EMPLOYMENT TRIBUNALS

Claimant: Mr G Deep
Respondent: Tesco Stores Ltd
Heard at: Birmingham
On: 2, 3, 4, 5 September 2024 (evidence) 19 November 2024 (submissions) 12 February 2025 (tribunal only deliberations) 14 February 2025 (judgment)
Before: Employment Judge Meichen, Mrs R Pelter, Mr D Faulconbridge
Appearances
For the Claimant: in person
For the Respondent: Mr S Way, counsel

JUDGMENT was sent to the parties dated 14 February 2025. The Claimant's claim failed and was dismissed. Oral reasons were provided to the parties at the hearing on 14 February 2025. Written reasons were subsequently requested by the Claimant. The following reasons are provided. The written reasons are based on the reasons given orally.

REASONS

Introduction

1. This final hearing had been listed for 4 days starting on 2 September 2024. The listing was insufficient. Given that the claim form had been submitted as long ago as 27 November 2020 we endeavored to conclude the case within a reasonable timescale rather than postponing. The evidence was concluded within the original 4 day listing. We were able to agree dates to come back for submissions, deliberations and then to give a decision in November 2024. We heard submissions as planned on 19 November 2024 but then the Employment Judge was taken seriously ill at that point and could not continue with the hearing. The Judge did not return to work until early in 2025. The case was relisted as soon as possible after that for the tribunal to conclude its decision making and to give an oral decision to the parties. The decision and oral reasons were delivered to the parties at the hearing on 14 February 2025.

The issues

2. The issues were agreed between the parties and approved by Employment Judge Hughes at a hearing on 30 July 2021. The Claimant was at that stage professionally represented by a solicitor who attended the preliminary hearing. The Respondent was likewise represented by a solicitor and Judge Hughes

recorded that the solicitors had *"spent some time agreeing a list of issues which I have approved".*

3. An application was made by the Claimant at the start of this hearing to amend the claim and/or the list of issues. We refused this application for reasons which we explained orally at the time and summarise now as follows. The application was made extremely late with no adequate explanation for why it had not been made sooner. The Claimant and his professional representative had agreed the issues over 3 years ago. An application of this nature could and should have been made sooner. The important features of the Claimant's case must have been captured in the list of issues which he agreed when he had the advantage of legal representation. There would be very considerable prejudice and unfairness to the Respondent if we allowed the application at this late stage. The Respondent had prepared its case based on the list of issues which had been agreed for over 3 years and they could not fairly be expected to deal with changes to that at the last minute which would entail adapting their evidence and argument "on the hoof". Alternatively there would be significant prejudice if we postponed the hearing to enable the parties to prepare the amended case, particularly because there would be more delay in a case which was already old and in danger of becoming stale. These types of prejudice far outweighed any prejudice which might be caused to the Claimant if we refused the application. In our view the list of issues which had been drawn up, agreed and approved over 3 years ago properly reflected the significant issues in dispute. An amendment was not necessary in the interests of justice, in particular because the list had been agreed between legal representatives, an amendment would delay or disrupt the hearing and there was nothing in the pleadings which shouted out that a claim or allegation had been missed or misunderstood.

4. The agreed and approved issues for the tribunal to determine are as follows:

1. Direct race discrimination

1.1 The Claimant is of the sub-caste, Chuhra.

1.2 The Claimant relies on a hypothetical comparator is who employed as a Night Replenishment Assistant who is not of the sub-caste Chuhra. Their circumstances must be materially the same as the Claimant's.

1.3 Was the Claimant treated less favourably than the comparator was or would have been? The Claimant relies on the following as acts of less favourable treatment:

1.3.1 On 20 July 2020, the Claimant raised a grievance against the night management team. The investigation was conducted by Andrea Welstead and an outcome delivered in September 2020. The Claimant appealed against this outcome however the appeal process and outcome has not been delivered by the Respondent

1.3.2 On 28 July 2020 Marie Mullane and Holly Thomas didn't permit the Claimant to have his companion of choice during a meeting

1.3.3 On 3 August 2020 Andrea Welstead met with the Claimant. During the meeting, it is alleged that she became aggressive and said she was offended by allegations made by the Claimant about differential treatment and she closed the meeting without resolving his concerns

1.3.4 On 3 September 2020 Andrea Welstead met with the Claimant to deliver the outcome of her investigation. During the meeting she behaved unprofessionally by suggesting that the Claimant was jealous of Barjinder Bakhshi, and the meeting start time and location was conducted inappropriately

1.3.5 Between 7 and 19 October 2020, the Claimant raised four Protectorline complaints. These have not been resolved.

1.4 If so, was the reason for the treatment the Claimant's race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin.

2 **Harassment related to race**

2.1 Was there unwanted conduct related to race? The Claimant relies on the following as acts of unwanted conduct

2.1.1 The matters relied on at 1.3 above.

2.2 Did that conduct have the purpose or effect of

2.2.1 Violating the Claimant's dignity, or
2.2.2 Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3 **Victimisation**

3.1 Did the Claimant do a protected act as follows:

3.1.1 On 20 July 2020, the Claimant raised a grievance against the Respondents' night management team alleging bullying and discrimination

3.1.2 On 30 July 2020 the Claimant raised a grievance against Marie Mullane alleging bullying and discrimination

3.2 Did the Respondent do the following things?

3.2.1 The Respondent has not resolved or delivered an outcome in respect of the Claimant's appeals regarding the 20 and 30 July 2020

3.2.2 In September 2020 the Claimant heard that colleagues were saying that the Claimant had tried to kill a fellow employee (Makkan). This rumour had been leaked by Barjinder Bakhshi.

3.3 By doing so, did the Respondent subject the Claimant to detriment?

3.4 If so, was it because the Claimant had done the protected acts?

4 **Unlawful deduction from wages**

4.1 The Claimant alleges that he was moved from the night shift to morning shift by Respondent on 24 July 2020. The Claimant was promised that his level of pay would remain the same however it was reduced by £400 per month. This is continuing.

The law

The burden of proof

5. Most of the Claimant's claims were brought under the Equality Act 2010 ("EqA"). Section 136 EqA sets out the burden of proof provisions which apply to these claims. Section 136(2) states: "*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".* Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

6. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the Claimant to prove facts from which the tribunal could conclude that the Respondent has committed an unlawful act of discrimination. This is known as the prima facie case.

