EMPLOYMENT TRIBUNALS

Claimant: **Mr Jaiden Nash**

Respondent: **Costco Wholesale UK Limited**

Heard at: **East London Hearing Centre On: 14 February 2024**

Before: **Employment Judge S Knight**

Representation

Claimant: Anthony Johnston (St Philips Chambers)
instructed by Irwin Mitchell LLP

Respondent: Ameer Ismail (Cloisters Chambers)
instructed by Towers & Hamlins LLP

JUDGMENT having been given orally to the parties on 14 February 2024 and sent to the parties on 20 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. These are the written reasons for a judgment on liability and remedy. Written reasons have already been given for refusing an application by the Respondent under Rule 20 of the Employment Tribunal Procedure Rules to extend time for presenting its Response.

The parties

2. The Respondent is a cash and carry warehouse membership club operating through a network of 29 warehouses in the United Kingdom.

3. The Claimant was employed by the Respondent as a Members Services

Assistant from 27 July 2022 until 30 September 2022 at one of its warehouses. He worked in the Front End department and was responsible for providing members and colleagues with general assistance inside and outside the warehouse.

The issues

4. The claim in this case is about race discrimination. The race discrimination claim is advanced as direct race discrimination, and as harassment in the alternative. Claims for unfair dismissal and failure to pay notice pay have been dismissed on withdrawal. The specific detriments which the Claimant asks the Tribunal to determine as instances of race discrimination are as follows:

    (1) On several occasions, between the middle of August 2022 and 30 September 2022 did a Supervisor shout at the Claimant in front of customers?

    (2) On several occasions, between the middle of August 2022 and 30 September 2022, did the Supervisor require the Claimant to effectively undertake the role of two people by requiring him to push more than the required limit of trolleys in the car park, namely in excess of 10 trolleys on any single occasion?

    (3) On a date on or around the end of August 2022 did the Supervisor hit the Claimant on his back or shoulder when he was taking a water break and tell him to get on with his job?

    (4) Between the middle of August 2022 and 30 September 2022 did the Supervisor refuse to permit the Claimant water breaks despite working in hot conditions outside?

    (5) Between the middle of August 2022 and 30 September 2022 did the Supervisor report that the Claimant's work ethic was poor to management?

    (6) On 30 September 2022 did a Manager tell the Claimant that he would not pass his probationary period and refuse to tell the Claimant why he had not passed his probationary period and that he expected him to "break his back" to show he really wanted the job?

    (7) On 30 September 2022 did the Respondent summarily dismiss the Claimant?

    (8) On 22 November 2022 did the General Manager fail to substantively respond to the Claimant's letter of complaint of 3 October 2022?

5. Early Conciliation started on 25 November 2022 and ended on 23 December 2022. The claim form was presented in time, on 27 December 2022. A Response was due by 3 February 2023.

6. The Response was late. It was filed on 22 December 2023. It was accompanied by a written application to extend time pursuant to Rule 20. That application was refused at the start of the hearing.

Procedure, documents, and evidence heard

7. This was a remote hearing listed to determine the Rule 20 application and then to consider either case management or the Claimant's substantive claim.

8. At the start of the hearing I checked whether any reasonable adjustments were required. No reasonable adjustments were requested.

9. I was provided with a bundle of documents in support of the Respondent's application, and a bundle of documents in support of the Claimant's claim. I also had the Tribunal's case file available.

10. I heard evidence under oath from the Respondent's General Manager on the Rule 20 application.

11. In relation to liability, I heard evidence under oath from the Claimant and his mother. I then heard submissions from the representatives.

12. After giving judgment on liability, in relation to remedy I heard evidence under oath from the Claimant. I then heard submissions from the representatives.

The facts

13. In assessing the evidence in this case I have borne in mind submissions made by the parties as to the reliability of individual witnesses. I have placed particular reliance on contemporaneous documentary evidence and borne in mind that just because a witness had confidence in their recollection and was honest, their account is not necessarily accurate where it is contradicted by documentary evidence.

14. During the course of the Claimant's evidence his mother said something to him. I could not hear exactly what was said, but it related to the evidence he gave about the motivations of the Manager, a colleague of the Manager, and the General Manager, for their actions towards him. In his evidence, all that the Claimant was able to do was speculate that their motivations were related to race. As I set out below, I find that their actions were not motivated by race. As a result, the Claimant's evidence on this point, and any influence on that evidence by the Claimant's mother, did not alter my findings of fact.

