EMPLOYMENT TRIBUNALS

Claimant: Ms. Z Mpofu

Respondents: (1) Mr. D Vant
(2) Sainsbury's Supermarket Ltd

Heard at: Cardiff, in person

On: 20, 21, 22, 23 and 24 May 2024

Before: Employment Judge Cawthray
Mr. M Lewis
Mrs. M Humphries

Representation
Claimant: In person, not legally qualified
Respondent: Mr. Winspear, Counsel

JUDGMENT having been sent to the parties on 29 May 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/Evidence/Procedure

1. The panel was provided with a Bundle of 500 pages. Some pages had been added past the deadline, but this was due to the Claimant sending over further documents that the wished to be included.

2. The Claimant had provided a written witness statement. She swore on the bible and gave oral evidence and was asked questions by Mr. Winspear and the panel.

3. The Respondent called five witnesses. All had provided a written witness statement and affirmed and gave oral evidence. The Claimant asked the following witnesses questions: Damien Vant, Simon Jones, Craig Nicholas and Deborah Clemerson. The panel asked questions as it deemed necessary.

4. She did not ask Yvonne Lynch any questions.

5. Oral closing submissions were made by both parties.

6. No reasonable adjustments were required for any attendee during the hearing.

7. At the start of the hearing I discussed the issues in detail with parties. Prior to this hearing, there were 5 preliminary hearings that considered case management on this claim, and extensive judicial time was spent in seeking to understand and record the issues. The issues are set out in the Case Management Order prepared by Employment Judge Sharp dated 6 December 2022.

8. However, it was necessary to ascertain the precise sums the Claimant sought under her unlawful deduction from wages complaint, as this had not been specified in monetary terms previously. I asked the Claimant to explain who much she was owed. The Claimant was not able to specify the amount, and made several references to 7 minutes being deducted. I asked the Claimant about her rate of pay, and on the information given Mr. Winspear calculated the value equating to 7 minutes as £1.28. The Claimant agreed this sum.

9. We also discussed the allegation at 6.1.2 of Employment Judge Sharp's 6 December 2023 Case Management Order & Summary, for completeness this was recorded as below:

   6.1.2 That the Claimant says she worked her usual shift time of 9pm to 7am on 23 October 2022/24 October 2022 but she had to do work assigned to the Monday shift, rather than other work. [Judge –I explained to the Claimant that if she was hourly paid, and she did not work longer hours and was paid for the shift, I did not understand how she could argue an unauthorised deduction. The Claimant said that she was not contracted to do work for the next day. I said that I did not consider it likely that the Claimant's contract prevented a lawful management instruction to unpack a pallet marked for Monday, but I would record what the Claimant had said].

10. Mr. Winspear explained the Respondent still did not understand this allegation, and I explained the operation of the unlawful deduction from wages provisions.

11. The Claimant reflected and confirmed that she did not wish to pursue this allegation and that she was withdrawing the allegation. I explained the consequences of withdrawal and the Claimant confirmed this was understood.

12. I explained the process of giving and challenging evidence and making submissions. I directed the parties to the List of Issues numerous times throughout the hearing.

13. No other matters were raised that the outset of the hearing.

14. The Claimant was well prepared, had considered and written questions in advance of the hearing starting and appeared to know the bundle well.

15. At the end of the hearing, in closing submissions, the Claimant raised concerns about case management compliance and directions and that delay by the Respondent had prejudiced her. It appears that the Respondent sent an email with a link to disclosure on 31 January 2024. The Bundle was due to be agreed by 29 February 2024, but it was not initially agreed by that date but was sent to the Claimant on 16 March 2024. Witness statements were due by 29 March 2024, but 24 Sunday was a non-working day before a bank holiday – accordingly the Respondent sent the Claimant its password protected witness statements by email on the Thursday before and then sent an email with the passwords on the next working day. The order did not specify simultaneous exchange. The parties liaised with the Tribunal via correspondence and the matter was considered resolved by the Respondent.

16. We considered the Claimant's comments, as made in closing submissions, but did not consider the Claimant had been prejudiced in any way. The Claimant had approximately three months to familiarise herself with the Bundle, and disclosure had taken place prior to this. The Claimant had been taking photographs of the whiteboard in work and had these in her own possession, and was able to add any documents she wished to the Bundle.

Issues

17. The Issues have been copied from the Employment Judge Sharp's Case Management Order & Case Summary as below. Accordingly, they retain the same numbering as in the original document for ease of reference. Where an allegation is no longer pursued, it has been removed.

1. Time limits
1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 August 2022 may not have been brought in time.
1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
1.2.1 Was the claim made to the Tribunal within three months(plus early conciliation extension) of the act to which the complaint relates?
1.2.2If not, was there conduct extending over a period?
1.2.3If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?
The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2In any event, is it just and equitable in all the circumstances to extend time?

2.Harassment related to race (Equality Act 2010 section 26)

2.1 Did the respondents do the following things:

2.1.1 the Claimant was required to work on aisle 7 on 10/4/22, 08/05/22, 05/06/22, 08/06/22/, 10/06/22, 12/06/22, 16/06/22, 19/06/22, 22/06/22, 09/07/22, 17/07/22, 23/07/22, 24/07/22, 04/08/22, 10/08/22, 21/08/22, 28/08/22, 04/09/22, 07/09/22, 08/09/22, 11/09/22, 01/10/22, 02/10/22, 05/10/22, 16/10/22, 23/10/22, 13/11/22, 16/11/22, 20/11/22, 26/11/22, 27/11/22,15/12/22, 16/12/22 and 29/12/22. Added today by consent (though the shifts were not all assigned by R1)– 05/01/23, 08/01/23, 12/01/23, 14/01/23, 22/01/23,24/01/23, 24/01/23, 25/01/23, 27/01/23, 29/01/23, 05/02/23, 11/02/23, 12/02/23, 17/02/23, 19/02/23, 06/04/23, 09/04/23 13/04/23, 16/04/23, 20/04/23, 23/04/23, 26/04/23, 30/04/23, 04/05/23, 05/05/23, 18/05/23, 01/06/23, 02/06/23, 08/06/23, 15/06/23, 17/06/23, 24/06/23, 28/06/23, 08/07/23, 20/07/23, 27/07/23, 28/07/23, 29/07/23,03/08/23, 17/08/23, 18/08/23, 24/08/23, 25/08/23 & 09/09/23.

The Claimant says that R1 allocated her aisle 7 because it was harder work with more bays and heavier goods, and also because it is the aisle for foreign foods. She asserts that no white colleagues were allocated aisle 7 when she was in work because the harder aisle was being allocated to her as a black person. She says the motivation was also to give her foreign food products because she was seen as a foreigner who should be doing it;

2.1.2 On 3 May 2022, the store manager approved the Claimant's 4 weeks holiday but the First Respondent refused all of the days on Kronos;

2.1.3 In or around March 2022,the First Respondent searched the Claimant's jacket exposing her sanitary pads on the shop floor. The Claimant says the First Respondent would not do the same to white colleagues and that it embarrassed her as in her culture that she was menstruating would be a private matter;

2.1.4 On 10 April 2022, the First Respondent wrote at the top of the board "So shift your bottoms and get out of here" and at the bottom of the board: "I, Damien, did a case and a half of yoghurts in 35 mins and I haven't been there for 9 months soon you know." The Claimant says these comments were aimed at her and was suggesting she was lazy.

2.2 If so, was that unwanted conduct?

2.3 Did it relate to race?

2.4 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?

2.5 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.

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

3.1The Claimant is a black person from Zimbabwe.

3.2 Did the respondents do the following things:

3.2.1the Claimant was required to work on aisle 7 on 10/4/22, 08/05/22, 05/06/22, 08/06/22/, 10/06/22, 12/06/22, 16/06/22, 19/06/22, 22/06/22, 09/07/22, 17/07/22, 23/07/22, 24/07/22, 04/08/22, 10/08/22, 21/08/22, 28/08/22, 04/09/22, 07/09/22, 08/09/22, 11/09/22, 01/10/22,

02/10/22, 05/10/22, 16/10/22, 23/10/22, 13/11/22, 16/11/22, 20/11/22, 26/11/22, 27/11/22,15/12/22, 16/12/22 and 29/12/22. Added today by consent (though the shifts were not all assigned by R1) –05/01/23, 08/01/23, 12/01/23, 14/01/23, 22/01/23, 24/01/23, 24/01/23, 25/01/23, 27/01/23, 29/01/23, 05/02/23, 11/02/23, 12/02/23, 17/02/23, 19/02/23, 06/04/23, 09/04/23 13/04/23, 16/04/23, 20/04/23, 23/04/23, 26/04/23, 30/04/23, 04/05/23, 05/05/23, 18/05/23, 01/06/23, 02/06/23, 08/06/23, 15/06/23, 17/06/23, 24/06/23, 28/06/23, 08/07/23, 20/07/23, 27/07/23, 28/07/23, 29/07/23, 03/08/23, 17/08/23, 18/08/23, 24/08/23, 25/08/23 & 09/09/23.