7. In determining whether there is a prima facie case, there must be *"some nexus between the facts relied on and the discrimination complained of"* (Wheeler v Durham County Council [2001] EWCA Civ 844).

8. The second stage, which only comes into effect if the Claimant has proved those facts, requires the Respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352.

9. If the burden passes to the respondent under section 136(3), then the standard of proof as to the alternative explanation provided is the balance of probabilities (Bennett v Mitac Europe Ltd EA-2020-000349-LA).

10. It is well established that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the Respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

11. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove 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 complainant which is unlawful. So the prima facie case must be proved, and it is for the Claimant to discharge that burden"*. The Claimant must prove facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23).

12. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).

13. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the Claimant's grievances and internal appeal against the rejection of those grievances. The EAT memorably observed: *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

14. The statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. Where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the Claimant was discriminated against they have no relevance. This was confirmed by Lord Hope in Hewage and is consistent with the views expressed in Laing v Manchester City Council and anor 2006 ICR 1519, EAT.

Direct discrimination

15. Section 13 EqA provides that: *"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". Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

16. In Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, *'why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?'.*

17. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 Lord Nicholls said *'… employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others. The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant …'.*

18. As was confirmed in Martin v Devonshire's Solicitors [2011] ICR 352 since Shamoon, the recommended approach from the higher courts has generally been to address both stages of the statutory test by considering the single 'reason why' question: was the treatment on the proscribed ground, or was it for some other reason? Considering the hypothetical or actual treatment of comparators may be of evidential value in that exercise.

Victimisation

19. Section 27 EqA states as follows:

> (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

20. The words in subsection 2 (c) should be given a wide meeting. In Aziz v Trinity Street Taxis [1988] IRLR 204 the Court of Appeal stated that an act could properly be said to be done 'by reference to' the predecessor legislation to the EqA if it were done by reference to the legislation *'in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act'.*

21. Where section 27(1)(d) is relied upon if what is alleged would not be unlawful under the relevant legislation there is no protected act.

22. In determining whether an act is a protected act, the following principles are relevant (Edwards v Unite the Union [2024] EAT 151 at para 56):

"(1) Words should be given their clear and literal meaning.

(2) The language relied upon need not state explicitly that an act of discrimination has occurred.

(3) All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 27(2) .

(4) Discrimination, including victimisation, should be defined in language sufficiently precise:

i. to enable people to know where they stand before the law; and,

ii. to prevent the valuable purpose of combating discrimination from becoming frustrated or brought into disrepute through the use of language which encourages unscrupulous or vexatious recourse to the machinery provided by the discrimination Acts."

23. In Beneviste v Kingston University UKEAT0393/05 the EAT was of the view that the appellant had not done a protected act. She had referred to grievance and criticisms of management and complaints of harassment and victimisation in the broad sense but nowhere did she identify a protected act within the meaning of the legislation. The EAT held that the legislation requires an allegation of an act which would amount to a contravention of the legislation. The allegation does not have to allege a contravention or identify the legislative provision contravened, but what is alleged must amount to a contravention. It is not the purpose of the legislation to afford protection to employees for every allegation they make, but only for allegations which amount to contraventions of discrimination legislation.

24. This was confirmed in Durrani v L.B. Ealing UKEAT/0560/2012: *"there must be something to show it is a complaint to which at least potentially the Act applies".* In Waters v Metropolitan Police Commissioner (1997) ICR 1073 it was held that the allegation relied on need not state explicitly that an act of discrimination had occurred: *"all that is required is that the allegation relied on should have asserted*

facts capable of amounting in law to an act of discrimination by an employer …". A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful (Garrett v Lidl Ltd UKEAT/0541/08).

25. In MOD v Jeremiah [1979] IRLR 436, [1980] ICR 13 the Court of Appeal found that a detriment exists *"if a reasonable worker would take the view that the treatment was to his detriment".* A detriment must be capable of being objectively regarded as such; an unjustified sense of grievance cannot amount to 'detriment' (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11). It is not necessary to demonstrate some physical or economic consequence for something to amount to a detriment, as Lord Nicholls said in Shamoon: *"while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".* In Deer v University of Oxford[2015] EWCA Civ 52 it was held that the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

26. In terms of causation the protected act must be more than simply causative of the treatment in the "but for" sense (Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425 at para 36). It must be a real reason: *"the real reason, the core reason, for the treatment must be identified"* (Woods v Pasab Ltd (t/a Jones Pharmacy) [2012] EWCA Civ 1578). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of sufficient weight (O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615).

Harassment

27. Section 26 EqA states as follows:

> (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*
> *. . .*
> *(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.*

28. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a *"consideration of the mental processes of the putative harasser".*

29. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely

because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

30. A number of important authorities have given guidance as to how to interpret the test under Section 26:

    a. *"… 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. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."* Richmond Pharmacology v Dhaliwal [2009] IRLR 336.

    b. *"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."* Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13.

    c. *"When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."* Grant v HM Land Registry [2011] IRLR 748 *CA.*

31. Conduct is "related to" a protected characteristic where there is a connection to the characteristic itself (rather than to the Claimant) on the facts. This was made clear in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495:

    "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."

32. A Claimant may only rely on the effect of the conduct where they were subjectively aware of it at the time (Greasley-Adams v Royal Mail Group Ltd [2023] ICR 1031 at paras 19-20).

33. A single act may amount to harassment but only if it is so serious that it is alone sufficient to create an "environment" with the proscribed purpose or effect. This was explained in General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 at para 99:

"This was an 'incident' and not an 'environment'. Moreover, although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so. True it is that the Claimant was shouted at and that his letter was described as over the top and too left-wing, but this did not prevent him from answering back to Paul Kenny (as the Tribunal found at paragraph 17.5), and nor did it prevent him from contacting Paul Kenny subsequently, for support in relation to his Labour Party difficulties. To conclude that the telephone conversation between Paul Kenny and the Claimant in November 2011 was an act of unlawful harassment is to trivialise the language of the statute."