Facts relevant to liability

15. The Claimant is black.

16. The Claimant worked at a warehouse run by the Respondent. New employees of the Respondent have a probation period. The Claimant was in this probation period throughout his employment by the Respondent.

17. Based on the contemporaneous documentary evidence, in particular printouts of the Respondent's electronic system for clocking in and out of work, I accept the Claimant's case that he was late for work on 3 occasions. I equally reject the Respondent's case, based on handwritten annotations on printouts of the electronic system, that the Claimant was late on more than 3 occasions. Proving

that the Claimant was late on more than the 3 occasions recorded on the Respondent's electronic system would have required some evidence showing that the Respondent's electronic system had not recorded all of the Claimant's latenesses. Such evidence could for example have taken the form of rotas which showed that the Claimant was due to clock in before his actual clocking in time recorded by the electronic system. The documentary record of the Claimant being late on 3 occasions matches the Claimant's account in his ET1, which was served before the annotated printouts were served, and this adds to the weight that can be afforded to the Claimant's account. As a result, I find that during the Claimant's employment he was late to work on only 3 occasions: on 20 August 2022, 21 August 2022, and 18 September 2022. Lateness was not a serious recurring issue for the Claimant.

18. The overall treatment experienced by the Claimant in his employment by the Respondent was in many instances unpleasant for him. This included instances of poor management such as not being given a raincoat when working in the rain. However, that does not form a specific allegation of race discrimination.

19. The Claimant had a Supervisor. The Supervisor carried out a number of unpleasant actions which do form the basis of specific allegations of race discrimination.

20. Firstly, on several occasions between the middle of August 2022 and 30 September 2022, the Supervisor shouted at the Claimant in front of customers.

21. Secondly, on several occasions between the middle of August 2022 and 30 September 2022, the Supervisor required the Claimant to effectively undertake the role of two people by requiring him to push more than the required limit of trolleys in the car park, in particular in excess of 10 trolleys on a single occasion.

22. Thirdly, on a date on or around the end of August 2022, the Supervisor hit the Claimant with a pen on his back or shoulder when he was taking a water break and told him to get on with his job.

23. Fourthly, between the middle of August 2022 and 30 September 2022, the Supervisor refused to permit the Claimant water breaks despite working in hot conditions outside.

24. Fifthly between the middle of August 2022 and 30 September 2022, the Supervisor reported that the Claimant's work ethic was poor to management.

25. While the Claimant was employed he thought that the Supervisor simply did not like him as a person. However, he has since spoken to Black and Asian colleagues who said that they were also subject to the same sort of behaviour and that the Supervisor had made racist remarks to them which included that she "hates black people", "hates these black kids", "stupid black idiots", and "lazy black idiot". I bear in mind that I have not had the opportunity of hearing from the Supervisor, and that the evidence I have heard is hearsay. However, on the evidence available I find that the Supervisor made these remarks. These remarks evidenced an attitude that the Supervisor had of hostility towards Black people.

26. On 30 September 2022 another supervisor called the Claimant into an office, where a Manager was waiting for the Claimant. The Manager was also Black. This happened during the Claimant's lunchbreak and not at a previously scheduled meeting. The Manager told the Claimant that the Claimant would not pass his probationary period. The Manager refused to tell the Claimant why he had not passed, and said that he expected the Claimant to "break his back" to show he really wanted the job. The Manager summarily dismissed the Claimant. The Claimant was later paid notice pay.

27. The Supervisor through negative reviews of the Claimant had led the Manager to form an opinion that the Claimant was not performing at the standard that he should have been. This led the Manager to the dismissal. However, there is no evidence that the Manager was himself motivated by the Claimant's race. Indeed, it would be surprising if he was, because he is also Black. I bear in mind that people of the same racial background can be motivated by racial prejudice against people of the same racial background. Nonetheless, I find that the Manager was not motivated by the Claimant's race.

28. On 3 October 2022 the Claimant sent an email to the General Manager of the warehouse. He complained about the conduct he had experienced, in particular alleging discrimination. On the same date the General Manager wrote back to him saying that she was on annual leave and would respond on her return.

29. On 14 November 2022 the Claimant sent a further email to the General Manager, requesting a response to his previous email. He did not receive a response. Instead, the General Manager sent a letter which did not respond to the issues raised, and in particular ignored the discrimination aspect of the issues.

30. There is no evidence that the General Manager was motivated by the Claimant's race and I find that as a matter of fact the General Manager was not motivated by the Claimant's race. Rather, the evidence tends to suggest that the General Manager simply did not take matters seriously, which caused her to fail to respond to the Claimant's letter of complaint.

