EMPLOYMENT TRIBUNALS

Claimant: Mr P Mungoni

Respondent: John Lewis PLC

Heard at: London South (by video)

On: 14, 15, 16 and 17 May 2024

Before: Employment Judge Evans
Ms G Mitchell
Mrs S Dengate

Representation
Claimant: in person
Respondent: Mr Graham, counsel

JUDGMENT

The Tribunal's unanimous judgment is that:

1. The complaint of constructive unfair dismissal is not well-founded. The claimant was not constructively dismissed. The complaint of unfair dismissal fails and is dismissed.

2. The complaint of direct race discrimination was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaint is therefore dismissed.

3. The complaint of harassment related to race was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaint is therefore dismissed.

REASONS

Preamble

1. These are the Tribunal's reasons for its reserved judgment set out above. It was necessary for the Tribunal to reserve its judgment because time was lost during the Hearing for the reasons explained at [15] below.

2. The claimant's employment with the respondent began on 6 October 2019 and ended on 6 July 2022. Early conciliation began on 2 September 2022 and ended on 14 October 2022. The claimant presented their claim on 11 November 2022.

3. The claim came before Tribunal on 14 May 2024. The parties had agreed a main bundle of 605 pages with pagination running to page 603 prior to the Hearing. Three additional documents were admitted during the hearing: a pdf document containing data extracted from google spreadsheets showing the duties to which partners on the claimant's shift were assigned between June 2021 and February 2022 ("the Duty Data document"), a pdf document with details of the ethnicity of partners working on the claimant's shift ("the Ethnicity Data document") and an excel spreadsheet with information about the activities as recorded in the respondent's Work Management System ("WMS") of partners working on the claimant's shift between June 2021 and February 2022 ("the Excel Activity document"). All references to page numbers are to the pagination of the main bundle unless otherwise stated.

4. The claimant gave evidence by reference to a witness statement. The respondent's witnesses were Mr Brett Edmeades (a Warehouse First Line Manager), Mr Neil Wilkinson (the Warehouse Shift Manager for the Fruit and Veg department), Ms Kate Wilson (a Shift Manager at the respondent's Regional Distribution Centre at Aylesford) and Ms Melanie Ridley (a Manager in the respondent's Appeals Office).

Applications and orders during the hearing

Applications

5. On the first day of the Hearing the claimant made an application to amend his claim to include a further allegation of direct race discrimination. That application was refused for reasons given orally at the Hearing. A separate order was sent to the parties in relation to this.

The disclosure issue

6. A central factual issue in this claim is how the different duties performed by members of the claimant's shift were allocated between June 2021 and February 2022. The claimant contends that he was treated unfairly because he was given a disproportionately low number of goods-in duties (which were to be preferred

because they involved less strenuous work). The contents of the respondent's witness statements made clear that some data concerning duty allocation had been available and used during the claimant's grievance. However, there was just one single page of redacted data contained in the bundle (page 344). It was redacted so that the names of all the partners whose data it concerned apart from that of the claimant were deleted and it did not in any event appear to relate to the period in question.

7. The disclosure issue came into focus at the beginning of second day of the Hearing. The Tribunal raised with the respondent, having regard to the overriding objective, whether it was the case that the only document relating directly to the allocation of duties was that at page 344 of the bundle. We noted apparent references to other documents in the respondent's witness statements. We also noted that we had concerns about that the fact that page 344 was redacted.

8. Mr Graham took instructions. The amount of information available to him increased as the day progressed. What he told us was, as the day progressed, as follows:

    8.1. There were two sources of information that might assist. First, a google spreadsheet, maintained by Mr Edmeades, which showed which partners were allocated to which duty. However, this was routinely deleted. Secondly, the respondent's warehouse management system, WLM, which records the codes partners enter into a system to show what tasks they have performed on any given day. The data in WLM was only routinely kept for 12 months. Mr Graham told us the head of operational solutions had been contacted to see if data could be retrieved.

    8.2. Later in the day, Mr Grahan informed us that the respondent had established that the respondent had access to 7 years of google data so the google spread sheets for the relevant period should be recoverable. It also appeared likely that WMS data would be recoverable. WMS data is similar to, but not the same as, WLM data.

    8.3. Later in the day, Mr Graham confirmed that the google spreadsheet would be recoverable as would the WMS data, but it was not clear how long recovery would take.

9. By way of explanation for this unsatisfactory state of affairs, Mr Graham explained that disclosure had been done in-house by the respondent's legal department. The external solicitors representing the respondent had queried the position in relation to disclosure when preparing the respondent's witness statement and had been told that documents beyond page 344 were thought not to be available. That had only turned out not to be the case following the further enquiries instigated by the Tribunal.

10. The claimant was understandably dissatisfied with this state of affairs. We took care to explain to him that we had intervened as we had because it seemed to us that the missing documents were exactly those documents which he might need to prove his case in relation to the allocation of duties. The reality was that

without those documents there was little documentary evidence in relation to the issues and what evidence there was - page 344 – did not really assist him. We put various courses of action to him, and he indicated that he would like to continue being cross-examined whilst the respondent's enquiries about the missing documents continued.

11. The claimant's cross-examination therefore proceeded whilst those instructing Mr Graham gathered the information set out above. By lunchtime the cross-examination was complete save in respect of the allocation of duties. After lunch the Tribunal adjourned to the morning of the third day (16 May 2024) so that the respondent could get as far as possible with obtaining the relevant google spreadsheet and the WMS data. We concluded it was not in the interests of justice to begin to hear the respondent's evidence before that of the claimant had concluded. We told the parties that a decision on how to proceed would be taken on the morning of 16 May 2024 and asked Mr Graham to provide at least part of the google spreadsheet and WMS data for illustrative purposes by 9.30am.

12. In fact on the evening of 15 May 2024, the respondent emailed the Duty Data document, the Ethnicity Data document and the Excel Activity document to the Tribunal and to the claimant. All three documents were clearly disclosable as they all contained information which was likely to support either the claimant's case (that he had been less favourably treated because of race in relation to duty allocation) or that he had not (the respondent's case). We had not analysed the documents so at this point we did not know whether the documents would assist the claimant or the respondent or, indeed, neither of them.

13. We asked the claimant whether he would like the documents to be admitted. He initially seemed to favour them being excluded (apparently on the basis that the respondent could have fabricated them). We again explained to him that we had raised the issue of the documents because it seemed to us that they should have been disclosed and because it seemed to us that on the evidence otherwise available it might well be the case that he would be unable to shift the burden of proof in his race discrimination claim. We emphasised that we had most certainly not raised the issue to give the respondent an opportunity to find evidence supporting its response and, indeed, that we would have been highly unsympathetic if the respondent itself had sought to introduce additional documents on day three of a four-day hearing. The claimant then decided he wanted the documents to be admitted. The respondent had no objection to this and so they were.

14. Once the decision to admit the documents had been taken, we asked the claimant whether he needed a further adjournment to prepare his cross-examination. He said that he did not. We did not press the claimant on this: he had had the documents overnight and the key documents (the Duty Data document and the Ethnicity Data document) were in fact easier to digest than we had feared they might be before we saw them. The respondent also indicated that it did not need any adjournment.