34. Whether a single act is *"sufficient to found a complaint is… a question of fact and degree"* (Insitu Cleaning Co v Heads [1995] IRLR 4).

Unauthorised deduction from wages

35. Section 13 ERA provides the right not to suffer unauthorised deductions:

(1)An employer shall not make a deduction from wages of a worker employed by him unless—
(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

36. Wages are "properly payable" if there is a legal right to them, whether under the contract of employment or otherwise (New Century Cleaning Co Limited v Church [2000] IRLR 27).

37. As it is the Claimant's claim that the amount of wages paid to him were not the amount that were properly payable, the Claimant bears the burden of proof.

Findings of fact

38. The Respondent is well known in the retail industry. It has over 3,400 stores in the United Kingdom and employs around 300,000 staff.

39. At all relevant times for this claim the Claimant was employed by the Respondent as a Customer Assistant at the Respondent's large store in Coventry. The Claimant's period of continuous service with the Respondent commenced on 16 May 2007. The Claimant was previously employed as a Customer Assistant on the night shift, however in June 2021 the Claimant requested a permanent change in his contract of employment so that he could work on the day shift. This was approved in July 2021. Before then there was a temporary change to the Claimant's shift pattern, which we shall explain below.

40. When he was working on the night shift the Claimant had some issues with the Lead Night Manager, Barjinder Bakhshi. In particular the Claimant raised a grievance against Mr Bakhshi on 7 August 2019 in which he alleged that Mr

Bakhshi had behaved unprofessionally towards him by accusing him of not doing his job properly amongst other matters. The Claimant said he felt bullied and this had led to him leaving his shift. This grievance came to a conclusion on 17 September 2019 when mediation was recommended between the parties.

41. On 14 July 2020 there was an incident between the Claimant and another Customer Assistant, Sunnathamby Mukunthan aka Makkan, who was working on the night shift.

42. On 16 July 2020 the Claimant raised concerns in a meeting with Mr Bakshi that he had not had sufficient support to refill the aisle during the shift on 14 July 2020 and he felt discriminated against. On the same date the Claimant submitted letters to the store manager complaining in general terms about unfair treatment and institutional discrimination. The complaints were initially said to be against Josh Vincent, Team Manager Nights, but the Claimant later expanded them to be against the management team generally.

43. On 17 July 2020, Sunnathamby Mukunthan raised a complaint against the Claimant. It was alleged that during his shift the Claimant had left the aisle he had been replenishing on a number of occasions and when asked about his absence he had pushed Mr Mukunthan and threatened him, saying he would see him outside and *"I will follow you home and sort you out".* It was further alleged that after their shift had ended, the Claimant had followed Mr Mukunthan home in his car, got out of his vehicle and grabbed Mr Mukunthan by his neck.

44. The Claimant denies the allegations made by Mr Mukunthan.

45. On 20 July 2020 the Claimant submitted his complaint about institutional discrimination as a grievance. Again the complaint was put in very broad terms and there were no specifics provided. On the same date the Claimant went on sick leave with work related stress.

46. The Claimant was informed that an investigation would take place into the complaint raised by Mr Mukunthan. In an email sent to the claimant on 23 July 2020 Grace Hood, Fresh Food Lead, confirmed to the claimant that following their meeting about the investigation it had *been "agreed that you will temporarily move to a day shift, whilst the current investigation takes place".* Clearly it was thought to be appropriate to move the Claimant to a day shift whilst the investigation was undertaken into the Claimant's alleged misconduct towards his colleague on the nightshift, Mr Mukunthan. The Claimant also wanted to move to the day shift as he requested that and this can be seen from the record of the return to work meeting on 27 July 2020 for example.

47. As he had been working on the nightshift the Claimant had been receiving a nightshift allowance (aka a nightshift premium). The Claimant responded to Grace Hood's email to seek confirmation that he would be paid his full pay whilst he was working *"these temporary new hours".* He specifically asked if he would get his full contracted pay plus his night shift allowance whilst he was working the day shift. Grace Hood responded to that query to confirm to the claimant that *"you will still receive full pay and all premiums as standard, as this is a request from*

store". In our view the nature of the agreement reached was crystal clear – i.e. that the claimant would be paid his usual pay including the night shift allowance for the period that he was temporarily required by the Respondent to work on the day shift whilst it investigated the complaint made by Mr Mukunthan.

48. The Claimant was invited to attend an investigation meeting on 28 July 2020 to discuss the complaint that had been made against him by Mr Mukunthan. The meeting was chaired by Marie Mullane (Non Food Manager) and Holly Thomas (Stock and Admin Manager) also attended in order to take a note.

49. At the outset of the investigation meeting, the Claimant stated that he did not have a representative with him but he would like one. The Claimant requested a specific colleague, Sarbjit Chand aka Sub Chand, to accompany him to the meeting. Ms Thomas had overheard other colleagues discussing that Mr Chand was on annual leave and she stated that he would not therefore be able to accompany the Claimant to the meeting. In order to ensure that the Claimant had a representative the Respondent delayed the start of the meeting to arrange for a union representative to accompany the Claimant. The Claimant also suggested that he required an accompanying colleague who spoke Punjabi and this too was arranged for him by the Respondent.

50. It subsequently transpired that Mr Chand was not on annual leave as Ms Thomas had thought.

51. During the meeting, the Claimant explained his version of events. The Claimant said that he had needed help to complete his tasks, that Mr Mukunthan had been assigned to assist but he started swearing at the Claimant and called him lazy. The Claimant alleged that it had been Mr Mukunthan who had been driving dangerously and had then become aggressive towards the Claimant on their journey home. The Claimant explained that he, like Mr Mukunthan, had reported the matter to the Police. As the Claimant's shift was coming to an end, it was agreed that the meeting would need to be reconvened. The hearing was meant to reconvene on 4 August 2020, although we understand the reconvened meeting in fact took place on 12 August 2020, as we explain below.

52. On 30 July 2020 the Claimant submitted a grievance against Ms Mullane and Ms Thomas. He alleged that they had bullied him, told lies and not followed the correct policy. A particular focus of the grievance was about the Claimant being wrongly informed that Mr Chand was on holiday. He considered this to be a lie and bullying done for Ms Mullane and Ms Thomas' own personal benefit or satisfaction.