Facts relevant to remedy

31. Arising from my findings of fact in relation to liability, I find that the only reason for the Claimant's dismissal was the underlying discrimination by the Supervisor which led to unfavourable reports to the Manager. The Claimant was not responsible for his dismissal. In particular, his latenesses did not cause or contribute to his dismissal. There is no indication that the Claimant was contemporaneously made aware of any issues with his performance. This leads me to find that he would not have been dismissed but for the discrimination.

32. The Claimant found some short pieces of work in November 2022 and January 2023 after his dismissal.

33. During his period of unemployment the Claimant also focused on re-educating and upskilling himself to allow him to work in an alternative sector of property development. He now runs a business in property development as well as working full-time. Clearly, the Claimant is not afraid of hard work.

34. The impact of the actions that the Claimant experienced should not be understated. They had a serious impact on his personality and he needed time to recover. He was scared of disappointing his parents as a result of his dismissal. He suffered from sleeplessness and flashbacks, and he acted differently towards his family. Although shortly after his dismissal he managed to obtain some small amounts of work, this was limited by the crushing impact on him of the experience of losing his job in the circumstances set out above. In particular, he suffered from anxiety and a lack of drive when wanting to put himself forward for new opportunities.

35. The Claimant has now recovered from his negative experiences. On 13 September 2023 the Claimant obtained new employment. As a result the Claimant has no ongoing losses.

Law

The right not to face discrimination

36. Employees have a right not to be discriminated against on the grounds of their race. Section 39(2) of the Equality Act 2010 establishes that:

"(2) An employer (A) must not discriminate against an employee of A's (B)—

[…]

(c) by dismissing B;

(d) by subjecting B to any other detriment."

37. Discrimination may be direct or indirect. Direct discrimination is defined in section 13 of the Equality Act 2010:

"13 Direct discrimination

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

38. "Race" for these purposes is defined in section 9 of the Equality Act 2010 as follows:

"(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins."

The nature of a detriment

39. Whether the Claimant has suffered a detriment is determined by asking, "Is the

treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] ICR 337 (27 February 2003) at ¶ 35). This is an objective test.

Comparators in discrimination cases

40. A Claimant may show that they have been discriminated against by comparing themselves with an actual comparator, or a hypothetical comparator. The circumstances of a comparator must be the same as those of the claimant, or not materially different: see section 23 of the Equality Act 2010. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage v Grampian Health Board* [2012] UKSC 37 (25 July 2012).

The burden of proof in discrimination claims

41. The burden of proof in a claim of discrimination is set out in section 136 of the Equality Act 2010. This states as follows:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

42. Section 136 prescribes two stages to the burden of proof: Stage 1 (primary facts) and Stage 2 (employer's explanation). These are analytical stages rather than stages of the hearing (see *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 (23 July 2021)). Unless the circumstances are truly exceptional, the tribunal should hear all the evidence and submissions from both parties before finding the facts.

43. At Stage 1, all that is needed at this stage are facts from which an inference of discrimination is possible. The burden of proof is on the claimant (see *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913 (24 November 2017) and *Efobi v Royal Mail Group Ltd*). As it was put in *Madarassy v Nomura International Plc* [2007] EWCA Civ 33 (26 January 2007), primary facts are sufficient to shift the burden if "a reasonable tribunal could properly conclude" on the balance of probabilities that there was discrimination.

44. The Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142 (18 February 2005) gave guidance on two points in particular about Stage 2. Firstly, the employer must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic. Secondly, because the evidence in support of the explanation will usually be in the possession of the employer, tribunals should expect "cogent evidence" for the employer's burden to be discharged.

Attributing one person's discriminatory motivation to another

45. In *Reynolds v CLFIS (UK) Ltd* [2015] EWCA Civ 439; [2015] I.C.R. 1010 (30 April 2015) the Court of Appeal held that liability for discrimination could only attach to an employer where an individual employee or agent for whose act it was responsible had done an act which satisfied the definition of discrimination. That meant that the individual employee who did the act complained of had themselves to have been motivated by the protected characteristic. There was no basis on which that individual's act could be said to be discriminatory on the basis of someone else's motivation.

Mitigation of loss and retraining

46. In *Gardiner-Hill v Roland Berger Technics Ltd* 1982 IRLR 498 (January 1982) the EAT held that a claimant who was 55 and had long been director of a specialist business was prudent and reasonable in seeking to replace his lost income by establishing his own business rather than seeking another job, and further that he was entitled to recover money which he had spent setting up his new business.