15. The hearing then proceeded. However, although we got to the end of submissions by the afternoon of the fourth day, we had lost around a day as a

result of the disclosure issue and this meant that there was insufficient time for the Tribunal to both deliberate and deliver its judgment on liability. Consequently, we reserved our decision.

16. Finally, we observe that it is highly regrettable that the respondent, a well-resourced company with skilled professional advisers, dealt with its disclosure obligations in such an unsatisfactory manner. The fact that it was established that the documents could be recovered within around 2 hours of the Tribunal raising the issue suggests that the efforts of the respondent to find them when carrying out the disclosure exercise were insufficient. We trust that the respondent will consider what went wrong and learn the necessary lessons so that this does not happen again.

The issues

17. The issues arising in this case were set out as follows in the case management orders of 8 March 2023 (page 54). The parties confirmed at the beginning of the hearing that those were indeed the issues that we should decide, subject to two changes. First, the respondent conceded that if the claimant had been constructively dismissed (which was denied) that dismissal was unfair. Secondly, the question of comparators was discussed and refined. The final list of issues was therefore agreed to be as set out below. The Tribunal included these in orders sent to the parties before the beginning of the second day so that the claimant as an unrepresented party was entirely clear about them.

1. Time limits

   1.1. Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

      1.1.1. Was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

      1.1.2. If not, was there conduct extending over a period?

      1.1.3. If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?

      1.1.4. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:

         1.1.4.1. Why were the complaints not made to the tribunal in time?

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

2. Unfair dismissal

   2.1. Was the claimant dismissed?

2.1.1. Did the respondent do the following things:

2.1.1.1. Did the respondent delay investigating the claimant's complaint of assault by Mr Terry Morris in November 2019 until the claimant raised his grievance on 21st of March 2022 despite the claimant having raised the incident with his first line manager Mr Brett Edmeades?

2.1.1.2. Did Mr. Neil Wilkinson on or about 02 March 2022, the senior warehouse manager, instruct Mr Edmeades to allocate the claimant to goods-in only once a fortnight.

2.1.1.3. Did Mr. Wilkinson say to the claimant on or about 02 March 2022 "life is not fair" and the claimant would never be treated fairly which the claimant contended was a racist comment.

2.1.1.4. Was the claimant allocated a disproportionately small number of goods-in duties between June 2021 and 14 February 2022 when compared with other comparable employees?

2.1.1.5. Did Mr Wilkinson force the claimant to sign a stress assessment on or about 19 May 2022 despite him being the cause of the claimant's stress?

2.1.1.6. Did the respondent adequately investigate the claimant's grievance dated 21 March 2022 and his appeal dated 13 May 2022 and undertake the investigation and each process in an independent and unbiased manner and reach a conclusion in each case based on evidence?

2.1.2. Did that breach the implied term of trust and confidence and/or in respect of the assault and breach of the implied duty to provide a safe place of work?

2.1.3. In respect of the implied term of trust and confidence the tribunal will need to decide:

2.1.3.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the respondent; and

2.1.3.2 whether it had reasonable and proper cause for doing so.

2.1.4. Was the breach a fundamental one? The tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.5. Did the claimant resign in response to the breach? The tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.6. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2. If the claimant was constructively dismissed, the respondent accepts that the dismissal was unfair.

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

3.1. The claimant self identifies as Black African.

3.2. Did the respondent do the following things:

3.2.1. Fail to equitably allocate to the claimant the work in goods-in. The claimant contends he was allocated the work less than seven times between June 2021 and 14 February 2022.

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.

The claimant has not identified a named individual in the same circumstances as him, so the Tribunal will decide whether the claimant was treated worse than someone else would have been treated.

However, the claimant says that with possibly one exception all the warehouse operatives/partners employed in the fruit and vegetable team at the respondent's distribution centre in Aylesford were white and so those other warehouse operatives/partners are relevant as evidential comparators.

3.4. If so, was it because of his race?

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

4.1. Did the respondent do the following things:

4.2. Did Mr. Wilkinson say to the claimant on or about 02 March 2022 "life is not fair" and the claimant would never be treated fairly which the claimant contended was a racist comment

4.3. If so, was that unwanted conduct?

4.4. Did it relate to race?

4.5. 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?

4.6. 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.

5. Remedy

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 unfair dismissal and/or 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. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

5.6. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

5.7. What basic award is payable to the claimant, if any?

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

The Law

Unfair dismissal

19. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

20. In order to bring a claim of unfair dismissal, the employee must show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee.

21. Section 95(1)(c) provides that an employee is dismissed when they terminate the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. When the employee does this there is a constructive dismissal.

22. In order for there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract, or which shows that the employer no longer intends to be bound by one or more essential terms of the contract.

23. If the employee relies on a breach of the implied term of trust and confidence, this is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is an objective one. Any breach of the implied term of trust and confidence is a fundamental breach.

24. A single act or omission by the employer may of course comprise a fundamental breach of contract. However a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be blameworthy or unreasonable. However, the last straw must contribute something to the breach even if relatively insignificant.

25. So far as the link between the fundamental breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. It must however be one of the factors.

26. Overall, therefore, the Tribunal must consider: (1) whether there has been a breach of contract by the respondent (2) whether any such breach was fundamental (3) where the employee resigned in response to the breach; and (4) whether the employee affirmed the contract notwithstanding the breach.

The Equality Act 2010 ("the Equality Act")

Prohibited conduct

27. Section 39(2) of the Equality Act provides that an employer must not discriminate against an employee as to the terms of their employment; in the way it affords access to (or by not affording access to) opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; by dismissing the employee; or by subjecting the employee to any other detriment.

Direct discrimination

28. One of the forms of discrimination prohibited by the Equality Act is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) of the Equality Act).

29. The question, therefore, is whether A treated B less favourably than A treated or would treat an actual or hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case race. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the Equality Act).

30. Deciding whether there has been direct discrimination is a comparative exercise. In many cases the claimant does not rely on a comparison between their treatment and that of another person. Rather they rely on other types of evidence from which it is contended that an inference can be drawn. The comparison is with how the claimant would have been treated if they had had some other protected characteristic.

31. In other cases, the claimant compares their treatment with that of one or more other people. Such a comparison may be relevant in two ways. First, if there are no material differences between the circumstances of the claimant and the person with whom the comparison is made, this may provide significant evidence that there could have been discrimination. The person with whom the comparison is made in such cases is often referred to as an "actual comparator".

32. Secondly, where the circumstances of the person with whom the comparison is made are similar, but not sufficiently alike for the person to be an "actual comparator", the treatment of that person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping the Tribunal to consider how a hypothetical person whose circumstances did not materially differ from those of the claimant would have been treated – such a hypothetical person usually being referred to as a "hypothetical comparator".

Harassment

33. Harassment is defined in section 26(1) of the Equality Act:

> *(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.*

34. Section 26(4) of the Equality Act deals with matters to be taken into account when deciding whether unwanted conduct had the relevant effect. The Tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

35. Whether conduct is "unwanted" is a question of fact which requires the Tribunal to decide whether the conduct was unwanted *by the employee* (Thomas Sanderson Blinds Ltd v Mr S English UKEAT/0316).