53. Andrea Welstead (Lead Dotcom Manager) was appointed to investigate the Claimant's grievance that he raised on 20 July 2020 in which he alleged institutional discrimination and bullying. The Claimant was invited to attend a grievance hearing in order to discuss his concerns in further detail. This took place on 3 August 2020. The Claimant was accompanied by Mr Chand.

54. During the grievance investigation meeting into the Claimant's allegation of discrimination, the Claimant explained that he felt unsupported when replenishing

stock in his aisle whereas he felt that other colleagues who had fewer tasks to complete were provided with assistance. The Claimant also stated that he felt that colleagues who were born in the UK were allowed to purchase and eat snacks before their break times whereas the Claimant, who was born in India, was not allowed to. The Claimant was given the opportunity to explain his concerns in detail. Ms Welstead agreed that she would conduct an investigation into the Claimant's complaints.

55. Towards the end of the meeting Andrea Welstead asked the Claimant about his reference to institutional discrimination and she asked the Claimant how he was being discriminated against in that sense. The Claimant said that he felt he was being treated differently by the management team because he was born in India. Ms Welstead said *"I am offended at what you just said you are taking it to a whole new level".* This comment is the subject of one of the Claimant's complaints in this case and so we will set out a fuller analysis of the context of the comment when we explain our conclusions.

56. The investigation meeting into the allegations made by Mr Mukunthan against the Claimant was reconvened on 12 August 2020. At the outset of the reconvened meeting, the Claimant brought it to Ms Mullane's attention that he had submitted a grievance against her and Ms Thomas concerning the previous meeting on 28 July 2020. He asked his representative Mr Chand (who attended this meeting) to read out the grievance. Ms Mullane was not aware of the existence of this grievance prior to the meeting on 12 August 2020. The Claimant alleged that Tesco were not following procedure correctly as they should deal with his grievance first and then continue with the investigation. Ms Mullane made the decision to adjourn the meeting without attempting to do any further investigation. She felt it was not appropriate for her to continue with her investigation whilst he Claimant had an outstanding grievance against her. The investigation meeting between the Claimant and Ms Mullane was not reconvened. Ms Mullane did not do any further investigation and the investigation was not picked up by anybody else.

57. An investigation was conducted into the Claimant's grievance concerning Ms Mullane and Ms Thomas. An outcome was sent to the Claimant on 15 May 2021. The outcome was that the Claimant's complaint in respect of not being told the truth about a colleague's absence was upheld but his complaint about bullying and not following procedures was not upheld.

58. By this stage the Respondent had stopped investigating the complaint made by Mr Mukunthan. Following the abandonment of the meeting on 12 August 2020 the investigation had been discontinued. There was no investigation after that meeting. The Claimant never faced any form of disciplinary action or sanction as a result of the allegations raised by Mr Mukunthan. There were no findings made against the Claimant.

59. The claimant's grievance about Ms Mullane and Ms Thomas was handled by Graham Noon, Lead Manager. When Mr Noon wrote to the claimant with the grievance outcome on 15 May 2021 he provided the claimant with a right of appeal. The claimant did not appeal this grievance outcome.

60. Andrea Welstead thoroughly investigated the Claimant's grievance concerns about discrimination, including interviewing 12 other colleagues who worked on the night shift. Each person interviewed was asked about the Claimant's allegation that people born in India were treated differently than colleagues born in England. Insufficient evidence was provided to support the Claimant's allegation. An investigation report was produced and sent to the Claimant on 30 August 2020. The Claimant's grievance was not upheld.

61. Ms Welstead arranged to meet with the Claimant on 3 September 2020 in order to explain the outcome of his grievance. The meeting was arranged to start at 10am but the start time was delayed because the Claimant and his representative Mr Chand did not attend the meeting on time.

62. When the Claimant and Mr Chand failed to attend at 10am, Ms Welstead went into the restaurant to look for them however they were not there. Ms Welstead found the Claimant on the shop floor and asked why he hadn`t come to the meeting. The Claimant replied by saying he couldn`t find Mr Chand. Ms Welstead had covered Mr Chand's shift so that the Claimant could have the time he might have needed with his chosen representative. However, Mr Chand had gone out in a vehicle even though he wasn`t rostered to drive. Ms Welstead asked a manager to take a driver to collect Mr Chand so that he could come to the meeting with the Claimant. In the end Mr Chand attended the meeting to represent the Claimant, but the meeting did not start until 12.25 because of the difficulty in locating Mr Chand.

63. The meeting was held in the Respondent's training room. During the meeting, there was no discussion between Ms Welstead and the Claimant about the Claimant being 'jealous' of Barjinder Bakshi.

64. The Claimant was signed off sick from 9 October 2020 due to stress at work and he remained signed off sick until 22 February 2021. During his sickness absence the Claimant attended an Occupational Health assessment on 7 January 2021, a wellness meeting on 18 January 2021 and a formal long term absence review meeting on 8 February 2021 where his prognosis and any steps the Respondent could take to facilitate a return to work for the Claimant were discussed.

65. The Claimant appealed the institutional racism grievance outcome on 12 September 2020. Dealing with the appeal was delayed due to the Claimant's sickness absence. On 23 November 2020 the Store Manager, Amanda Woods, wrote to the Claimant to attempt to arrange a grievance appeal meeting. On 5 December 2020 the Claimant wrote back to say that he would engage with his appeal once he returned to work. The Respondent took steps to progress the appeal once the Claimant returned to work in February 2021. On 22 March 2021 the Claimant requested that an appeal hearing scheduled for that day be postponed. The Claimant attended the grievance appeal meeting about institutional racism on 19 April 2021 and a subsequent meeting on 21 April 2021. On that occasion the outcome was confirmed to the Claimant. The appeal was not upheld.