The Claimant says that R1 allocated her aisle 7 because it was harder work with more bays and heavier goods, and also because it is the aisle for foreign foods. She asserts that no white colleagues were allocated aisle 7 when she was in work because the harder aisle was being allocated to her as a black person. She says the motivation was also to give her foreign food products because she was seen as a foreigner who should be doing it.

3.2.2 On 8 September 2022 the First Respondent had pre scheduled the Claimant the night before to do aisle 7 and then biscuits and then bakery. The Claimant says that white colleagues would normally be given biscuits, and then cereal, and then bakery but she was singled out for aisle 7, biscuits and bakery in a way that white colleagues were not. She says a white colleague Craig was given cereal to do but she still had more to do than white colleagues.

3.2.3 On 13 November 2022 (not 7 November which is the date in the Claimant's email of 8 August 2023), the store manager was present on the shop floor. The Claimant was allocated aisle 7, tea and coffee and cooked meat with a colleague Yvonne. Later Yvonne and the First Respondent had a discussion and Yvonne was removed leaving the Claimant to do the work alone. The Claimant says this was done deliberately so that she had lots to do and would look bad in front of the store manager.

3.2.4 On 23 November 2022, the First Respondent did not give the Claimant a delivery when all her white colleagues had one. She says she was allocated aisle 7 on the board but had not been given products to stock aisle 7. The Claimant alleges it was done on purpose to cause her stress and to make her look bad.

3.2.5 On 15 December 2022, the First Respondent removed the pallet on which the Claimant was working to the warehouse. It meant the Claimant could not initially find the pallet and it meant the Claimant would have to travel a long distance with the products. The Claimant says this was done deliberately to target her and make her job more difficult. She says a colleague, Debbie, also had a few products on the pallet but that Debbie got caught up in conduct that was targeting the Claimant.

3.2.6 On 4 December 2022, the First Respondent allocated the Claimant to aisle 8. The Claimant submits this was done deliberately to give her extra work to do because there were two rollers left from the night before which meant she had to do the Sunday delivery and also the work left from the night before. She says it was also extra work again because aisle 8 had been left in a mess with cardboard everywhere. The Claimant says she was deliberately targeted for this work and Mac, a white colleague, who usually did aisle 8 on a Sunday, was taken off it. She alleges that one reason the First Respondent did this is because the two rollers had been left by an Indian colleague and that the First Respondent was making the claimant do what he saw as foreigners' work.

3.3 Was that less favourable treatment?
The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.
3.4 The Claimant says he was treated worse than her white [or possibly not black] Trading Assistant (Night Shift)colleagues as follows:
3.2.1: Yvonne, Gill, Paul, "Foz", Karen, Nong [The Respondent says that Nong is not white. The Claimant told Judge Harfield on 4 October 2023 that she viewed this colleague as white because she was not black like her], Marc, Alex, Dan J, Dan H and Tonisha•
3.2.2 Craig
3.2.3 Yvonne
3.2.4 Khadence, Greg, one of the Dans, Alex, Ben. Adrian Ann, Sue, Karen and Foz
3.2.5 Gill, Dan, Adrian, Karen, Sam, Ann, Tonisha, Ben, Craig Connor, Mike, Riui
3.2.6 Mac
3.5If so, was it because of race?

4.Victimisation (Equality Act 2010 section 27)
4.1Did the Claimant do a protected act as follows:
4.1.1Engage in ACAS Early conciliation and the certificate was sent to the Respondents on 14 December 2022.
4.2Did the respondents do the following things:
4.2.1 On 17 December 2022, the Claimant was due to work. The First Respondent did not put her shift on Kronos or the board so the Claimant went home and did not get to do the promised shift. The Claimant says this was retaliation for proceeding with the Tribunal process by undertaking ACAS early conciliation.
4.3By doing so, did it subject the Claimant to detriment?
4.4If so, was it because the Claimant did a protected act?
4.5Was it because the respondent believed the Claimant had done, or might do, a protected act?

5.Remedy for discrimination or victimisation
5.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
5.2 What financial losses has the discrimination caused the Claimant?
5.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
5.4 If not, for what period of loss should the Claimant be compensated?
5.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
5.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
5.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
5.9 Did the Respondent or the Claimant unreasonably fail to comply with it by?
5.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

5.11By what proportion, up to 25%?
5.12 Should interest be awarded? How much?

6. Unauthorised deductions
6.1 Were the wages paid to the Claimant less than the wages they should have been paid? The Claimant complains of the following matters (a third matter was not recorded as the Claimant said she had written it down incorrectly and it postdated the claim form by about nine months– I said an amendment application would be required):
6.1.1 That she was underpaid by 7 minutes for work done on 28 August 2022 (the Claimant says she worked until 7am and the First Respondent recorded her finish time as 6.53am);
6.2 Was any deduction required or authorised by statute?
6.3Was any deduction required or authorised by a written term of the contract?
6.4Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
6.5Did the Claimant agree in writing to the deduction before it was made?
6.6How much is the Claimant owed?

Facts

18. Set out below are our findings of fact based on the evidence presented to us.

19. The Claimant started working for the Second Respondent on 26 October 2019. She remains employed as a Trading Assistant Night Shift. She is contracted to work on Thursday and Sunday and works a night shift. She sometimes works extra hours as overtime.

20. At the time the allegations are about, the Claimant worked at the Second Respondent's Thornhill store.

21. The Claimant contacted ACAS for the purpose of Early Conciliation regarding the First Respondent, Mr. Vant, on 2 November 2022. The Early Conciliation certificate was issued on 14 December 2022.

22. The Claimant contacted ACAS on 10 November 2022, in relation to the Second Respondent, and an Early Conciliation Certificate was issued on 22 December 2022.

23. The Claimant submitted her claim to the Employment Tribunal on 11 January 2023.

24. Mr. Damien Vant previously worked at the Thornhill store as Shift Supervisor. This role involves supervising staff on shift, arranging staffing, ensuring staffing and local employment matters. Mr. Vant started working at the Thornhill store in 2019. Mr. Vant was on paternity leave in 2021 and early 2022.

<u>Working on aisle 7</u> [issues 2.2.1 and 3.2.1]

25. The Claimant alleges that she was required to work in aisle 7 on the dates listed in issue 2.1.1 and 3.2.1.

26. The Respondent accepts that the Claimant was regularly required to work on aisle 7. The Claimant was allocated aisle 7 by both Mr. Vant and Mr. Jones, and others.

27. The Claimant was also allocated to other aisles, typically 8 and readys. This was demonstrated by the evidence in the bundle, namely whiteboard photographs.

28. The night shift operates by staff generally starting by stocking shelves on a dry aisle, and then moving to fresh product stocking after a break. The Claimant takes her break around 1.30am. The shift supervisor or night manager assigns night staff with work and they are informed of the work they are due to complete each shift by the information on a whiteboard. The whiteboard records the time per task. For example, one night aisle 7 may be allocated 5 hours work and another night it may be allocated 2.5 hours work. The work and tasks vary daily dependent on business needs, and this is influenced by what is delivered, how busy the store has been and what needs doing. Each member of the night team typically has a couple of aisles that they are regularly assigned to. This is because working familiar aisle increases productivity and efficiency as staff members become familiar with the products and location.

29. If staff worked overtime, or when there was sickness or leave, they may be allocated on aisles different to their usual aisle/s in order to meet the demands of the shift.

30. Deborah Clemerson worked a night shift at the Thornhill store from December 2021 until she moved to day shifts. She initially worked 2 shifts and this increased to 4. She did not work Sundays unless it was overtime. She regularly worked aisle 7, she considered it her aisle as she worked that aisle for the majority of her shifts. She would be moved from aisle 7 to work on other aisles depending on who else was working and what the shift needs were. For example, she would often cover a colleague Ann, who was regularly allocated aisle 6. Ms. Clemerson is white.