36. Turning to the necessary causal connection, "related to" is a broad test requiring an evaluation of the evidence in the round. It is broader than the "because of"

formulation in a direct discrimination claim. In deciding whether conduct "related to" a protected characteristic, the Tribunal must apply an objective test and have regard to the context in which the conduct took place (Warby v Winda Group Plc EAT 0434/11). It is not, however, to be reduced to a "but for" test. It is not enough to show the individual has the protected characteristic or that the background related to the protected characteristic.

37. HHJ Auerbach gave useful guidance in relation to the necessary causal connection in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495:

20. Some basic points about the architecture of the variation of the definition of harassment found in sub-sections 26(1) and 26(4) are worth restating at the outset. Firstly, as Ms Millns correctly submitted, there are three components, all of which must be satisfied, albeit that the third has within it two alternatives. The conduct must be found to be unwanted; it must be found to relate to the relevant characteristic; and it must have either the proscribed purpose or the proscribed effect, or both. Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direct discrimination found in section 13(1) of the 2010 Act . Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits.

21. Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. These propositions, we think, drive from a pure consideration of the language of the statute, and have been articulated in previous authorities including Hartley, O'Brien, and Nailard.

…

23. It is important to note that much of the discussion in Nailard concerned whether there was harassment related to sex, by virtue of what is called the motivation of the particular individuals concerned, because that was the focus of the particular issue in that case. The Tribunal in that case, it was said, needed to focus on the motivation for the conduct of the employed officials, as opposed to that of the lay officials, about whose alleged conduct complaint had been made to the employed officials.

24. However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is

called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

38. Unite the Union v Nailard [2019] ICR 28 was a decision of the Court of Appeal dealing with the meaning of "related to".

39. Whether the impugned conduct is sufficiently serious to "violate" a claimant's dignity is essentially a matter of fact for the Tribunal. However, in Richmond Pharmacology v Dhaliwal [2009] ICR 724 Underhill P said:

Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

40. In Betsi Cadwaladr University Health Board v Hughes and others [2013] EAT 0179 Langstaff P affirmed this view, commenting:

…the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

41. Langstaff J said this at [21] of Weeks v Newham College of Further Education UKEAT/0630/11/ZT in relation to "environment":

An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant.

42. Consequently, whilst a one-off act may violate an employee's dignity it would not be sufficient to create a degrading environment.

Burden of proof

43. Section 136 of the Equality Act provides for a shifting 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.*

44. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [201] ICR 1263.The Barton guidance is as follows:

> *(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the dis-crimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*
>
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
>
> *(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) 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 sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having commit-ted, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

45. There is therefore a two-stage process to the drawing of inferences of direct discrimination. In the first place, the claimant must prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent had committed an act of discrimination against the complainant. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question.

46. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All

the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

47. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

48. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the same or not materially different as those of the claimant having regard to section 23 of the Equality Act. Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ. If anything more is required to shift the burden of proof when there is an actual comparator, it will be less than would be the case if a claimant compares their treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator.

49. Turning to the burden of proof in a claim of harassment, In a complaint of harassment, the claimant will need to establish on the balance of probabilities that they have been subjected to unwanted conduct which had the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. They will also need to adduce some evidence to suggest that the conduct could be related to a protected characteristic.

Time limits in discrimination claims

50. Section 123 of the Equality Act 2010 provides where relevant as follows.

> *(1) Subject to sections 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…*
>
> *…*
>
> *(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.

51. Turning first to the question of whether there is a "continuing act" (i.e. conduct extending over a period of time), there is a continuing act when the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686). The focus of the Tribunal should be on the substance of the complaint not on whether there was a discriminatory policy, rule, practice, scheme or regime – these are just examples given in the authorities of when an act extends over a period of time.

52. Turning to the “just and equitable” extension, it is for the claimant to show that it would be just and equitable to extend time. However, the discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. The Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. These will usually include:

    52.1. the length of and reasons for the delay;

    52.2. whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigation the claims while matters were fresh;

    52.3. the prejudice to the claimant in refusing to extend time.

53. Other factors which may be relevant include:

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

    53.2. the extent to which the party sued had co-operated with any requests for information;

53.3. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

53.4. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action;

53.5. the merits of the claim.

54. In Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576 the Court of Appeal noted that the Tribunal when considering the exercise of its discretion has a “wide ambit” within which to reach a decision. However, although the discretion is wide there is no presumption that it should be exercised so as to extend time. Indeed, the exercise of discretion is the exception rather than the rule. Further, the burden, which is one of persuasion, is on the claimant to persuade the Tribunal it is just and equitable to extend time.

Submissions

55. The parties did not provide written submissions. We summarise their oral submissions briefly here.

56. In his submissions Mr Graham for the respondent contended amongst other things that:

56.1. There had been no delay in investigating the November 2019 incident with Mr Morris;

56.2. The evidence of Mr Wilkinson and Mr Edmeades should be preferred in relation to the 2 March 2022 meeting;

56.3. The evidence in relation the goods-in allocation of work issue did not support the claimant’s case;

56.4. The evidence showed the claimant had misunderstood the purpose of the stress assessment and in any event, Mr Wilkinson had not forced him to sign it;

56.5. The grievance procedure had been conducted reasonably from start to finish.

57. The claimant’s submissions focus on matters including what he regarded as:

57.1. Ms Ridley failing to take responsibility for her decision on his appeal;

57.2. The unsatisfactory nature of the evidence produced relating to the allocation of goods-in duties, and inconsistencies in it throughout;

57.3. Being subjected to racist comments;

57.4. The inappropriate involvement of Mr Wilkinson in the stress assessment process;

57.5. The failure of the respondent to investigate the November 2019 incident with Mr Morris at the time it occurred;

57.6. The lack of knowledge of the respondent of his own contractual terms. This last point appeared to arise because the respondent had written to him before his work permit had expired to enquire about its renewal rather than simply relying on clause 16 of his contract (page 93) to terminate his employment at the point (if it arrived) when he no longer held the right to live and work in the UK.

Findings of fact

58. These findings of fact do not of necessity refer to all of the evidence that was before the Tribunal. As in many cases, the bundle was of excessive length and contained a significant number of irrelevant documents. The Tribunal made plain at the outset that it would not necessarily read pages contained in it that were not referred to in the witness statements or during the course of the Hearing.

General background findings and the grievance process

59. The claimant was employed as a Fruit and Vegetable Warehouse Assistant in October 2019 at the Aylesford Regional Distribution Depot. The claimant worked on the nightshift and the two First Line Managers he worked with most closely were Mr Edmeades and Mr Joy.

60. There was an incident between the claimant and Mr Morris, another Warehouse Assistant, early in the claimant's employment in November 2019 ("the November 2019 incident with Mr Morris"). The claimant raised it with Mr Edmeades who raised it with Mr Morris. Mr Edmeades then spoke briefly to the claimant again. Nothing further happened in relation to that incident until 2022.

The grievance

61. On 16 February 2022, the claimant emailed Mr Edmeades (page 127) saying he was raising concerns about "Unfair treatment/bordering discrimination, bullying, the resultant stress it causing me". Mr Edmeades and Mr Joy held a meeting with the claimant the following day to discuss these matters. The claimant raised three issues (1) the fact he had been asked to go for breaks early on 14 February 2022 ("the 14 February breaks issue"); (2) not being given an opportunity to work on goods-in between June and September 2021 and in the following period as regularly as other partners including new recruits ("the goods-in allocation of work issue"); and (3) the November 2019 incident with Mr Morris.