66. After receiving the outcome of his grievance about institutional racism, the Claimant submitted four Protector Line complaints between 6 and 19 October 2020. Protector Line is a confidential telephone and email service for the Respondent's staff which allows concerns of whatever nature to be raised, confidentially if the employee wishes. The Claimant's Protector Line concerns included that he had asked for copies of meeting notes from 2018 and 2019 and had not been provided with them. The Claimant also suggested that Ms Welstead's grievance investigation had been 'bogus' and that she was 'trying to misuse her position to interrupt the course of justice'. The Claimant was provided with copies of the meeting notes he had requested in his first Protector Line complaint. The remaining Protector Line complaints were treated as part of the appeal against the institutional racism grievance outcome.

67. The Claimant returned to work at the end of February 2021, initially on a phased return. As we have mentioned, the Claimant had been moved to the day shift on a temporary basis whilst the matters raised by Mr Mukunthan were investigated. The Claimant's pay remained unchanged during this time and he continued to receive the night shift premium from July 2020 until he went off sick in October 2020. The Claimant was signed off sick with stress at work from 9 October 2020 to 22 February 2021 and in that period he was in receipt of sick pay.

68. Upon the Claimant's return to work in February 2021, at the Claimant's request, the Claimant remained working on day shifts. As we have mentioned by this stage the Respondent was no longer investigating the complaint made by Mr Mukunthan. Nevertheless the Claimant's request to continue working day shifts was accommodated in view of his health concerns. The Claimant was resistant to suggestions that he should move back to the night shift. In fact, the Claimant refused to go back on to nights when it was proposed by the Respondent that he do so and this could be seen by a letter which the Claimant wrote on 10 May 2021 which could be found at page 1055 of the bundle. This demonstrates the point that the Claimant was no longer required by the Respondent to work on the day shift whilst it investigated the complaint that had been raised by Mr Mukunthan back in July 2020. The investigation into that matter had come to an end long ago and in fact far from the Clamant being required by the Respondent to move to the day shift it was now the Claimant who was refusing to go back to the night shift when asked to do so by the Respondent.

69. In June 2021, the Claimant requested that he be permanently moved to work on day shifts and he signed a permanent change in hours request form on 26 June 2021 to facilitate his move. The Claimant's request to permanently move to the day shift was granted, we understand with effect from 4 July 2021.

Analysis and conclusions

Direct discrimination/harassment

70. For his direct race discrimination claim the Claimant relied on his caste and in particular that he is a member of the subcaste, Chuhra. The Claimant relies on a hypothetical comparator who was employed as a Night Replenishment Assistant who is not of the subcaste Chuhra.

71. A particular difficulty which we don't think the Claimant overcame or even really engaged with was that there was no evidence that the alleged perpetrators of the discrimination were aware of the Claimant's caste or subcaste or that they perceived him to be part of a particular caste or subcaste. There was not even evidence that they were aware of the caste system. It therefore seemed very unlikely that the Claimant was discriminated against because of his caste.

72. The Claimant relied on five alleged acts of direct race discrimination and in the alternative the Claimant alleged that those same five acts were harassment related to his race.

73. In respect of each allegation we have considered whether the facts relied upon by the Claimant have been made out and then considered whether what took place amounted to either direct race discrimination or harassment related to race bearing in mind at all stages the burden of proof provisions to which we have referred.

74. The first allegation was about the grievance which the Claimant raised on 20 July 2020. This was the grievance about institutional discrimination. The Claimant alleged that the appeal process and outcome has not been delivered by the Respondent.

75. The tribunal finds that this allegation has not been made out on the facts. We found that an appeal process was followed and an outcome delivered. The appeal was heard by Jamie Mesnard, Lead Trade Manager. The Claimant attended grievance appeal meetings with Mr Mesnard on 19 and 21 April 2021. An outcome was provided to the Claimant by letter dated 21 April 2021. The appeal was not upheld.

76. The decision on appeal was explained by Mr Mesnard in the meeting on 21 April 2021. We can see from the meeting notes that he clearly communicated an outcome to the Claimant which was that he considered that the original decision made by the investigating officer Andrea Welstead was correct. A recommendation was then made for there to be a support plan to enable the Claimant to move back to his contractual shift pattern. This may not have been the outcome the Claimant wanted, however the appeal process was followed and an outcome was delivered by the Respondent to the Claimant.

77. For those reasons this allegation must fail on the facts, and it cannot therefore succeed as an allegation of either direct race discrimination or harassment.

78. For completeness we should mention that we considered that the delay in completing the appeal was not excessive bearing in mind the process had been paused at the Claimant's request during his sickness absence. Furthermore, the process and how long it took was not because of or related to race. There was no evidence from which we could infer that it was. The process would have been the same and taken as long in relation to the Claimant's hypothetical comparator. There was no less favourable treatment. The allegation would fail for these reasons also.

79. The second allegation was that on 28 July 2020 Marie Mullane and Holly Thomas didn't permit the Claimant to have his companion of choice during a meeting.

80. We found that the meeting on 28 July 2020 was an investigation meeting into the allegations of misconduct against the Claimant made by Sunnathamby Mukunthan. The content and conduct of the meeting had nothing at all to do with race. It was only related to Mr Mukunthan's serious complaint against the Claimant.

81. The tribunal found that the Claimant was informed of his right to be accompanied at this meeting. That information could be found in the letter which invited him to the meeting which could be seen on page 375 of the bundle.

82. We think it is incorrect to suggest that the Claimant was not permitted to have his companion of choice at the meeting of his right to have a companion. We shall explain our reasons.

83. The Claimant did not arrange for a companion to accompany him in advance of the meeting. What he did instead was indicate just before the meeting started that he wished for Mr Chand to be his representative at the meeting. This was the first time that the Claimant had indicated that he wished for Mr Chand to be his representative. There was then a conversation between Marie Mullane, Holly Thomas and the Claimant in which Holly Thomas said that Sub Chand was on holiday and therefore he would not be available to represent the Claimant. This was incorrect. Sub Chand was not on holiday.

84. The tribunal considered that this was a genuine mistake made by Holly Thomas and that she had honestly misunderstood the position. The fact that the Claimant was misinformed is not disputed by the Respondent. In fact as we mentioned the Respondent upheld the Claimant's grievance insofar as it related to the misinformation the Claimant was given about Mr Chand's absence. It was acknowledged by the Respondent, and we agree, that Holly Thomas should have checked the situation rather than just relying on what she had overheard. However Ms Thomas was not refusing to permit the claimant to have his companion of choice, rather she just made an honest mistake as to whether his chosen representative was available.