31. Other members of staff were also allocated aisle 7, including Craig Nicholls, Muhammad, Dan J and Giannas.

32. The bundle contains a large number of images of the whiteboard that were taken by the Claimant. It does not contain images of all the shifts the

Claimant has worked. The whiteboard shows the tasks allocated to staff. It is cleaned at the end of each shift.

33. The Claimant alleges she was required to work on aisle 7 on the dates specified in issues 2.1.1 and 3.2.1 Set out below is a summary of where the Claimant worked on those dates as shown by the whiteboard images in the Bundle. As noted below, the Claimant did not work on aisle 7 on all the dates she alleges.

34. There were several dates when on our own review of the photographs in the Bundle we were not able to find a whiteboard image, but we note there are some undated images in the Bundle.

10/4/22 – 7, yoghurts, cooked meats
08/05/22 – 7, top stock, readys, advanced
05/06/22 - 7, 8, cooked meat, yoghurts
08/06/22 – 7, 9, yoghurts, sandwiches
10/06/22 - unable to make finding of fact on this date – no photo
12/06/22 - 7, yoghurts, sandwiches
16/06/22 – 7, 9, cooked meats, sandwiches
19/06/22 - 7, readys, crisps
22/06/22 – 7, cooked meats, advanced
09/07/22, - 7 and rest not clear
17/07/22 – 7 cooked meat and sandwiches
23/07/22 – 7, 9, cooked meat, advanced
24/07/22 – 7, yoghurts, advanced
04/08/22 – 7, yoghurts, fruit pots
10/08/22 – 7, sweets, yoghurt
21/08/22 – 7, readys, advanced
28/08/22 – 7, yoghurts, advanced
04/09/22 – 7, yoghurts
07/09/22 - unable to make finding of fact on this date – no photo
08/09/22 – 7, biscuits, bakery, plinths
11/09/22 - unable to make finding of fact on this date – no photo
01/10/22 – 7, 8, readys, fruit pots
02/10/22 – 7, yoghurts, fruit pots
05/10/22 – Claimant not on whiteboard
16/10/22 – Claimant not on whiteboard
23/10/22 – 7, yoghurts
13/11/22 – 7, 9 cooked meats
16/11/22 – 7, cooked meats, fresh
20/11/22 – 7, readys
26/11/22 – 8, ready meals
27/11/22 – 7, yoghurts
15/12/22 – 7, yoghurts
16/12/22 - 7, bakery
29/12/22 – 7, yoghurts
05/01/23 – 8, readys
08/01/23 – 7, yoghurts
12/01/23 – 8, readys
14/01/23 – 8, readys
22/01/23 – 7, yoghurts

24/01/23 – 7, readys
25/01/23 – 7, ready put backs, yoghurts
27/01/23 – 7, readys
29/01/23 – 7, cooked meat, sandwiches
05/02/23 – 7, readys, advanced
11/02/23 - 8, readys, salads and berries
12/02/23 – 7, readys, salad and berries
17/02/23 – 8, readys
19/02/23 – unable to make finding of fact on this date – no photo
06/04/23 – 8, readys
09/04/23 – 7, 8 yoghurts, advance
13/04/23 - 8, readys and fresh plinths
16/04/23 – 8, yoghurts, bakery
20/04/23 – 8, readys
23/04/23 – 7, yoghurts
26/04/23 – 7, yoghurts, dress fresh plinths
30/04/23 – 7, yoghurts
04/05/23 – 8, readys
05/05/23 – 8, readys
18/05/23 – 8, readys
01/06/23 – 8, readys
02/06/23 – unable to make finding of fact on this date – no photo
08/06/23 8, readys
15/06/23 – 8, readys
17/06/23 – 8, ready, fresh
24/06/23 – 7, yoghurts
28/06/23 – 7, readys
08/07/23 – 7, yoghurts, juice and cheese
20/07/23 – 7, yoghurts
27/07/23 – 7, yoghurts
28/07/23 – 7, yoghurts
29/07/23 – 7, yoghurts, fresh
03/08/23 – 7, readys, fresh
17/08/23 – 7, yoghurts
18/08/23 – 7, yoghurts
24/08/23 - unable to make finding of fact on this date – no photo
25/08/23 – 7, yoghurts
09/09/23 – 7, 8 yoghurts

35. The Claimant alleges she was required to work aisle 7 on 5 October 2022. According to the whiteboard image at page 369, the Claimant was not showing on the whiteboard on that day. However, page 180 - record of hours worked - indicates that the Claimant worked 8.15 hours on 5 October 2022. That was a Wednesday, and was not the Claimant's usual day of work, and was therefore overtime. On the evidence presented, we are unable to make a finding of fact on what specific work the Claimant undertook on 5 October 2022.

36. Aisle 7 comprises two sides. It contains grocery products including baked beans, canned tomatoes, oil, vinegar bottles, salt, pepper, herbs and spices. The products are a range of cans, boxes and bottles. There is also a section that contains foreign foods. The foreign food section contains Polish, Indian and Chinese foods.

37. The evidence demonstrates that Aisle 7 is not considered to be unique or exceptional in relation to stocking. Each aisle is different, for example the alcohol aisle contains glass but toilet paper can be bulky. Aisle 7 is not harder than other aisles.

March 2022 [issue 2.1.3]

38. The Second Respondent had a policy of conducting random searches. The search process involved an app called Mite Smart. Supervisors and managers would use the app to input the names of the colleagues at work that shift. The app would then generate the names to be searched. A search would involve supervisors/managers asking staff to turn their pockets out. Staff would not be touched and their pockets would not be emptied other than by them.

39. Mr. Vant did conduct searches on the Claimant in accordance with the policy and app generation.

40. On an unspecified date in March 2022 the Claimant went to break and left her jacket in her trolley. The Claimant says during her break a colleague notified her that Mr. Vant had searched her jacket and left her sanitary pads on display. The Claimant did not see Mr. Vant move her trolley or touch her jacket but in response to questioning she said that she thought Mr. Vant was attempting to accuse her of stealing and when he entered the jacket pockets he found sanitary pads. She said that he intended to cause her embarrassment and that in her culture no one should be aware of periods so he left her pads on top of her jacket. Also in response to questioning she said that maybe Mr. Vant thought that as a black person she may not get periods.

41. Mr. Vant said that he would often move trolleys with personal belongings to the next area being worked on the shop floor whilst staff were on break to be helpful and keep the store tidy. We accept this evidence.

42. Mr. Vant does not recall specifically moving the Claimant's trolley and does not recall seeing a sanitary pad as part of any search. Mr. Vant says he does not search a colleagues jacket without the member of staff present.

43. On balance, considering all of the evidence, we find that Mr. Vant did move the Claimant's trolley. We accept Mr. Vant's evidence that he did not touch the Claimant's jacket when he moved the trolley and did not see any sanitary pads.

10 April 2022 [issue 2.1.4]

44. On 10 April 2022 Mr. Vant wrote the following comments on the whiteboard:

"Damien did a cage and a half of yoghurts in 35 mins and I haven't been on there for 9 months, sooo you know."

"*So shift your bottoms and get out of here."*

45. The whiteboard is used by managers and supervisors to write down the staff names and work allocated to them for a particular shift. The whiteboard is seen by all staff.

46. Mr. Vant had been on paternity leave for 7 months and on his return to work he was frustrated with the output level and performance of the night shift team. Whilst staff were on break he took some yoghurts and stocked a shelf of yoghurts. There was no reason for choosing yoghurts. A number of night shift staff work yoghurt shelves.

47. On 10 April 2022 the Claimant was allocated the following work on: aisle 7, yoghurts, cooked meats and advance. The times are not clear but yoghurts was allocated 3 hours and 20 minutes.

48. The comment regarding yoghurts was made to let the team know that Mr. Vant felt he was able to stack quickly and there was no reason to be slow.

49. The comment regarding shift your bottoms was written with the intention of being a fun comment and to boost morale. Shift your bottoms can be considered as a common phrase intending to mean hurry up or get a move on.

50. Whilst questioning Mr. Vant the Claimant suggested to Mr. Vant that the comment regarding shift your bottoms was body shaming. Mr. Vant disagreed.

51. The Claimant believes that the comments were aimed at her and suggested that she was lazy.

52. We find that the comments were not directed at any individual. We do not consider the comments to be body shaming.

3 May 2022 [issue 2.1.2]

53. The Second Respondent has a policy that requires any holiday request for over three weeks' to be approved by a Store Manager.

54. The Claimant sent a system request for four weeks' holiday on 3 May 2022. The Claimant sent an email to Alyn Davies, Store Manager, and he replied the same day, at 16;24 stating: *"Approved. Please proceed with your booking. I have copied in Simon also."* On this email chain, at page 135 of the Bundle, there is no evidence of Mr. Jones being copied in.