62. By an email of 17 February 2022 (page 126) the claimant reiterated these points and said "this is a formal complaint". Mr Edmeades forwarded this email to Mr Wilkinson on 20 February 2022 (page 126). He notes in the email:

I gave [the claimant] the info he would need to raise a formal grievance against us or a meeting with yourself in an attempt to resolve informally. [The claimant] has requested a meeting with all of us to discuss and hopefully move forward.

63. That meeting took place on 2 March 2022 and was attended by the claimant, Mr Edmeades, and Mr Wilkinson. It lasted a number of hours. Following the meeting the claimant wrote to Mr Wilkinson on 6 March 2022 (page 129), he reiterated points about the 14 February breaks issue, the allocation of goods-in work and the incident with Mr Morris. He also included the following allegation about how Mr Wilkinson had behaved during the meeting:

You also added that there will be no fair treatment on [sic] me, you suggested to Brett that I should be afforded the Goods inn [sic] opportunity on a fortnightly basis whilst others get it on a weekly basis.

64. The claimant then submitted a formal grievance on 21 March 2022 (page 132) this raised:

64.1. The November 2019 incident with Mr Morris;

64.2. The goods-in allocation of work issue, adding various related points including that Mr Steven was always on his back nagging and/or blaming him when he worked in goods-in, and also that Mr Wilkinson has disability "there will be no fair treatment on me, he suggested to Brett that I should be afforded the Goods inn opportunity on a fortnightly basis whilst others get it on a weekly basis";

64.3. The 14 February breaks issue;

64.4. An incident when he had told the Management Office of an incident when someone had thrown a tissue with blood on top of the crusty bread" and the "facial expression from Pete made me feel uncomfortable".

65. The claimant subsequently updated his grievance on 4 April 2022 (page 168). The updated grievance covered the same points but also complained that his line managers had failed "to deal with my concerns in line with the partnership policy". This was essentially a complaint about what the claimant said was the failure of Mr Wilkinson to deal with the points he had raised at the meeting on 2 March 2022.

The grievance investigation

66. Ms Wilson was allocated the task of investigating the grievance. She did not know the claimant and had no prior knowledge of his complaints. At the claimant's request she postponed the grievance meeting, but by two weeks not the four he had requested.

67. Ms Wilson met with the claimant on 19 April 2022 (page 178). The claimant was accompanied by Mr Sierkowski. At a relatively early stage (it is recorded at page 7 out of 23 in the notes of the meeting) Mr Sierkowski explained he had been told by Mr Joy that he could not speak in the grievance meeting. Ms Wilson explained that this was not correct. Having regard to the evidence concerning the subsequent conversation of Ms Wilson and Mr Joy concerning this, we find that Mr Joy was simply misinformed and that he was not trying to prevent Mr Sierkowski participating appropriately. We also find that in fact Mr Sierkowski made only a very limited attempt to participate, even after Ms Wilson had informed him at a relatively early stage in the meeting that he could speak during it.

68. Ms Wilson then went through the grievance as set out above with the claimant in a meeting lasting around four hours. She agreed with him who she would interview and various other steps she would take.

69. After the meeting Ms Wilson interviewed:

    69.1. Mr Joy on 25 April 2022 (page 200);
    69.2. Mr Edmeades on 26 April 2022 (page 214);
    69.3. Mr Wilkinson on 27 April 2022 (page 228);
    69.4. Mr Stevens on 2 May 2022 (page 238);
    69.5. Mr Morris on 3 May 2022 (page 249).

70. We find that all these interviews were reasonably thorough: they represented a genuine and reasonable attempt by Ms Wilson to get to the bottom of the allegations made by the claimant. In broad terms, Ms Wilson put the relevant factual matters to the obvious witnesses and made careful notes of what they had said. Indeed, taking account of our industrial experience of such investigations, the interviews conducted by Ms Wilson were more thorough than is often the case.

71. So far as data concerning the allocation of goods-in duties was concerned, we find that Ms Wilson accessed and considered a document containing the same or very similar data to the Duty Data document, but she did so only in respect of the period June to September 2021.

<u>*The grievance outcome*</u>

72. Ms Wilson reached a decision in relation to the grievance and wrote to the claimant rejecting it on 6 May 2022 (page 256). Her conclusions (page 258) may reasonably be summarised as follows:

    72.1. There was no evidence to support the allegation of physical assault by Mr Morris (it was noted that CCTV footage was not retained as far back as would have been necessary);

    72.2. The claimant's job rotation had been fair compared to other partners and "a few more do not get Goods in on a regular basis". She did not accept

that Mr Wilkinson had said "you are not going to be treated fairly because life is not fair";

72.3. The claimant was not the only partner who had been asked to go for breaks early;

72.4. There was no evidence to support the allegation that Mr Paul Stevens had sworn at the claimant and Mr Joy did not remember the incident when the claimant said his facial expression had made him uncomfortable;

72.5. There was no evidence that he had been threatened, victimised or unfairly treated.

72.6. She recommended to the night management team that "when they are allocating jobs they take into consideration the frequency of jobs assigned so it becomes a fairer rotation for all Partners on shift".

73. We find that the conclusions reached by Ms Wilson were reasonably open to her on the basis of the evidence she had gathered during her investigation. We find that her use of the expression "no evidence" did not mean that she was not considering the evidence provided by the claimant. Rather she meant that there was in her view no evidence beyond his account. Her conclusions do not suggest that she approached her task with a closed mind.

74. We find, however, that her conclusions did fail to cover one point raised by the claimant: the allocation of duties between October and February 2021. However, we do not find that the omission was deliberate. We find that it was caused by the initial emphasis in the grievance on the period June to September caused by the claimant having said that he was allocated no goods-in duties during that period.

The grievance appeal

75. The claimant appealed against the grievance outcome on 13 May 2022 (page 262). He made points including the following:

75.1. **The November 2019 incident with Mr Morris:** he disagreed with Ms Wilson's factual conclusion and criticized what he saw as a failure to investigate and deal with the allegation appropriately in 2019;

75.2. He disagreed with how Ms Wilson had dealt with Mr Joy telling Mr Sierkowski that he could not speak during the grievance meeting;

75.3. **The goods-in allocation of work issue**: Ms Wilson had not investigated the whole period, having apparently just looked at the period to September 2021. Further, she had not considered the conflicting reasons given for why he was not allocated goods-in work.

75.4. Ms Wilson had reached the wrong conclusion in relation to the alleged "life is not fair" comment by Mr Wilkinson;

75.5. **The 14 February breaks issue**: Ms Wilson had not addressed the question of him being sent to breaks early on 14 February;

75.6. Ms Wilson had not considered all the evidence before dismissing his complaint about Mr Stevens.

76. We find that much of the claimant's appeal represented his disagreement with factual findings which Ms Wilson had been entitled to reach in light of the evidence before her. To some extent it also represented a misreading of the grievance outcome: Ms Wilson had in fact addressed the 14 February breaks issue (top of page 259).

77. The appeal hearing took place on 14 June 2022 before Ms Ridley who had been appointed to deal with it. The claimant was accompanied by Ms Edmonds.