85. Because of the misunderstanding around Sub Chand being on holiday the Respondent arranged for a different union representative to accompany the Claimant, and they also arranged for an interpreter at the Claimant's request.

86. The Claimant did not prove any facts from which we could conclude that the reason why the Claimant was misinformed about Mr Chand being on holiday was because of race or that the misinformation was related to race. Indeed, we considered it was plain and obvious that the misinformation arose from a simple misunderstanding and that it had nothing at all to do with race. Holly Thomas would, we find, have made the same mistake in relation to the Claimant's hypothetical comparator. There was no less favourable treatment. The mistake was not because of or related to race. Race had absolutely nothing to do with the genuine mistake made by Holly Thomas.

87. Accordingly, this allegation must fail as an allegation of direct discrimination or harassment.

88. The next allegation is that on 3 August 2020 Andrea Welstead met with the Claimant and during the meeting, it is alleged that she became aggressive and said she was offended by allegations made by the Claimant about differential treatment and she closed the meeting without resolving his concerns.

89. In our view this allegation needs to be set in its full context.

90. The meeting of 3 August 2020 was an investigation meeting to discuss the Claimant's grievance about institutional discrimination. As we have mentioned the Claimant had submitted a written grievance alleging institutional discrimination in very broad terms – he had not provided any specifics of what the complaint was about. The investigation meeting with the Claimant therefore had to establish what the Claimant was actually complaining about. Notes were made of the meeting and they were in the bundle. The meeting lasted over two hours. Andrea Welstead made a serious and sustained attempt to understand and get to grips with the Claimant's complaint.

91. No complaint is made of Andrea Welstead's conduct of the investigation. The tribunal found that she thoroughly investigated the Claimant's concerns about having been discriminated against. The investigation process as a whole was carried out fairly and thoroughly. This is demonstrated by the fact that 12 witnesses were interviewed.

92. In our judgement however the atmosphere in the meeting of 3 August became tetchy as it wore on. Towards the end of the meeting Andrea Welstead asked the Claimant about his reference to institutional discrimination and she asked the Claimant how he was being discriminated against in that sense. She considered that the Claimant's answers to her questions were unclear. It appeared to us that Andrea Welstead, not unreasonably in our judgement, was forming the view that the Claimant had been quick to make wide-ranging allegations of institutional discrimination with little to no evidence to back it up. She began to feel frustrated about that. Nevertheless Andrea Welstead said that she would investigate the Claimant's concerns further and began to draw the meeting to a close.

93. At this juncture the Claimant became frustrated. Andrea Welstead said in her statement that the Claimant became increasingly irate. The tribunal accepts that description. It was a change in tone in the meeting. It appears to us that the Claimant formed the view that Andrea Welstead was not taking his complaints seriously. We do not think that was an accurate view. In any event at this point in the meeting the Claimant and his representative Mr Chand began to talk amongst themselves. This had the effect of excluding Andrea Welstead from the meeting which was taking place for her to investigate.

94. The change in the Claimant's attitude and the Claimant's decision to speak to Mr Chand and not her led to Andrea Welstead becoming more frustrated. She then said *"I am offended at what you just said you are taking it to a whole new level".* This comment was made at a heated point in the conversation and was a reaction to what Andrea Welstead considered to be the Claimant's broad ranging and unsubstantiated allegation of institutional discrimination.

95. The reason why this comment was made was not race. The reason why the comment was made was Andrea Welstead's sense of frustration because she felt that the claimant was making wide ranging and unsubstantiated allegations of discrimination. Andrea Welstead would have treated the hypothetical comparator who made a similar type of allegation in a similar context in the same way. There was no less favourable treatment. Therefore this allegation must fail as an allegation of direct discrimination.

96. We find that the comment was unwanted, and it did relate to race. The Claimant was making a complaint of race discrimination, and he was saying that he was being treated differently due to his race. The way in which he put that complaint lacked focus, nevertheless however it was a complaint which was connected to race and it was Andrea Welstead's reaction to that complaint which led her to make the comment. On that factual matrix the tribunal finds that the comment was related to race.

97. The tribunal finds that this conduct did not have the purpose of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant. There was no evidence that that was Andrea Welstead's purpose.

98. The tribunal finds that the conduct did not have the effect of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant. In making that assessment we have taken into account that this was the only act which we found could even arguably amount to harassment and that a single act may amount to harassment only if it is so serious that it alone is sufficient to create an environment with the proscribed effect. We considered that this comment was not so serious as to have had that effect. It was not reasonable for the conduct to have had that effect. Andrea Welstead's words in the heat of the moment were poorly chosen but they did not stop her from properly considering and investigating the Claimant's complaint. Moreover the words did not stop the Claimant from continuing to pursue his complaints, often in a forthright manner. Considering the perception of the Claimant we found that he was annoyed about what he wrongly saw in the meeting as a failure by Andrea Welstead to take his complaints seriously, but that impression was formed in advance of the comment being made. The comment itself did not have the proscribed effect even in his own perception of events. To find that this single comment was an act of unlawful harassment would be to trivialise the language of the statute. Accordingly this comment was not harassment related to race.

99. The other elements of this allegation are not made out on the facts. We do not consider that Andrea Welstead became aggressive during the meeting. It is misleading to suggest that Andrea Welstead closed the meeting without resolving the Claimant's concerns. The meeting served its purpose which was to find out more information from the Claimant about the nature of his concerns so that they could be properly investigated. As we have explained a comprehensive investigation then took place. Again the outcome was likely not to the Claimant's satisfaction but his concerns were resolved in the sense that they were fully investigated and an outcome was provided. Moreover, this approach was not

because of or related to race. The Claimant did not prove any facts from which we could conclude that it was. The approach would have been the same in relation to the hypothetical comparator. There was no less favourable treatment. The allegation would also fail for these reasons.

100. The next allegation was that on 3 September 2020 during a meeting Andrea Welstead behaved unprofessionally by suggesting that the Claimant was jealous of Barjinder Bakhshi, and the meeting start time and location was conducted inappropriately.