47. In *Cooper Contracting Ltd v Lindsey* 2016 ICR D3 (22 October 2015) the EAT summarised the principles applicable to assessing mitigation of loss. An employment judge had been entitled to conclude that a claimant had not failed to mitigate his loss by becoming self-employed following his unfair dismissal. In reaching this conclusion, the EAT rejected the suggestion that the duty to mitigate loss is a duty to take all reasonable steps to lessen the loss, observing that the burden was on the employer to show that the claimant had acted unreasonably.

Conclusions

Conclusions on liability

48. I have found that the actions involved in alleged detriments 1-8 all took place. All of the actions found to have taken place would be considered from the perspective of a reasonable employee to amount to detrimental treatment.

49. The treatment amounted to less favourable treatment than was shown by the Respondent to its employees who were not Black. It was specifically the Claimant who was subject to this conduct and there is no evidence that the Respondent's employees who were not Black or Asian were subject to the same sort of conduct. The Supervisor's remarks were specifically aimed at Black people.

50. The effective cause of the treatment by the Supervisor was the Claimant's race, i.e. that he was Black. This is what motivated the Supervisor. However, the actions of the Manager were not motivated by race. They were motivated by the false reports of Claimant's performance from the Supervisor. Applying *Reynolds v CLFIS (UK) Ltd*, the Supervisor's motivations cannot be attributed to the Manager. Further, the motivation for the General Manager's actions was neglect, rather than race.

51. The actions of the Supervisor in relation to detriments 1-5 formed a continuing course of conduct which ended on 30 September 2022. The incidents were

linked, were discriminatory, and the Respondent was responsible for them.

52. As a result, the Claimant's claim succeeds in respect of detriments 1-5 relating to the actions of the Supervisor.

53. However, the Claimant's claim fails in respect of detriments 6-8 relating to the actions of the Manager and the General Manager, because neither the Manager nor the General Manager were motivated by race.

54. Nonetheless, the actions of the Supervisor led to the dismissal, which is a factor which is relevant to remedy.

Conclusions on remedy

55. The Claimant succeeded in relation to detriment 4, that between the middle of August 2022 and 30 September 2022, the Supervisor reported that the Claimant's work ethic was poor to management. This was the cause of the decision of the Manager to dismiss the Claimant. As a result, the losses which flowed from the Claimant's dismissal in turn flowed from this act of discrimination.

56. The Claimant was not responsible for his dismissal in any way. In particular, 3 short latenesses during his probation period would not have caused or contributed to his dismissal.

57. The Claimant has taken all reasonable steps to mitigate his loss. In particular, he made attempts to find some work, and he retrained. This was a reasonable approach for him to take, particularly in circumstances where he had a limited employment history and was recovering from the emotional damage of his experiences with the Respondent.

58. Therefore, the Respondent is responsible for the losses which the Claimant suffered as a result of the loss of his employment, which in turn was brought about by the Supervisor's discrimination. The loss of earnings suffered amounted to **£14,884.05**.

59. The Claimant is entitled to interest at 8% per annum on the loss of earnings he has experienced, for half of the period between dismissal and the date of the hearing. That is 502 days / 2 = 251 days. 251 days' interest at 8% per annum on £14,885.05 = **£818.82**.

60. In terms of injury to feelings I am assisted by the case of *Nassir-Deen v North East London Strategic Health Authority* Case No 2204690/2004 (10 July 2006, unreported). This case is around the same level of severity. *Nassir-Deen* is just a guideline case and not a tramline, but the level of harm seems to approximately fit this case, as does the award made when adjusted for inflation.

61. This case just falls within the lowest part of the middle *Vento* band because it is more than an isolated or one-off occurrence, but equally the Claimant was not aware of the racial basis for the discrimination as it was happening. As a result, the impact on him would not be the same as if, for example, he had observed the racially discriminatory comments that had been made about Black people by the

Supervisor. In all the circumstances of the case, a figure for injury to feelings of **£10,000** is appropriate.

62. The Claimant is entitled to interest at 8% per annum on the loss of earnings he has experienced, for the whole period between dismissal and the date of the hearing. 502 days' interest at 8% per annum on £10,000 = **£1,100.27**.

63. The Claimant is therefore entitled to compensation of **£26,803.14**.

Employment Judge S Knight
Date: 22 March 2024