78. Following the appeal meeting Ms Ridley interviewed:

78.1. Ms Wilson on 16 June 2022 (page 328);

78.2. Mr Edmeades on 5 July 2022 (page 342).

79. Ms Ridley reached a decision in relation to the claimant's appeal and wrote to him on 5 July 2022 rejecting his appeal (page 453).

80. The grievance procedure at page 536 of the bundle sets out the process to be followed on appeal as follows:

If, following the first stage of the process, you feel your grievance remains unresolved, you should submit an appeal within seven calendar days of receiving the written outcome of your grievance meeting.

You will be invited to attend a meeting with an Appeals Manager, who will meet with you, wherever possible, within 28 calendar days of receiving your appeal and without unreasonable delay to consider your appeal. They will consider your grounds for appeal and review the case, carrying out fresh investigations where they see this as appropriate. The decision of the Appeals Manager is final.

81. We find that Ms Ridley followed this procedure. We find that she was entitled to take as her starting point the investigation conducted by Ms Wilson. She was not required by the respondent's procedure to conduct a fresh investigation of all the matters raised in the grievance by the claimant. Rather she was required to carry out such fresh investigations as she considered appropriate in light of the appeal. We find that she did this by conducting interviews with Ms Wilson and Mr Edmeades.

82. We find that in the course of her interview she sought and obtained further data relating to the goods-in allocation of work issue so that she was able to address the issue of whether duties had been allocated fairly during the whole of the period complained of by the claimant.

83. Overall, we find that Ms Ridley carried out as much further investigation as was necessary in the circumstances. In particular, she sought further data in relation to the goods-in allocation of work issue given that Ms Wilson had not considered the whole of the period raised by the claimant.

84. We find that the conclusions reached by Ms Ridley were reasonably open to her on the basis of the evidence she had before her and what the claimant had said to her in his appeal. Her conclusions do not suggest that she approached her task with a closed mind.

The November 2019 incident and whether there was a delay in investigating it

85. The claimant alleges that he was assaulted by another Warehouse Assistant, Terry Morris, in November 2019. There is no contemporaneous document setting out anyone's account of this incident.

86. The claimant first set out his account of this incident in writing over two years later in his email of 17 February 2022 referred to at [62] above. He wrote:

> *The second issue as per my previous email was on the bullying from Terry, the morning Partner which I had brought to your attention between November 2019 and February 2020 where I was told that it was friendly chat. I was struck (physically) which no one should endure in a work place. The Partner had forcibly struck (physically hit) my hand from the pullet pump as he asked me who I thought I was, I was not happy and I live in fear, drop in confidence and a lingering feeling of shame and humiliation.*

87. The claimant's account of the incident has since February 2022 been broadly consistent. For example, when interviewed by Ms Wilson (page 181) he said that Mr Morris had "lifted my hand off the pump" "with force, like a hit". The claimant said Mr Morris was saying "who do you think you are" "he was still holding my hand saying the same thing, he let go of my hand and I put the pump up away and told Abigail…". The way he characterised the incident has, however, changed with him increasingly referring to it as an "assault".

88. Mr Edmeades explained in his statement that the claimant had reported an incident in which Mr Morris had lifted his hand from a pump on a truck and said "who do you think you are?" (At the beginning of his evidence he said that the word "forcibly" should not have been included in paragraph 5 of his witness statement because this reflected how the claimant had characterised the incident subsequently, not what he had said to him at the time.) He said that the claimant had made no allegation of assault. Mr Edmeades was clear that if an allegation of assault had been made, he would have carried out an investigation which would have included reviewing CCTV footage and taking statements from other operatives.

89. Mr Edmeades says in his statement that he spoke to Mr Morris who denied having touched the claimant's hand but admitted that he had said "who do you

think you are" and had "shooed him away with his hand", intending to make a joke. Mr Edmeades says that Mr Morris was apologetic, said he had not wanted to cause offence, and said that he wanted to resolve the misunderstanding. He said that he would apologise.

90. When interviewed by Ms Wilson, Mr Edmeades referred to the claimant having at the time told him of a "motion and a lifting of the arm saying, "who do you think you are". He explained that he had spoken to Mr Morris and asked him to apologise to the claimant.

91. When interviewed by Ms Wilson (page 250) Mr Morris indicated he was not happy at being faced with such a serious accusation and asked if there was CCTV footage. He said that he had been "joking about" and had then apologised to the claimant after Mr Edmeades had explained that the claimant had not taken his actions as they had been intended. He said the claimant had accepted his apology. He denied touching the claimant. He said he and the claimant said good morning and hello on a daily basis.

92. We find that in November 2019 Mr Morris joked with the claimant in a way that the claimant did not think was funny. We find that the claimant complained about this to Mr Edmeades but did not describe what had happened as an assault. We find that he did however refer to Mr Morris having made physical contact with him by knocking his hand off the pallet pump handle and then holding it whilst he said, "who do you think you are?". We find that Mr Edmeades spoke with Mr Morris who explained he had been joking. We find that Mr Edmeades explained this to the claimant and explained that Mr Morris was prone to such behaviour. We find that the claimant accepted this explanation and did not suggest that he wanted to pursue the matter further. We find that he did not after this incident "live in fear", suffer from a "drop in confidence" or have a lingering feeling of "shame and humiliation".

93. We found that the varying accounts of how the claimant had described the actual incident at the time, and of the actual incident itself, were not really that different considering the passage of time and the absence of any contemporaneous documentation. However, to the extent that our findings above about how the claimant characterised the incident at the time and reacted to it require us to prefer the evidence of Mr Edmeades to those of the claimant, we do so for the following reasons. First, these findings are more consistent with the undisputed facts: that the claimant did not raise the issue again in any significant way after he had first spoken to Mr Edmeades until early 2022, over two years later. Secondly, given the way the respondent reacted promptly when a formal grievance was raised about the matter in 2022, we find it very unlikely that, if an allegation of assault had been made at the time, Mr Edmeades would have dealt with it by simply having a word with Mr Morris. Thirdly, the claimant has over-egged his description of what happened: even on the basis of his account in his interview with Ms Wilson in his interview on 9 April 2022, to describe what the claimant said happened as an "assault" would not be normal in every-day language, whatever the criminal law definition of "assault" may be.

94. We find that Mr Edmeades' contemporaneous investigation of the claimant's complaint was prompt, proportionate and reasonable in light of the way the claimant described the incident to him in November 2019. We find that it was also reasonable for Mr Edmeades to take no further action in light of the fact that the claimant accepted Mr Edmeades' explanation of the event and did not suggest that he wanted to pursue the matter further in November 2019. In making these findings we do not of course suggest that the way Mr Morris behaved was appropriate workplace behaviour. It was not.

Whether at the meeting on 2 March 2022 Mr Wilkinson instructed Mr Edmeades to allocate the claimant goods-in only once a fortnight

95. We find that achieving a mathematically equal allocation of goods-in (and, indeed, other) work between all partners was in reality impossible. This was because of the many factors in play which included, in relation to goods-in work:

    95.1. Whether a particular partner has been trained on goods-in work (at the relevant time the claimant had). Goods-in work is not work that partners do when they first start work with the respondent.

    95.2. Normally, four partners work on goods-in. However, one of those must be trained to use the counterbalance and another must be WMS trained. (The claimant was not either counterbalance or WMS trained.) Partners with specialist training are consequently more likely to do goods-in work than other partners.