55. There is a second email from Mr. Davies, that is identical, times at 19:24. This shows Mr. Jones as being copied in.

56. We cannot make any clear finding on whether or not Mr. Davies sent two emails at different times. It is possible that he realized that he had not copied Mr. Jones in and resent or that the email was sent from a different time zone. We do not consider it necessary to make a firm finding on the

time sent and note the request was approved and Mr. Jones was notified. We do not consider the fact there were two emails in the Bundle to evidence any fraudulent behaviour.

57. The later response was copied to Mr. Jones, but not to Mr. Vant. Mr. Vant was not aware of Mr. Davies approving the request. The request related to holiday to be taken in March 2023. The Claimant took annual leave in March 2023.

58. A shift supervisor or Nightshift Manager can only approve such a holiday request on the Kronos system after the Store Manager has approved.

59. A print out of the Kronos system shows the requests for March 2023 as being refused. The print out does not show who refused the request or when.

60. Mr. Jones was on paternity leave at the time the Claimant made the request.

61. At an interview on 29 December 2022 Mr. Jones, when discussing holiday rejection with Mr. Vant said*: "I haven't printed it but it was refused on your account".* Mr. Vant responded explaining that it was not him and suggested Nikki, a former colleague may have. In oral evidence, he explained that sometimes he, and other supervisor/managers, do not log out and therefore use each other's account sand that tin the interview he was trying to think of an explanation for the rejection being on his account.

62. Mr. Vant's evidence is that he did not refuse the Claimant's request. He stated that before leaving the Thornhill store he checked the holiday records and could not find any record of him approving or rejecting any holiday request for the Claimant.

63. Within his witness statement, Mr. Jones stated that he has reviewed the May 2022 period and cannot see any evidence of Mr. Vant rejecting the Claimant's leave request. The Claimant did not challenge this.

64. The Second Respondent's policy would mean that any night shift manager/supervisor would need to reject a request for leave on Kronos without approval from the Store Manager.

65. We are unable to reach a finding of fact on who rejected the request on Kronos, but on balance, on the evidence before us during this hearing, noting the subsequent review of records by both Mr. Vant and Mr. Jones, we find that Mr. Vant did not reject the request. The request was approved by Mr. Davies. The rejection on the Kronos system did not undo the approval.

28 August 2022 [issue 6.1.1]

66. The Claimant is paid monthly. There are several pay slips in the Bundle, but they are from June 2023 onwards.

67. On 28 August 2022 Mr. Vant clocked four staff, including the Claimant, off work at 06:53am. The end time was 07:00am. A colleague reported to Mr. Vant that the Claimant and three others left the shop floor and went to the canteen without permission. The colleague was frustrated as there was still work to do.

68. After the shift ended Mr. Vant stayed behind and checked the CCTV. It showed the Claimant and three others leaving the floor and going to the canteen. Mr. Vant recorded the end time as 06:53am on Kronos, as at page 137 of the Bundle, and deducted 7 minutes for each of them. Mr. Vant notified Mr. Jones and Mr. Davies and he considered that the correct approach would be to have a discussion with the staff, tell them they left early and pay had been deducted and warn not to do again.

69. The Second Respondent's CCTV footage is only kept for three months.

70. During cross examination Mr. Vant said that Mr. Jones was spoken to by Mr. Jones and that she admitted ending work early. The Claimant did not further challenge this evidence.

71. The Claimant stated she had not left the store before 7.00am.

72. The Claimant emailed Mr. Jones on 30 August 2022. The email states: *"I did not clock out at 06:53 on Monday because I was on the shop floor @ 06:55 with Gill. Took my shallow trolleys via checkouts then outside. Went upstairs to the canteen where everyone was waiting for 07:00."*

73. On 9 December 2022 the Claimant attended a fair treatment meeting with Mr. Jones. In that meeting, when discussing the clocking off/deduction matter, the notes record Mr. Jones telling the Claimant: *"That is gross misconduct, we both agreed you went up early but he didn't go about it the wrong way so I put them back. You should have been docked but I put it back as there was no notice. You weren't the only person."* [As copied with typos].

74. The Claimant's work schedule for 10 April 2022 to 20 February 2023 sets out the dates and hours worked by the Claimant. This documents runs to 20 February 2023, and therefore must have been printed at some time after that date. It records the Claimant's end time as 7.00am on 28 August 2022.

75. The Claimant, in response to a question from the panel seeking clarification, stated that she has not been paid for the 7 minutes and she was owed £1.28.

76. Mr. Vant accepted that he was not aware of process that he should have warned the Claimant and the colleagues about deducting pay. He says that for the all four staff, the 7 minutes were paid back because they were not warned.

77. The Bundle does not provide documentary evidence that the sum of £1.28 was deducted from the Claimant's pay nor that it was paid back.

78. On the evidence available to us it is clear that the Claimant's end time was later amended to show a finish of 07:00am. In our view this supports a finding that the hours were reinstated on the internal systems. It is not clear when the minutes were added back to the system.

79. However, the issue of the minutes and any associated pay are slightly different. It was only in response to a clarification question that the Claimant says she has not been paid the £1.28. There are no documents showing any deduction in pay. Further, at the start of the hearing, when discussing the issues the Claimant was asked to specify the amount of the deduction she alleged was made. The Claimant was unable to do this, and the sum of £1.28 came from Mr. Winspear's calculations done at the start of the hearing using an hourly rate of £11 per hour, which the Claimant stated was the rate. The Claimant agreed that was the correct calculation.

80. On balance, taking all the above into account we find that the Claimant's record was adjusted by Mr. Vant to show clocking off at 06:53 and were later amended to show 7:00am. There is no documentary evidence that any deduction of £1.28 was made to the Claimant's salary. Given the Claimant was unclear on the amount of the alleged deduction at the start of the hearing, and reference throughout has been in relation to 7 minutes and not a monetary value, we find there was no deduction from pay.

8 September 2022 [issue 3.2.2]

81. On 8 September 2022 the Claimant was allocated the following work on the whiteboard: aisle 7 / biscuits / bakery / plinths. The Claimant says this was a break from an aisle pattern which was biscuits, cereal and then bakery.

82. Having undertaken a review of the whiteboard photographs, we do not find there to be an established pattern of white colleagues working biscuits, cereal and bakery. The Claimant worked this pattern on 10 February 2023 and 4 August 2023.

83. On 8 September 2022 a colleague, Craig was provisionally allocated cereals / porter / fresh plinths. This does not follow the pattern suggested by the Claimant in issue 3.2.2. There are many other examples in the whiteboard photos when the staff did not follow the BCB, and other patterns suggested by the Claimant.

84. Mr. Vant was not working the night shift commencing on 8 September 2022, but did work the previous night. Mr. Jones was the manager on shift on 8 September and Mr. Gary Davies the supervisor.

85. When time and workload permitted Mr. Vant would produce a draft of work for the next shift to assist the next manager/supervisor in. He did this for 8 September 2022 on the whiteboard but did not allocate any job timings. Mr. Vant considered the tasks assigned to both the Claimant and Craig would amount to approximately 8.5 hours work each. He says only doing biscuits, cereal and bakery would have not given the Claimant enough work.

86. Mr. Jones and Mr. Davies could manage the work on the shift as they wished, and were not bound by a draft produced by Mr. Vant.

13 November 2022 [issue 3.2.3]

87. The whiteboard for 13 November 2022 shows the following:

    Yvonne – 11 (4:00) / [rubbed out] / cooked meat (2:24) / plinths
    Danele – 7 (2:48) / 9 (2:45) /cooked meat 2:25.

88. The Claimant says Yvonne was initially allocated aisle 9 for her second task but this was later rubbed out.

89. On 13 November 2022 the Store Manager Alyn Davies attend the nights shift. The reason for Mr. Davies' attendance was not set out in the witness statements. In response to questioning, the Claimant said that the reason Mr. Davies attended was because she had complained to him about Mr. Vant in an email dated 14 September 2022. In her email she said: *Harassed, discriminated and racially abused by Damien Vant.*

90. Mr. Davies replied on 21 September 2022 and told the Claimant that he had been out of the office and had forwarded to Simon Jones.

91. Mr. Vant stated that Mr. Davies attended the store as the Second Respondent had wished for all Store Managers to work a night shift to understand the night shift better as Store Managers did not often work nights.

92. On the balance of probabilities, considering the lack of reply from Mr. Davies, we find that the likely reason for his attendance at store was as stated by Mr. Vant.

