claim. We had already determined she was entitled, and did not receive, 6 weeks' notice pay. That figure was £1655.46.

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Employment Judge McTigue

Date: 18 March 2024

JUDGMENT SENT TO THE PARTIES ON
28th March 2024

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