    95.3. The rhythm of life in the warehouse: on any given day some partners will be absent for planned reasons (for example holiday). Others will be absent with no or little notice (for example, because they are ill).

    95.4. The number of partners required to do particular duties may vary as a result of fluctuating seasonal demand for particular products or kinds of products.

96. We find that in light of the near impossibility of achieving an equal distribution of all duties to all partners, Mr Edmeades and Mr Wilkinson as the managers would encourage partners to raise any concerns they had about the duties they were allocated and that, if well-founded, their concerns would be taken into account by them being given more or fewer duties of a particular kind. We find that when a concern was raised Mr Wilkinson could look at past job allocation data to get a feeling for whether a particular partner had been treated fairly. We accept Mr Wilkinson's evidence that over his ten years as a Shift Manager he has had many conversations with partners of this nature.

97. We find that Mr Wilkinson had a look at the job data for the period initially raised by the claimant (June to September 2021) and reasonably thought that the allocation of the claimant to goods-in looked about right. We find that in the course of a lengthy discussion with the claimant about duty allocation on 2 March 2022 Mr Wilkinson set out in detail the matters covered by our findings of fact in [95] and [96], explained that it was Mr Edmeades and not he who dealt with duty

allocation on a day-to-day basis, and said that Mr Edmeades and the claimant should discuss how often the claimant would like to work in goods-in so that Mr Edmeades could take that into account when dealing with the various factors that affected his ability to allocate the claimant goods-in duties. We find that Mr Wilkinson said to the claimant that the allocation to him of goods-in duties resulting from this process could not be accurately predicted: for example, it might be once a week or once a fortnight.

98. We therefore find that Mr Wilkinson did not instruct Mr Edmeades to put the claimant on goods-in duties “only” once a fortnight. To the extent that these findings require us to prefer the evidence of Mr Wilkinson and Mr Edmeades to that of the claimant we do so for reasons including the following:

98.1. It was Mr Edmeades task to decide on the exact allocation of duties and we find that Mr Wilkinson would have not interfered in this by giving such a specific instruction.

98.2. What Mr Wilkinson says he said accords more with the reality of how duties could be allocated in the warehouse than what the claimant says he said.

98.3. There was a meeting lasting several hours. It is improbable that having invested a significant amount of time in the matter, Mr Wilkinson would then have given an instruction that he would have known would have caused the claimant to regard the matter as not resolved.

Whether at the meeting on 2 March 2022 Mr Wilkinson said to the claimant “life is not fair” and “the claimant would never be treated fairly”

99. The claimant alleges that on 2 March 2022 Mr Wilkinson said to him that “life is unfair” and “you will never be fairly treated”. Mr Wilkinson denies this. He says that he said it was not always possible for work allocation to “be 100% fair”. That was also the recollection of Mr Edmeades, who was also present at the meeting.

100. We find that Mr Wilkinson did not say to the claimant that “life is unfair” and “you will never be fairly treated”. We find that instead he said words to the effect of “the allocation of different duties can never be 100% fair”. We prefer the evidence of Mr Wilkinson and Mr Edmeades in this respect to that of the claimant for the following reasons:

100.1. It is unlikely that Mr Wilkinson would spend around three hours in a meeting to discuss the claimant’s various concerns and then make the comments that he is alleged to have made, which would quite clearly have not reduced the claimant’s concerns but would instead have increased them.

100.2. By contrast, the comment that we have found Mr Wilkinson made reflects our finding above about the near impossibility of obtaining a mathematically equal work allocation.

100.3. The words “life is not fair” that the claimant attributes to Mr Wilkinson in this claim were not in fact included when the claimant first complained in writing about what had happened at the meeting on 2 March 2022. In his email of 6 March 2022 (pages 129-130) he simply says, “you also added that there will be no fair treatment of me”. Whilst this is similar to the alleged comment “you will never be fairly treated”, we find that if Mr Wilkinson had really said “life is not fair” then the claimant would have been likely to quote that in his email.

Whether Mr Wilkinson forced the claimant to sign a stress assessment on or about 19 May 2022 despite Mr Wilkinson being the cause of the claimant’s stress

101. The claimant states that on 19 May 2022 Mr Wilkinson forced him to sign a stress assessment form despite Mr Wilkinson being the cause of the stress.

102. The form in question was at pages 276 to 281 of the bundle. The claimant signed on page 281 under the words “[the claimant] has confirmed that there is nothing outside of his grievance that is currently causing his stress at work”. The claimant accepts that that was an accurate statement.

103. Ms Wilson had following her meeting with the claimant tried to arrange an occupational health referral in light of the stress that he had told her about. The claimant told Ms Wilson that he was unsure why the occupational health team were attempting to contact him as the only cause of stress was his grievance. However, the occupational health team nevertheless advised that an individual stress risk assessment should be completed. This is evidenced by the email from Ms Giles at page 261.

104. We find that completing the stress assessment form was an unwelcome task for both Mr Wilkinson and the claimant. We find that Mr Wilkinson took advice in relation to whether he was really the best person to conduct it given the claimant’s grievance but was told that he was.

105. We find that Mr Wilkinson did not force the claimant to sign the stress assessment form. We find the claimant signed the form after indicating what should be recorded on page 281 and that both he and Mr Wilkinson thought that there had been little good reason to complete it.

106. We prefer the evidence to Mr Wilkinson that of the claimant in relation to the question of the claimant being “forced” to sign because there was no good reason for Mr Wilkinson to “force” the claimant to sign the form. It simply recorded what the claimant had already said to a number of people. Obviously, we might have made different findings in this respect if, for example, the wording above the signature on page 281 had been wording withdrawing the claimant’s grievance and saying that the cause of his stress was unrelated to his work, but it was not.

The allocation of duties between June 2021 and 14 February 2022

107. The claimant liked to be allocated duties in the “goods-in” section. He regarded such duties as “desirable” because the work was less physically demanding than other work.

108. The Duty Data document and the Ethnicity Data document contain a considerable amount of information about the allocation of duties in the goods-in section for the period in question. We reject as far-fetched the claimant’s suggestion that the Duty Data document was fabricated during the Hearing. We reject his suggestion because various matters when taken together point to this being highly improbable: (1) the Duty Data document is generally consistent with traces of data contained in other documents; (2) if the respondent had wished to fabricate data to support its case then the data would probably have been more clearly supportive of its case; (3) the document was produced in the full-glare of the Tribunal hearing and with the involvement of the respondent’s legal representatives. We therefore accept the Duty Data document and the Ethnicity Document as being essentially accurate.

109. The first page of the Duty Data document shows how many goods-in duties the partners listed on it did in the relevant period. The distribution is as follows:

Number of duties done in relevant period	Number of partners
0	7
1-10	3
11-15	4
16-20	7
21-25	9
26-30	2
31+	7
TOTAL	39

110. We find, having heard Mr Edmeades’ evidence, that the seven partners with no goods-in duties were partners who had not been trained to do Goods-in work.

111. We find, again on the basis of Mr Edmeades’ evidence, that two of the three partners with 1 to 10 duties (of whom the highest had just 5 duties) had had significant periods of absence and that the third had only recently been trained to do goods-in work.