93. During the shift, Mr. Vant changed the tasks allocated to Yvonne. Neither Mr. Vant or Yvonne can recall the evening precisely, but consider there would have been a change in work need and Mr. Vant asked Yvonne to assist him the breaking down. This meant she did not work on aisle 9. Mr. Vant and Simon were also undertaking breakdown work. Mr. Vant cannot recall the precise reason why Yvonne's work was varied but say it would have been due to business needs. We accept that Mr. Vant required Yvonne to assist with breaking down due to a large delivery.

23 November 2022 [issue 3.2.4]

94. The Claimant was allocated to aisle 7 for the first part of the shift on 23 November 2022. 2.30 yoghurts 6; 13 fresh plinths []–[The Tribunal cant see the last words on photograph.]

95. No delivery had arrived for aisle 7 on that day and the Claimant did back stock. Product deliveries are managed by the depots, and the night shift

staff do not control what deliveries they receive and when. Usually deliveries arrive by 9.00pm, but deliveries can be later.

96. The Claimant did not raise the matter with Ms. Vant. In response to questioning she said she raised the lack of delivery with the other manager, Gary, and that he said he did not know where it was.

4 December 2022 [issue 3.2.6]

97. On 4 December 2022 Mr. Vant assigned the Claimant to start with aisle 8 for 3.30 hours followed by readys (4) hours and something else that is not legible. An employee called Mac started on aisle 7 that day.

98. In his witness statement, Mr. Vant stated that Mac had been moved to alcohol and this was the reason for the Claimant being assigned to aisle 8.

99. The whiteboard image does not show Mac working on alcohol, and in response to questioning, Mr. Vant explained he must have mixed up Mac with other colleagues. Mr. Vant could not specifically recall the reason why the Claimant was allocated to 8 and Mac 7. The Claimant was regularly allocated to 8, and also regularly did readys.

100. The Claimant says that on 4 December 2022 there were two rollers left by Indian colleague from the previous night and that the aisle was untidy. However, Mr. Vant states that 4 December was a busy day of shopping, and we consider December likely to be busy. We were not directed to any documentary evidence regarding there being two rollers or a messy shop floor. We cannot make any firm finding on whether there were two rollers.

101. Mr. Vant stated that he did not choose the messiest aisle to give the Claimant and did not allocate aisle 8 due to rollers being left by an Indian colleague. We accept this.

14/15 December 2022 [issue 3.2.5]

102. On 14 December 2022 the Claimant started work on aisle 7. Ms. Clemerson was allocated aisle 8 for the first part of the shift.

103. The Bundle contains a photograph of a large pallet board. The Claimant took the photograph at 22.09 of a large pallet board in the warehouse. When questioning Mr. Vant, she said this was the pallet he removed from the shop floor. In her witness statement the Claimant references a photograph at page 306. This is similar to that at page 289, but has no date stamp.

104. Mr. Vant explained that the photograph shows a board that he took out to the shop floor in error, that only a few products had been removed and that this photograph is not the pallet board that he refers to at paragraph 35 of his witness statement.

105. The pallet board photographed shows items for aisles 7, 8 and 11.

106. Ms. Clemerson's oral evidence was that Mr. Vant had told her that the board was incorrect, and had been brought out in error. The correct pallet was then provided with produce for both aisles 7 and 8.

107. On the same shift, on 15 December 2022 at around 1.00am/2.00am Mr. Vant removed a half empty pallet that the Claimant and Ms. Clemerson had been working on for products in aisles 7 and 8. The. Mr. Vant moved the pallet as the Claimant and Deborah were running behind schedule. This was due to the mistake earlier in the shift with the incorrect board.

108. Online shoppers start at 3.00am, with the majority starting at 4.00am. Mr. Vant removed the pallet in readiness for online shoppers and told the staff to move on to their next aisle.

109. Mr. Vant regularly moved pallets and tided the shop floor.

110. On balance, we accept that the pallet board shown on the photographs was not the one that Mr. Vant moved later in the evening, and that he moved a different pallet at around the Claimant's break time.

111. There is no evidence that the Claimant travelled long distances with products from the moved board.

17 December 2022 [issue 4.2.1]

112. Mr. Vant gave supplemental evidence in relation to the allegation regarding 17 December 2022.

113. There was no evidence before us on when the First Respondent became aware that the Early Conciliation certificate had been issued, and therefore we were unable to make definitive findings of fact on the First Respondent's knowledge of the certificate being issued. However, both Respondents would have been aware of ACAS Early Conciliation before the certificated was issued on 14 December 2022. However, given the dates, we consider it likely that the First Respondent was aware of the Early Conciliation certificate dated 14 December 2022 by 17 December 2022.

114. On 14 December 2022 at 13:34 the Claimant text Mr. Jones and told him she was available for overtime on 17 December 2022. Mr. Jones replied on 15 December 2022 at 8.00am and said *"Sorry Zanele just seen this brilliant I will put on Kronos".* Mr. Jones did not update Kronos but he messaged Mr. Vant and Mr. Davies and informed them the Claimant would be working overtime and asked them to put her on Kronos. Mr. Vant was aware the Claimant was due to work on 17 December 2022. He forgot to update Kronos in advance. Whilst preparing the Whiteboard a colleague came and spoke with him and he forgot to add the Claimant's name to the Whiteboard. Mr. Vant went to the office and completed a planner sheet which included the Claimant.

115. At about 9.05pm, Mr. Vant was informed by a colleague, Sam, that the Claimant had attended work and was upset that she was not on the Whiteboard. Mr. Vant explained to Gary and Sam that he had assigned her tasks but had just forgotten to put her on the whiteboard and asked them to go after the Claimant. Whilst questioning Mr. Vant the Claimant said that Gary had got to her after she passed the checkouts and she told him that she was leaving. She has not stated this in evidence previously.

116. The Claimant left the store, and at this point Mr. Vant updated Kronos to show the Claimant had been due to work but recorded her as having unauthorized attendance due to her leaving work. Mr. Vant stated that not putting the Claimant on Kronos or the Whiteboard was an error. We find this was an oversight.

117. The Claimant submitted a grievance on 18 October 2022. A fair treatment meeting took place on 9 December 2022. Mr. Jones attempted to meet with the Claimant on 30 March 2023 to talk about the outcome. The Claimant did not wish to discuss the outcome. The outcome letter was sent to the Claimant via post on 14 April 2023 and the Claimant received it on 15 April 2023. The letter received by the Claimant was dated 8 April 2023. There is a slightly different version of the letter in the bundle, with two different dates within it, the rest of the letter is the same. Mr. Jones was not aware of any amendment to the outcome letter. We do not consider the version showing different dates to be an attempt to forge documentation.

Law

Section 13 Equality Act 2010

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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 36 – Equality Act 2010

Burden of proof

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c)the Special Immigration Appeals Commission;

(d)the First-tier Tribunal;

(e) the Education Tribunal for Wales;

(f) the First-tier Tribunal for Scotland Health and Education Chamber.

118. Under section 13(1) of the Equality Act 2010 read with section 11, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others.

119. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

120. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions

cannot be answered without first considering the 'reason why' the claimant was treated as he was. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).*

121. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

122. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

123. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA; Royal Mail Group Ltd v Efobi [2021] UKSC 22*). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

Stage 2: The respondent must then prove that it did not discriminate against the claimant.

124. In other words, where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of race, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

125. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board [2012] IRLR 870, SC.)*

126. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258.* Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

127. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status*

(e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)

128. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".*' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.* It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

129. In *Amnesty International v Ahmed UKEAT/0447/08/ZT* the EAT stated, paragraph 36, *"…the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)…".*

130. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.*

131. The Tribunal must consider the EHRC Statutory Code of Practice.

Harassment

Section 26 Equality Act 2010

Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

132. Paragraph 7.7. of the ECHR Code states: *“Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour.”*

133. Although harassment is similar to direct discrimination it covers actions “related to” a protected characteristic, which goes further than “because of”.

134. When considering whether a claimant’s dignity has been violated or an intimidating, hostile, degrading humiliating or offensive environment

has been created, it must be kept in mind that it is not enough that the conduct was simply upsetting.

135. When considering effect it must be considered whether it was reasonable for the conduct to have had the effect taking in to account both a claimant's perception and the overall circumstances.

136. Section 212(1) of the EqA says:

"detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

Subsection 5 states:

"Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."