101. A meeting did take place on 3 September 2020. We found that on that date Andrea Welstead met with the Claimant to deliver the outcome of her investigation into the Claimant's grievance about institutional discrimination.

102. The allegation that the start time of the meeting and the location of the meeting were conducted inappropriately was not very clear to the tribunal. The start time of the meeting was delayed so that the Claimant's chosen representative could attend. There was in our view nothing inappropriate about that. In fact it was advantageous and arguably generous to the Claimant since it was his responsibility to ensure his chosen representative was informed about the meeting. As regards location we found that the meeting took place in a training room. There was nothing inappropriate about that choice of room. In any event these matters were not because of or related to race. The Claimant did not prove any facts from which we could conclude that they were. The meeting would have taken place at the same time and at the same place in relation to the hypothetical comparator. There was no less favourable treatment.

103. There is no evidence either in the meeting notes which could be seen in the bundle on page 614 or in the investigation report which was communicated at the meeting and which could be seen in the bundle on page 607 or indeed even in the Claimant's witness statement of Andrea Welstead stating that the Claimant was jealous of Barjinder Bakhshi. It was not clear to the tribunal why Andrea Welstead would have made such a comment, what she might have meant by it or in what context she might have said that. The suggestion did not really make sense. Accordingly, we found the comment was not made. Therefore the factual basis for this allegation has not been made out. In any event there was no evidence from which it could be inferred that the manner in which the meeting was conducted or its content was because of or related to race. Further, Andrea Welstead would have conducted the meeting the same way in relation to the hypothetical comparator and there was no less favourable treatment.

104. For all these reasons this allegation must fail both as an allegation of direct discrimination and of harassment.

105. The final allegation is that between 7 and 19 October 2020, the Claimant raised four Protectorline complaints and these have not been resolved.

106. The process of Protectorline complaints was explained in the Respondent's evidence, which we accepted. In summary the process enabled an individual to raise complaints which were initially allocated to the relevant store manager and then they would be allocated to other managers to consider as deemed appropriate in the circumstances.

107. As we have mentioned, the Claimant raised multiple Protectorline complaints relating within a short timeframe. The nature of the complaints he raised was not very clear. The Claimant also appealed against his grievance outcome shortly before raising the Protectorline complaints. One Protectorline issue regarding missing meeting notes was quickly resolved by providing the notes to the Claimant. There was an overlap between the issues complained about in the appeal and in the outstanding Protectorline complaints. In these circumstances, the Respondent's approach was to treat the Protectorline complaints as part of the Claimant's appeal against his grievance outcome. As a result of that approach there was no separate investigative process into the Claimant's Protectorline complaints, but they were not ignored. The issues raised by the Claimant were resolved in the sense that they were dealt with as part of the grievance appeal process.

108. There was no evidence from which it could be inferred that the manner in which the complaints were dealt with was because of or related to the Claimant's race. They would have been dealt with the same way in relation to the hypothetical comparator. There was no less favourable treatment.

109. For these reasons the allegation about Protectorline complaints must also fail as an allegation of race discrimination or harassment.

Victimisation

110. The Claimant relies on two protected acts as follows:

102.1 First, that on 20 July 2020, the Claimant raised a grievance against the Respondent's night management team alleging bullying and discrimination.

102.2 Second, that on 30 July 2020 the Claimant raised a grievance against Marie Mullane alleging bullying and discrimination

111. It was rightly accepted by the Respondent that the first matter was a protected act, and we so find.

112. The second alleged protected act could be seen on page 411 of the bundle. This was the grievance against Marie Mullane and Holly Thomas alleging bullying, dishonesty and not following the correct policy at the investigation meeting when the Claimant requested Sub Chand to represent him and he was wrongly informed by Holly Thomas that Sub Chand was on holiday. According to the Claimant's grievance he regarded the misinformation about Sub Chand being on holiday as a deliberate lie which had been done for the managers' own personal benefit or satisfaction.

113. The grievance of 30 July 2020 makes no reference to discrimination or to any protected characteristic. It is instead an accusation of lying for personal benefit. It does not set out facts which are capable of constituting an allegation of discrimination. It does not say anything for the purposes of or in connection with the Equality Act. It has nothing to do with proceedings under the Equality Act. The Claimant had previously made complaints which amounted to allegations of

discrimination and when he made those complaints he expressly and in a forthright manner accused the Respondent of discrimination. The Claimant simply chose not to make that allegation in respect of this particular complaint.

114. We therefore find that the grievance of 30 July was not a protected act.

115. The Claimant alleges that he was subjected to 2 detriments. We shall consider whether what the Claimant alleges took place and then if it did whether it constituted a detriment that was done because of the protected act which we have found.

116. The first allegation of detriment was that the Respondent has not resolved or delivered an outcome in respect of the Claimant's appeals regarding the 20 and 30 July 2020 grievances.

117. The tribunal finds that this allegation has not been made out on the facts. We found that in respect of the 30 July 2020 grievance the claimant did not appeal the outcome (probably because his grievance was upheld in part). We found that in respect of the 20 July 2020 grievance the claimant did appeal the outcome and an appeal process and outcome was delivered as we have already explained. The detriment simply did not happen as the Claimant alleged.

118. The reason for the way the Claimant's grievances and appeal were handled was not the protected act. There was no evidence that those who handled the grievances and the appeal were motivated by the protected act. The Claimant did not prove any facts from which we could conclude that the reason for the way the Claimant's grievances and appeal were handled was the protected act.

119. We found that the delay in completing the appeal in respect of the 20 July 2020 was not excessive bearing in mind the process had been paused at the Claimant's request during his sickness absence. The process and how long it took was not in our view a detriment. The process and the length of it was also not because of the protected act. Again, there was no evidence and no facts proved to support that contention.

120. The second allegation of detriment was that in September 2020 the Claimant heard that colleagues were saying that the Claimant had tried to kill a fellow employee (Makkan). The Claimant alleges that this rumour had been leaked by Barjinder Bakhshi.