112. We find that at least nine of the eighteen partners who had done more than 20 goods-in duties were counterbalance trained as were at least four of the seven partners who had done more than 31 duties.

113. We find in accordance with the Duty Data document that the claimant had done 14 duties in the relevant period.

114. Turing to facts relevant to the race discrimination claim, we find, having regard to the Ethnicity Data document (and adopting its terminology) that the claimant and one other partner were “Black African”, that 35 partners were “White –

English (UK)/Polish/Latvian/Romanian)", one was "White and Black Caribbean (UK)" and one "preferred not to say".

115. Of the ten partners with 0-10 duties, nine are "White – English (UK)/Polish/Latvian/Romanian)" and one is "Black African".

116. Of the four partners with 11-15 duties, one (the claimant) is Black African, one is "preferred not to say" and the other two are "White – English (UK)/Polish/Latvian/Romanian)". None of them have more duties than the claimant, and of the other two who are "White – English (UK)/Polish/Latvian/Romanian)" one has the same number of duties, and one has thirteen.

117. Of the 25 partners with 16 or more duties, one is "White and Black Caribbean (UK)" and the remainder are "White – English (UK)/Polish/Latvian/Romanian)".

Resignation

118. The claimant resigned by a letter emailed to Ms Sharon White on 6 July 2022 (page 461).

Conclusions

119. Unfair dismissal

119.1. Was the claimant dismissed?

119.1.1. Did the respondent do the following things:

119.1.1.1. Did the respondent delay investigating the claimant's complaint of assault by Mr Terry Morris in November 2019 until the claimant raised his grievance on 21st of March 2022 despite the claimant having raised the incident with his first line manager Mr Brett Edmeades?

In light of our findings, we conclude that there was no such delay. As we have found at [94] above, Mr Edmeades carried out a prompt, proportionate and reasonable investigation in November 2019. He did not delay. We further conclude that when the claimant raised the matter again in March 2022, Mr Edmeades again did not delay in dealing with it.

119.1.1.2. Did Mr. Neil Wilkinson on or about 02 March 2022, the senior warehouse manager instruct Mr Edmeades to allocate the claimant to goods-in only once a fortnight.

In light of our findings of fact, particularly at [98] above, we conclude that he did not.

119.1.1.3. Did Mr. Wilkinson say to the claimant on or about 02 March 2022 "life is not fair" and the claimant would never be treated fairly which the claimant contended was a racist comment.

In light of our findings of fact, particularly at [100] above, we conclude that he did not.

119.1.1.4. Was the claimant allocated a disproportionately small number of goods-in duties between June 2021 and 14 February 2022 when compared with other comparable employees?

119.1.1.4.1. We could conclude that the number of goods-in duties would be "disproportionately" small if it were too large or too small by comparison with the number of duties allocated to other comparable partners.

119.1.1.4.2. The claimant has not identified clearly either in his submissions or evidence who he considered other comparable partners to be. However, realistically, partners who either did not have the necessary training, or who had had such training only very recently, or who had had significant periods of absence during the relevant period, or who had been trained as described at [112] above would not be "comparable".

119.1.1.4.3. Looking at our findings of fact in relation to the data at [108] to [117] above, we conclude that, given the factors considered at [95], the claimant with 14 goods-in duties could not argue that the number of his duties was disproportionately low when comparing himself with anyone who had done 20 or fewer. The difference is simply not sufficient.

119.1.1.4.4. The next question, therefore, is whether the 9 partners who did more than 20 but who were not counter-balanced trained were "comparable". We conclude that the claimant has failed to prove that they were. The evidence in relation to them is simply too limited. We have therefore concluded that the claimant has failed to prove that he was allocated a disproportionately small number of goods-in duties compared to comparable partners in the relevant period.

119.1.1.5. Did Mr Wilkinson forced the claimant to sign a stress assessment on or about 19 May 2022 despite him being the cause of the claimant's stress?

In light of our findings of fact above, in particular at [105], we conclude that he did not.

119.1.1.6. Did the respondent adequately investigate the claimant's grievance dated 21 March 2022 and his appeal dated 13 May 2022 and undertake the investigation and each process in an

independent and unbiased manner and reach a conclusion in each case based on evidence?

119.1.1.6.1. In light of our findings of fact above about the way that the claimant's grievance was initially investigated by Ms Wilson and then on appeal by Ms Ridley, we conclude that they each did an adequate investigation and carried out their part in the process in an independent and unbiased manner and reached conclusions in each case based on the evidence. The allegation of the claimant is not therefore made out factually.

119.1.1.6.2. We accept that neither carried out their role perfectly. For example, Ms Wilson failed to consider the whole of the period covered by the goods-in allocation of work issue, but that was corrected on appeal. Equally, it would be possible for a lawyer to find fault with the exact drafting of Ms Ridley's appeal outcome. However, these matters do not alter our conclusion as set out in the previous paragraph.

119.1.1.6.3. Further, the claimant's conviction that it had been inappropriate for Ms Ridley to rely on the investigation of Ms Wilson was quite simply incorrect: there is nothing in the procedure of the respondent as set out at [80] which prevented her from doing that provided she carried out such further investigation as she thought necessary. We have found above that she did carry out such further investigation.

119.1.2. Did that breach the implied term of trust and confidence and/or in respect of the assault and breach of the implied duty to provide a safe place of work?

119.1.3. In respect of the implied term of trust and confidence the tribunal will need to decide:

2.1.3.3 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the respondent; and

2.1.3.4 whether it had reasonable and proper cause for doing so.

2.1.3.4.1 In light of our conclusions above, we inevitably conclude that there was no breach of the implied term of trust and confidence. Further and separately, even if we had concluded that the claimant had received a disproportionately low number of goods-in duties in the relevant period, we would not have concluded that that was conduct likely to destroy or seriously damage trust and confidence in light of the way the respondent dealt with the matter in the meeting on 2 March 2022.

2.1.3.4.2 We also conclude that there was no breach of the implied term that an employer must provide a safe place of work. This is because the November 2019 incident with Mr Morris was dealt with appropriately at the time and there is no suggestion by the claimant that any similar incident took place subsequently. Further and separately, what happened at the time was in any event too minor to amount to a breach of the relevant implied term. It was only characterised by the claimant as an assault at a much later date.

119.1.4. Was the breach a fundamental one? The tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

There was no breach and so this issue does not arise.

119.1.5. Did the claimant resign in response to the breach? The tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

119.1.5.1. In light of our conclusions above, there was no breach and so this issue does not arise. However, if it had arisen, we would have concluded that the claimant resigned in response to the rejection of his grievance appeal.

119.1.5.2. Further and separately, if we had concluded that there had been a breach of the implied term to provide a safe working environment (and we have not) we would have also concluded both that the breach was not repudiatory and, also, that the claimant did not resign in response to it more than two and a half years later.

119.1.6. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

In light of our conclusions above, this issue does not arise.

119.2. If the claimant was constructively dismissed, the respondent accepts that the dismissal was unfair.

There was no constructive dismissal and so the claimant was not unfairly dismissed.

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

120.1. The claimant self identifies as Black African.

120.2. Did the respondent do the following things:

120.2.1. Fail to equitably allocate to the claimant the work in goods-in. The claimant contends he was allocated the work less than seven times between June 2021 and 14 February 2022.