137. The Explanatory Notes for Section 212 definition of detriment under the Equality Bill (then clause 201) provided the background reason for the definition as follows:

"It is necessary to clarify in this clause that "detriment" excludes harassment, to make it clear that where the Bill provides explicit harassment protection, it is not possible to bring a claim for direct discrimination by way of detriment on the same facts."

138. The effect of section 212(1) is that harassment and direct discrimination claims are mutually exclusive, meaning that a claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct. A claimant must choose or run alternative claims.

Victimisation

Section 27 Equality Act 2010

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

139. The law on victimisation is designed to make sure that employees can raise concerns about discrimination without fear of repercussions. Victimisation has a specific legal meaning.

140. A claimant is protected when he or she complains about discrimination even if they are wrong and there has been no discrimination. However, a claimant is not protected if they made an allegation in bad faith, namely they did not really believe it was discrimination.

141. In considering the link between the protected act and the detriment a Tribunal needs to consider how to interpret the word ‘because’ in section 27. The law requires more than a ‘but for’ link: it is not enough to say that, if the Claimant had not made the complaints, then the bad treatment would not have happened.

142. The Tribunal must consider what was in the mind of the decision maker, consciously or subconsciously. Chief Constable of West Yorkshire v Khan [2001] ICR 1065 HL suggests must find the ‘core reason’ or the ‘real reason’ for the act or omission. The Equality and Human Rights Commission Code at paragraph 9.10 also makes it clear that the protected act need not be the only reason for the decision.

143. The person who subjects a claimant to a detriment needs to have known that the claimant did the protected act.

<u>Unlawful deduction of wages</u>

144. Section 13(1) of the Employment Rights Act 1996 (ERA) provides an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.

145. An employee has the right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to section 23 ERA. The definition of “wages” in section 27 ERA includes holiday pay.

146. A claim about an unauthorised deduction from wages must be presented to an Employment Tribunal within three months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

147. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum, although a contract of employment can provide more. The leave year begins on the start date of the Claimant’s employment in the first year and, in subsequent years, on the anniversary of the start of the Claimant’s employment, unless a written relevant agreement between the employee and the employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the Claimant on termination of employment in lieu of any accrued but untaken leave.

148. A worker is entitled to be paid a week’s pay for each week of leave. A week’s pay is calculated in accordance with the provisions in sections 221-224 of ERA, with some modifications.

Time Limits

123 Time limits

(1) Subject to section 140B 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

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

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

149. Section 123 of the Equality Act 2010 sets out the time limit for bringing discrimination claims in the Tribunal. It provides that complaints of discrimination should be presented within three months of the act complained of.

150. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought *"within such other period as the Tribunal thinks is just and equitable*". This provides a broader discretion than the reasonably practicable test for other claims.

151. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.

152. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS " freezing" of the time limits does not operate to assist a Claimant (Pearce v Bank of America EAT 0067/19).

153. Time limits should be adhered to strictly (relevant case being Robertson v Bexley Community Centre 2003 EWCA CIV 576.)

154. The burden of proof is on the Claimant.

155. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

- *the length of and reasons for the delay;*

the extent to which the cogency of the evidence is likely to be affected by the delay;

- *the extent to which the party sued had cooperated with any request for information;*
- *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
- *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

156. In *Aberttawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194* the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.

157. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.

Conclusions

158. In reaching our conclusions, which were unanimous, we applied the law to the findings of fact. We considered fully the oral submissions of both parties, and paid careful regard to the allegations as set out in the list of issues, noting that significant judicial resource was spent in case management and there were a large number or preliminary hearings that involved clarifying the Claimant's case and issues in the claim.

159. We have set out our conclusions regarding time after the conclusions regarding the discrimination complaints. The issues are addressed in issue number, noting the findings of fact above are set out, as far as possible, in chronological order.

Harassment

160. Set out above is the statutory test for harassment. In order to be successful in a harassment complaint, it must be shown that the Claimant was subjected to unwanted conduct that was related to the Claimant's race and that such unwanted conduct had the effect or purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

161. We have also had regard to the ECHR Code, and in particular paragraph 7.7 as refenced by Mr. Winspear.

162. Paragraph 7.7. of the ECHR Code states: *"Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry,*

jokes, pranks, acts affecting a person's surroundings or other physical behaviour."

163. Although harassment is similar to direct discrimination it covers actions "related to" a protected characteristic, which goes further than "because of".

164. When considering whether a claimant's dignity has been violated or an intimidating, hostile, degrading humiliating or offensive environment has been created, it must be kept in mind that it is not enough that the conduct was simply upsetting.

165. When considering effect it must be considered whether it was reasonable for the conduct to have had the effect taking in to account both a claimant's perception and the overall circumstances.

Issue 2.1.1

166. As set out in the findings of fact above, the Claimant was not required to work on aisle 7 on all of the alleged dates. However, the Claimant was required to work on aisle 7 on a number of occasions, and this has been accepted by the Respondents. The Claimant also regularly worked in other aisles

167. Dealing first with whether being required to work aisle 7 was unwanted conduct. We have considered this in view of the particular allegation at 2.1.2.

168. We do not consider being allocated to aisle 7 on the dates that she was allocated to be unwanted conduct.

169. We understand that the Claimant may not have wanted to work on aisle 7, but do not consider aisle 7 to be considered as a hard or foreign aisle.

170. Further, we cannot see any link between the Claimant being allocated to work on aisle 7 and the fact that she was a black Zimbabwean. Other members of staff, including white staff, were also regularly allocated to aisle 7.

171. As noted in the findings of fact above, supervisors and managers allocated work based on aisle experience, who was on shift and work requirements of a particular night. There is no evidence at all to suggest allocation to aisle 7 on the dates in question was related to race.

172. For completeness, even though we do not consider it to be unwanted conduct or related to race, if we are wrong on that, we have gone on to consider whether the Respondents intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that the Respondents allocated

aisle 7 to the Claimant, and indeed to others, based on the needs of the shift and the best way to ensure efficiency.

173. The Tribunal understands that the Claimant has been upset by being allocated aisle 7. However, noting in particular that the way that work is allocated to night staff based on experience and work demands we have not been able to conclude that the conduct reasonably had the effect of violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

174. This allegation of harassment fails.

Issue 2.1.2

175. This allegation of harassment is that on 3 May 2022 the Store Manager approved the Claimant's 4 weeks' holiday request but that Mr. Vant refused all of the days on Kronos.

176. Again, we have considered whether there was any unwanted conduct in view of the particular allegation and our findings of fact. As explained above, we did not find that Mr. Vant refused or rejected the Claimant's leave request, and therefore this results in a conclusion that there was no unwanted conduct.

177. However, even if Mr. Vant had refused the request for four weeks' holiday on Kronos, in view of the factual situation, noting that there had been approval by the Store Manager, we note that the Claimant may have been annoyed or upset by the refusal on Kronos but, we do not consider the refusal was in any way related to race.

178. The Claimant was aware she needed approval for that length of holiday and sought and obtained it.

179. Any refusal or rejection on Kronos, by Mr. Vant or anyone else who was not aware that she had approval, was because such requests could not be permitted without Store Manager approval.

180. For completeness, even though we do not consider a refusal on Kronos to be unwanted conduct related to race, if we are wrong on that, we have gone on to consider whether the Respondents intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that any refusal by Mr. Vant or any other person that refused the request and was not aware that the Claimant had approval from the Store Manager was in accordance with policy, that requests over three weeks could not be granted without approval.

181. The Tribunal understands that the Claimant is upset by her request being refused on Kronos. However, on balance, noting that the Claimant was aware of the policy and that approval was required, that she sought approval and obtained it, that she knew only Mr. Jones had been copied in

and Mr. Vant was not aware of the approval, we have not been able to conclude that the refusal reasonably had the effect of violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

182. This allegation of harassment fails.

Issue 2.1.3

183. This allegation of harassment is that Mr. Vant, the First Respondent, searched the Claimant's jacket and exposed her sanitary pads.

184. We have first considered whether this amounts to unwanted conduct, in view of the findings of fact that we have reached, namely that Mr. Vant did not search the Claimant's jacket when moving her trolley and did not expose sanitary pads.

185. Accordingly, as we do not consider the factual allegation as pursued by the Claimant to have taken place we do not consider there to have been any unwanted conduct. We have found that Mr. Vant did move the Claimant's trolley to the next aisle she was working on, but do not consider this amounts to unwanted conduct.

186. Further, and for completeness, we do not consider moving the Claimant's trolley was in any way related to race. Mr. Vant moved staff trolleys in order to keep the store tidier, and it meant after break staff could go to the aisle they were assigned. If we are wrong, and sanitary pads did become exposed, we do not consider this to be related to race.