120.2.1.1. In light of our findings of fact above, we conclude that the claimant was not allocated goods-in work only seven times between June 2021 and February 2022. He was allocated such work 14 times.

120.2.1.2. Further, in our light of our conclusions above in relation to the question of whether the claimant was allocated a "disproportionately small" number of such duties, we also conclude that he has failed to prove that the allocation was not equitable. The complaint of direct race discrimination therefore fails.

120.3. 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.

The claimant has not identified a named individual in the same circumstances as him, so the Tribunal will decide whether the claimant was treated worse than someone else would have been treated.

However, the claimant says that with possibly one exception all the warehouse operatives/partners employed in the fruit and vegetable team at the respondent's distribution centre in Aylesford were white and so those other warehouse operatives/partners are relevant as evidential comparators.

120.4. If so, was it because of his race?

120.4.1. It did not seem to us to be satisfactory to dispose of the complaint of race discrimination by concluding that the claimant has not proved that he was treated inequitably – that being the way in which the claimant had chosen to put his factual allegation of less favourable treatment.

120.4.2. It did not seem to us to be satisfactory because the way the claimant presented his complaint of direct race discrimination during the Hearing was really that the difference between the number of goods-in duties he was allocated, and the number allocated to white partners, represented less favourable treatment because of race. We have therefore gone on to consider this argument and to set out what our conclusions would have been *if* this had been the less favourable treatment alleged (which it was *not*).

120.4.3. We have noted the nature of the comparative task required of the Tribunal in a claim of direct discrimination at [30] to [32] above. We have therefore considered whether the claimant has identified any actual comparator, and the answer is that he has not: the claimant has not identified any individual white person whose circumstances were not materially different. This is not a criticism of the claimant.

120.4.4. What the claimant argues, in effect, as set out in the list of issues, is that all of the other partners in the relevant department were white and so can serve as evidential comparators. That is to say that their treatment may provide evidence to support the drawing of an inference of discrimination by helping the Tribunal to consider how a hypothetical white partner whose circumstances did not materially differ from those of the claimant would have been treated.

120.4.5. We have concluded, however, that the treatment of the white members of the claimant's department is of little assistance in this respect. This is for two reasons. First, we have too little information about their circumstances, in particular their level of training. We know that at least 9 of the 18 partners who had done more than 20 goods-in duties were counter-balanced trained and so were in materially different circumstances. We do not have any significant information about the others. We are not in a position to make findings about the extent to which their circumstances were or were not materially similar (or different).

120.4.6. Secondly, and perhaps more importantly, there are four partners in the 11-15 duties group as set out above. The claimant is one (14 duties), there are two white partners (13 and 14 duties respectively) and one "preferred not to say" (with 13 duties). As such, there clearly were white partners who were in the relevant respect treated similarly to the claimant and whose circumstances the claimant has not identified as materially different.

120.4.7. We explained the shifting burden of proof to the claimant several times during the Hearing. At the end of his evidence, we specifically asked him if there was anything else which he believed pointed to the reason for him receiving fewer goods-in shifts than some white partners being race. That is to say we asked whether there was anything in the wider circumstances of his employment that pointed in that direction. The claimant referred to the 14 February breaks issue, but in light of the evidence considered during the grievance and set out in the witness statements, we have concluded that there was an obvious factual reason for the claimant having been asked to take his break early: the lack of work. Further, when the matter had been investigated the respondent had found that other partners had been asked to take their breaks early. The other matter referred to by the claimant was really too vague to be of assistance: that on one (unidentified) day when he had attended work ill the respondent had chosen not to allocate him the lighter goods-in work.

This did not seem to us to assist the claimant: the fact that an employer does not rejig its work allocation on a particular day to help a worker who is ill does not point without more to unlawful discrimination.

120.4.8. Taking the evidence in the round, all the claimant has proved is that he was treated less favourably (by being allocated fewer goods-in shifts) than some white partners but as favourably or more favourably than other white partners. He has not proved facts from which we could in the absence of any other explanation conclude that the reason for the less favourable treatment was race. If we had been required to consider his direct discrimination claim in this way, it would therefore have failed because we would have concluded that he had not shifted the burden of proof.

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

121.1. Did the respondent do the following things:

121.2. Did Mr. Wilkinson say to the claimant on or about 02 March 2022 "life is not fair" and the claimant would never be treated fairly which the claimant contended was a racist comment

In light of our findings of fact above, particularly at [100], we conclude that he did not.

121.3. If so, was that unwanted conduct?

This issue does not arise. However, if the claimant had proved that Mr Wilkinson had made the comments alleged, we would have concluded that such conduct was unwanted.

121.4. Did it relate to race?

This issue does not arise. However, if it had arisen, the comments made clearly do not explicitly relate to race. We would have concluded that Mr Wilkinson's motivation was not infected by race discrimination because we have found no evidence that it was. We would have further concluded that there was no feature of the factual matrix that we have considered which could properly lead us to the conclusion that the conduct in question related to race. Rather we would have concluded that Mr Wilkinson was explaining rather clumsily that it was not possible to achieve a completely fair allocation of work, for the reasons set out in our findings of fact above.

121.5. 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?

The issue does not arise.

121.6. 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.

The issue does not arise.

Time limits

121.7. Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

121.7.1. Was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

121.7.2. If not, was there conduct extending over a period?

121.7.3. If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?

121.7.4. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:

121.7.4.1. Why were the complaints not made to the tribunal in time?

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

121.8. Having heard all the evidence, we felt that it was appropriate to set out what our conclusions would have been if we had concluded that the complaints of discrimination and harassment had been presented within the time limit provided for in section 123 of the Equality Act. That is why we consider the issue of time limits last of all.

121.9. The allegation of direct race discrimination relates to an alleged course of conduct over a period ending on 14 February 2022. The primary 3-month limitation period therefore expired on 13 May 2022. The allegation of harassment related to race concerns something that is said to have happened on 2 March 2022. The primary limitation period expired on 1 June 2022. Early conciliation did not begin until 2 September 2022 and so is not relevant for the purpose of calculating limitation. Taking the claimant's case at its highest (i.e. assuming that the allegations of direct race discrimination and harassment were a continuing act), the primary limitation period expired on 1 June 2022. The claimant did not present his claim until 5 months later on 11 November 2022.

121.10. The claimant has put forward no positive case to explain this delay, but we have nevertheless considered whether it would be just and equitable to extend time by 5 months pursuant to section 123(1)(b) of the Equality Act.

Bearing in mind that the burden of persuasion is on the claimant, we have concluded that it would not be just and equitable to extend time by 5 months for the following reasons:

121.10.1. Although the claimant might have made a case for delay being reasonable whilst he was pursuing his grievance, this had definitively concluded on 5 July 2022 when he received the grievance appeal outcome and, indeed, he resigned just two days later.

121.10.2. The delay is considerable.

121.10.3. The claimant was aware of all the facts necessary to begin his claim by the time he resigned on 7 July 2022 and yet did not begin it for a further 4 months.

121.10.4. The claimant has not set out any steps that he took to obtain advice in relation to the mechanism for pursuing a claim, whether by carrying out research on the internet or otherwise.

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Employment Judge Evans

Dated: 2 June 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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