187. For completeness, even though we do not consider moving the trolley with a jacket in to be unwanted conduct or related to race, if we are wrong on that, we have gone on to consider whether the Respondents intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that Mr. Vant moved staff trolleys, not only the Claimant's, in order to manage the shift and tidiness of the store.

188. The Tribunal understands that the Claimant is upset by her belief about what took place and that she would have been embarrassed by any sanitary products being on display. However, noting that trolleys being moved appears to have been done often and to all staff, we have not been able to conclude that the conduct reasonably had the effect of violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

189. This allegation of harassment fails.

Issue 2.1.4

190. This allegation of harassment is that Mr. Vant, the First Respondent, made two comments. Within the allegation itself the Claimant says the comments were aimed at her and were suggesting that she was lazy.

191. We have first considered whether the comments amount to unwanted conduct, in view of the findings of fact. As set out above, we do not consider the comments to have been directed at the Claimant as they were on the whiteboard for all staff to see and were written with the aim of boosting staff efficiency.

192. We do not consider there to have been any unwanted conduct.

193. Further, we do not consider either comment was in any way related to race. There is nothing in the words used that have any link to race whatsoever.

194. For completeness, even though we do not consider either comment to be unwanted conduct or related to race, if we are wrong on that, we have gone on to consider whether the Respondents intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that Mr. Vant made the comments to demonstrate to staff that stocking could be undertaken quickly and to encourage them to work quicker.

195. The Tribunal understands that the Claimant is upset by the reference to bottoms, and that she is concerned this was reference to her private parts. However, we do not consider this to be the case, and as noted in the findings of fact above, it is a phrase that is widely understood to mean hurry up. There is no criticism of the Claimant not knowing this, and it is understood that English is not the Claimant's first language. On balance, taking into account the specific comments, the fact they were on the whiteboard for all staff and the Claimant's perception, we have not been able to conclude that the comments reasonably had the effect of violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

196. This allegation of harassment fails.

Direct Race Discrimination

197. We have dealt with each allegation of direct discrimination in order of that set out in the list of issues.

198. We have kept in mind the key principle that direct race discrimination is where a claimant is treated less favorably **because of** a protected characteristic, in this case race.

Issue 3.2.1

199. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that she was required to work on aisle 7 on the dates listed in issues 3.2.1 was 'because of' race.

200. As set out in the findings of fact above, the Claimant was not required to work on aisle 7 on the all the dates listed. She was allocated to work on aisle 7 on a large number of the dates. Aisle 7 was no harder than other aisles and was not considered to be a foreign aisle.

201. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that race played any part in the reason for the Respondents requiring the Claimant to work on aisle 7, noting that various employees of different races also worked on aisle 7. There is no prima facie case of race discrimination.

202. We have considered whether there are any inferences that should be taken into account when reaching our conclusion, and based on the findings of fact we do not consider there to be.

203. We have concluded that the reason for the supervisors and managers allocating aisle 7 to the Claimant on the dates in question was based on the needs of the shift. The Claimant regularly worked aisle 7, meaning that she experienced on the aisle and should be able to stock it efficiently. Work was allocated based on who was on shift and the work requirements of a particular night shift. The times allocated to aisle 7 also varied.

204. The Claimant failed to show that the Respondent treated her less favorably than any actual or hypothetical comparator. In considering the named comparators, we note that on occasion Mac, Dan J and Nong all worked on aisle 7. We understand reference to Marc at issue 3.4 should read Mac.

205. Further, as set out above, Ms. Clemerson , who is white, regularly worked aisle 7 on her usual shifts and considered it to be her aisle.

206. There was simply no evidence that the Respondent would have treated someone who was not a black Zimbabwean any differently in regarding allocation of work, in relation to aisle 7 in particular.

207. We conclude there was no less favourable treatment.

208. The requirement to work aisle 7 was not related to race.

209. The Respondent has shown a non-discriminatory explanation, namely requiring the Claimant to work aisle 7 on some shifts if she was the best placed person to do so within the demands of the shift.

210. Accordingly, the direct race discrimination complaint in relation to being required to work aisle 7 fails.

Issue 3.2.2

211. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that Mr. Vant prescheduled the shift for 8 September and did not allocate her biscuits, cereal and bakery as per issue 3.2.2 was 'because of' race.

212. As set out in the findings of fact above, the Claimant was provisionally allocated aisle 7, biscuits, bakery, plinths on 8 September 2022 by Mr. Vant. The managers on shift did not change the provisionally assigned tasks.

213. There were no established aisle patterns for white colleagues, the evidence demonstrated that work, and the length of task, was allocated based on business need. Further, the Claimant herself did work biscuits, cereals, bakery on two occasions thus indicating work was allocated to staff on need, not race.

214. During questioning of Mr. Vant the Claimant suggested to Mr. Vant the reason he preplanned to allocate her to aisle 7 was because he knew Simon would not allocate aisle 7 to her after her claim was accepted by the Employment Tribunal. It is noted that the claim form was submitted on 11 January 2023, and early conciliation had not commenced by this date.

215. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that race played any part in the reason for the First Respondent preplanning the Claimant to work on aisle 7, biscuits, bakery, plinths. There is no prima facie case of race discrimination.

216. We have considered if there are any inferences that should be taken into account when reaching our conclusion, and based on the findings of fact we do not consider there to be.

217. We have concluded that the reason for the supervisors and managers allocating aisle 7, biscuits, bakery, plinths on 8 September 2022 was due to the needs of the shift and how much work was required in any particular areas.

218. The Claimant failed to show that the Respondent treated her less favorably than any actual or hypothetical comparator. In considering the named comparators, we note that on 8 September 2022 Craig actually worked cereals / porter / fresh plinths. Other night staff shift worked a

range of aisles and there was no identifiable patterns. There was no differential treatment.

219. There was simply no evidence that the Respondent would have treated someone who was not a black Zimbabwean any differently in regarding allocation of work, in relation to patterns generally and in particular on 8 September 2022.

220. We conclude there was no less favourable treatment.

221. The requirement to work aisle 7, biscuits, bakery and fresh plinths on 8 September 2022 was not related to race.

222. The Respondent has shown a non-discriminatory explanation, namely requiring the Claimant to work where needed to meet the requirements of the shift.

223. Accordingly, the direct race discrimination complaint in relation to 8 September 2022 fails.

Issue 3.2.3

224. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that Yvonne being removed her scheduled tasks including aisle 9 an cooked meats leaving the Claimant to complete work alone as alleged in issues 3.2.3 was 'because of' race.

225. As set out in the findings of fact above, the Claimant and Yvonne were initially scheduled to be working aisle 9 and cooked meat together. It was not clear what second task had been allocated to Yvonne. However, during the shift Yvonne was required to help breaking down, resulting in a change to the intended work program.

226. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that race played any part in the reason for the Respondents requiring the Claimant to work on aisle 7. There is no prima facie case of race discrimination.

227. We have considered if there are any inferences that should be taken into account when reaching our conclusion, and based on the findings of fact we do not consider there to be.

228. We have concluded that the reason for moving Yvonne from the scheduled tasks was to assist in breaking down

229. The Claimant failed to show that the Respondent treated her less favourably than any actual or hypothetical comparator. In considering the named comparator, Yvonne, we do not see that the Claimant working on her assigned tasks alone is less favourable treatment in comparison to

Yvonne being required to assist in breaking down. The Claimant's role included stacking shelves, and that is what she did that night.

230. There was simply no evidence that the Respondent would have treated someone who was not a black Zimbabwean any differently in adjusting work plans in order to meet the need to break down pallets.

231. We conclude there was no less favourable treatment.

232. The decision for Yvonne to help with breaking down and leave the Claimant to do some work alone was not related to race.

233. Further, we note that on the Claimant own case it appears that her concern was being made to look bad in front of the Store Manager. The Claimant asserts it was to make her look bad in front of the Store Manager, but we found we was present to learn the shift, and not because the Claimant had emailed him some weeks earlier. We see no link to race at all.

234. The Respondent has shown a non-discriminatory explanation, namely there was a large volume of breaking down needed.

235. Accordingly, the direct race discrimination complaint in relation to Yvvone being removed from the assigned tasks fails.

Issue 3.2.4

236. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the First Respondent not giving the Claimant a delivery on 23 November 2022 was 'because of' race.

237. As set out in the findings of fact above, the first task allocated to the Claimant on 23 November 2022 was aisle 7 for 2.30 hours. No delivery had arrived for aisle 7 by the start of shift.

238. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that race played any part in the reason for the First Respondent not giving the Claimant a delivery for aisle 7. There is no prima facie case of race discrimination.

239. It was noted that in her witness statement the Claimant says that she was not given a delivery because she complained about the workload of aisle 7 but in the list of issues she says it was done to cause her stress and make her look bad.

240. We have considered if there are any inferences that should be taken into account when reaching our conclusion, and based on the findings of fact we do not consider there to be.

241. We have concluded that the reason for the Claimant not being given a delivery was simply because there was not one.

242. The Claimant failed to show that the Respondent treated her less favorably than any actual or hypothetical comparator. In considering the named comparators, Khadence, Greg, one of the Dans, Alex, Ben, Adrian, Sue, Karen and Foz, we are not aware of what delivery they were given that night or when. However, in a large supermarket there was work to do, we do not see how not being given a delivery for the first allocated shift amounts to less favourbale treatment of any colleagues who may have been given a delivery to work when there was not one available.

243. There was simply no evidence that the Respondent would have treated someone who was not a black Zimbabwean any differently in not giving them a delivery for an allocated aisle when a delivery had not arrived.

244. We conclude there was no less favourable treatment.

245. The reason for not giving the Claimant a delivery was because one had not arrived and was not related to race.

246. The Respondent has shown a non-discriminatory explanation, namely there was no delivery to give her.

247. Accordingly, the direct race discrimination complaint in relation to not being given a delivery fails.

Issue 3.2.5

248. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the First Respondent removing a pallet that she was working on meaning she had to travel long distances 1 was ‘because of’ race.

249. As set out in the findings of fact above, Mr. Vant removed two pallets that night, the first had been put out in error and the second was removed during break when it was unfinished the Claimant and Ms. Clemerson to move to the next task. As a matter of fact, we found she did not travel long distances to get products that shift.

250. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that race played any part in the reason for Mr. Vant moving any pallet on 15 December 2022. There is no prima facie case of race discrimination.

251. We have considered if there are any inferences that should be taken into account when reaching our conclusion, and based on the findings of fact we do not consider there to be.

252. We have concluded that the reason for moving the first pallet was that the first was put out in error and the second was not completed and other tasks needed working on.

253. The Claimant failed to show that the Respondents treated her less favorably than any actual or hypothetical comparator. In considering the named comparators: Gill, Dan, Adrian, Karen, Sam, Ann, Tonsisha, Ben, Craig Connor, Mike and Rui.

254. However, Ms. Clemerson, who is white, was sharing the pallets with the Claimant, the moving of the pallets impacted her in the same way as it did the Claimant. There was therefore no less favourable treatment because of the Claimant's race.

255. There was simply no evidence that the First Respondent did or would have treated someone who was not a black Zimbabwean any differently in relation to moving pallets on 15 December 2022.

256. We conclude there was no less favourable treatment.

257. The movement of pallets was not related to race.

258. The Respondents have shown a non-discriminatory explanation, namely the first pallet was removed as it was put out by mistake and the second pallet because it was not completed and the next tasks needed working on.

259. Accordingly, the direct race discrimination complaint in relation the pallet being moved fails.

Issue 3.2.6

260. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the First Respondent allocating the Claimant aisle 8 on 4 December 2022 was 'because of' race.

261. As set out in the findings of fact above, the Claimant regularly worked aisle 8. There was no corroborative evidence of there being two rollers and aisle 8 mess. We note the Claimant has taken photographs of some matters in the store, none were supplied in relation to this allegation.

262. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that race played any part in the reason for the First Respondent allocating aisle 8 to the Claimant on 4 December 2022. There is no prima facie case of race discrimination.

263. Although the Claimant considers it was to give her extra work and because the colleague who left the rollers was Indian and therefore Mr. Vant viewed it as foreigners work, in the context of the Claimant regularly

working aisle 8 and staff being required to work where assigned to meet the business need there is nothing suspicious in the Claimant being allocated aisle 8. There is no evidence to support a view that any additional work left by a colleague was considered to be foreigners work.

264. We have considered if there are any inferences that should be taken into account when reaching our conclusion, and based on the findings of fact we do not consider there to be, noting the Claimant often worked aisle 8 and readys.

265. The Claimant failed to show that the Respondent treated her less favorably than any actual or hypothetical comparator. In considering the named comparator, Mac, we do not see how the Claimant working aisle 8 and Mac working 7 amounted to less favorable treatment. Both would have needed to work on any aisle allocated to them.

266. There was simply no evidence that the Respondent would have treated someone who was not a black Zimbabwean any differently in giving the Claimant aisle 8 on 4 December 2022.

267. We conclude there was no less favourable treatment.

268. The reason for allocating aisle 8 is because store management considered that was appropriate for the shift in question.

269. The Respondent has shown a non-discriminatory explanation, namely it was considered appropriate to assign the Claimant to 8 and Mac to 7 for that shift.

270. Accordingly, the direct race discrimination complaint in relation to being allocated aisle 8.

271. Each allegation of direct race discrimination fails.

272. We have considered the cumulative effect, and do not consider taken together there to be any direct race discrimination.

Victimisation

273. The Claimant relies on engaging in ACAS Early Conciliation and the certificate that was sent to the Respondents on 14 December 2022. The Respondent accepts this amounts to a protected act.

274. Early conciliation in relation to Mr. Vant, the First Respondent, started on 2 November 2022.

275. The Claimant contacted ACAS on 10 November 2022, in relation to the Second Respondent, and an Early Conciliation Certificate was issued on 22 December 2022.

276. The Claimant alleges that the detriment, put another way the retaliation or repercussion, from engaging in early conciliation and the certificate being sent on 14 December 2022, was that the First Respondent did not put the Claimant on Kronos or the whiteboard so she did not get to for the promised shift.

277. As always, applying the law to the findings of fact is key.

278. As set out above, on 14 December 2022 the Claimant offered, by way of message to Mr. Jones, to work overtime on 17 December 2022, and this was agreed by Mr. Jones on 15 December 2022. Mr. Jones' message indicates he is happy for the Claimant to work overtime, and we note it was likely to be a busy period given the proximity to Christmas.

279. There was an agreement in place. Mr. Jones asked the shift supervisors, Mr. Vant and Mr. Davies to put the Claimant on Kronos. This did not happen due to an oversight, an error. Both Mr. Vant and Mr. Davies knew the Claimant was scheduled to work and were planning for this.

280. We do not consider the Claimant was subjected to detriment. We do not consider the fact that she was not on the whiteboard or Kronos at the start of her overtime shift was a disadvantage, a detriment. All involved knew she was due to work and there was work for her to do. The Claimant left without speaking to any management, she could have raised with them and started her work. She did not. The Claimant chose to leave the workplace.

281. Further, even if we are wrong and there was detriment, we do not believe not putting the Claimant on Kronos or the whiteboard was because of the fact that the Claimant engaged in ACAS Early Conciliation and the certificate for Mr. Vant being sent on 14 December 2022. The Respondents had agreed to the Claimant working overtime on 15 December 2022, some weeks after Early Conciliation commenced, and the day after the certificate being sent. We do not consider the actual sending of the certificate to have any bearing on the error made by the First Respondent.

282. The claim of victimisation fails.

Unlawful deductions from wages

283. As set out in the findings of fact, there was no evidence to support a finding that a deduction was made.

284. Accordingly, the wages paid to the Claimant in relation to the pay period for 28 August 2022 were not less than they should have been.

285. As there was no deduction, the claim fails.

Time Limits

286. The Respondents submitted that any claim regarding a matter that took place before 3 August 2022 was out of time.

287. ACAS Early Conciliation took place in relation to the First Respondent between 2 November and 14 December 2022 and in relation to the Second Respondent between 10 November and 22 December 2022. The claim form was submitted on 11 January 2023.

288. None of the Claimant's discrimination, harassment or victimisation allegations are successful. Therefore there is no continuing act.

289. For completeness, the following allegations are out of time

2.1.2 – 3 May 2022
2.1.3 – in or around March 2022
2.1.4 – 10 April 2022

290. Further it is noted that the primary time limit for all three allegations had expired before commencement of Early Conciliation.

291. We were not provided with any evidence or submissions on whether the Tribunal should extend the time limit.

292. In any event, we did not consider it just and equitable in all the circumstances to extend time.

Employment Judge Cawthray

Date 21 June 2024

REASONS SENT TO THE PARTIES ON 24 Jun 2024

FOR THE TRIBUNAL OFFICE Mr N Roche