121. The evidence put forward by the Claimant in support of this allegation was very thin. The Claimant relied in particular on an email which could be seen on page 605 of the bundle as demonstrating the existence of the alleged rumour. This was an email sent by the Claimant to Mr Bakshi on 27 August 2020. When we read the email it did not really advance the Claimant's case. The Claimant reports having met somebody called Neelam who had told him that he shouldn't be scaring people. When the Claimant asked Neelam who told her that she said *"I am not going to tell you".* The Claimant asked Mr Bakshi to investigate this further.

122. The email sent on 27 August 2020 does not evidence that there was a rumour that the Claimant had tried to kill somebody and it does not evidence that any rumour had been leaked by Barjinder Bakhshi. If the Claimant really considered that it was Mr Bakshi who was responsible for spreading rumours about him then it was odd that he asked Mr Bakshi to investigate it.

123. The Claimant later suggested to Graham Noon that Neelam had implied that it was Barjinder Bhakshi who had been spreading rumours about him. Mr Noon was asked by Amanda Woods to speak to Neelam about this. Mr Woods spoke to Neelam shortly before the 5 November 2020 lockdown. Neelam told Mr Noon that she had not heard Mr Bhakshi spreading any rumours about the Claimant. In fact, the Claimant had been the one to tell her that he was working on day shifts because there was an ongoing investigation into his conduct.

124. One of the Claimant's witnesses, Asad Ali, provided a statement in which he described that "most" of his colleagues on the night shift were talking about the incident involving the Claimant and Mr Mukunthan. Specifically they had talked about the allegation that the Claimant had assaulted and tried to strangle Mr Mukunthan and whether the Claimant would be sacked. This appears to the tribunal to have the ring of truth about it. It would not be surprising if staff found out about the allegations made by Mr Mukunthan and talked about it. Wherever the truth lay in terms of who had been the aggressor it was a shocking allegation that would be likely to provoke discussion. There was no evidence that these discussions were caused by a rumour started by Mr Bakhshi that the claimant had tried to kill someone. Rather it was much more likely that they were caused by people finding out about the actual complaint that Mr Mukunthan had made.

125. We find that what was discussed amongst the Claimant's colleagues was not a rumour spread by Mr Bakhshi, but the complaint which had in fact been made by Mr Mukunthan.

126. There is no evidence of any rumour that the Claimant had tried to kill someone or of a rumour being spread by Barjinder Bakhshi. This was an unfounded and unsubstantiated suspicion of the Claimant. We find the rumour was not leaked by Mr Bakhshi as alleged by the Claimant. Accordingly the factual basis of this allegation has not been made out either. There is no detriment as alleged by the Claimant.

127. We further find that the reason for Mr Bakshi's treatment of the Claimant was not the protected act. There was no evidence that Mr Bakshi was in any sense motivated by the protected act. The Claimant did not prove any facts from which we could conclude that the reason for any aspect of Mr Bakshi's treatment of the Claimant was the protected act.

128. For all these reasons the Claimant's claim of victimisation must fail and be dismissed.

Unauthorised deduction from wages

129. The Claimant alleges that he was moved from the night shift to the day shift by the Respondent on 24 July 2020. The Claimant says that he was

promised that his level of pay would remain the same, however it was reduced by £400 per month. This was said to be continuing.

130. We found that the Claimant was moved from the day shift to the night shift on or around 24 July 2020. This was because of the serious complaint made by Mr Mukunthan and the decision of the Respondent that the Claimant and Mr Mukunthan should be separated whilst that was investigated.

131. As we have explained, it was agreed that the Claimant's pay including his entitlement to the night shift premium would remain the same as he had been temporarily required by the Respondent to work on the day shift whilst Mr Mukunthan's complaint was investigated.

132. The Claimant's pay was not reduced by £400 per month from July 2020. We found his pay remained the same until he went off sick in October 2020 – i.e. he did not experience any reduction as a result of being required to move from the night to day shift. From October 2020 the Claimant's pay then fluctuated due to his sickness absence, his phased return and his request not to return to the night shift even though the investigation into Mr Mukunthan's complaint had stopped.

133. The fact that the Claimant did not suffer a deduction to his pay from July 2020 appears to be conceded by the Claimant because he said in his witness statement at paragraph 51 that *"… from April/May 2021 Tesco stopped to pay me as promised by Grace Hood, Grace Hood confirmed that I will be doing 28 hour per week, but I will get full pay including night premium because I am not getting full pay, I am doing 36.5 hr every week plus over time (whenever available) to bring home sufficient amount of money. I am doing 8.5 hr per week extra and not getting night premium. I suffered a loss of approximately £525 per month since April 2021 to date."*

134. This evidence demonstrates the fact that the real substance of the Claimant's complaint about wages is that he was no longer given his night shift premium after he returned to work following his sickness absence and was working his full time hours again – i.e. from around April/May 2021. He did not allege in his evidence that he suffered a shortfall in his pay from July 2020.

135. When he initially returned to work from February 2021 the Claimant asked for a phased return which involved him working reduced hours on the day shift.

136. The Claimant's phased return came to an end but due to the Claimant's health he felt he could not go back to working nights and as a result from May 2021 he was transferred onto the beers wines and spirits section working daytime hours rather than on the night shift. The Claimant agreed to this transfer and indeed it came about because of the difficulty he felt he would have returning to the night shift. It was not something that the Claimant was required to do by the Respondent.

137. In fact, the Claimant refused to go back on to nights when it was proposed by the Respondent that he do so and this could be seen by the letter which the Claimant wrote on 10 May 2021 which could be found at page 1055 of the bundle.

In that letter the Claimant said: *"You are aware of my mental situation and other issues I am not mentally strong at this present time to face all the negative environment continuously. My mental health is improving due to being away from the night shift. During my wellness meeting with Michael Dunn said to me I have to go back onto the night shift. I requested him to give me a written letter to go back to nights, I refused to sign because I am not ready to go back on nights".*

138. The Claimant's apparent belief that he was entitled to receive the shift premium when he went back to full time hours on the day shift in May 2021 is wrong. As we have explained, and as we think was in fact crystal clear all along, the agreement between the Claimant and the Respondent was that whilst the Claimant was required by the Respondent to work on the day shift as a result of the allegations against him he would continue to receive his night shift premium.

139. There was no promise that the Claimant's pay would remain the same indefinitely, or beyond the point at which the Respondent no longer required him to work on the day shift because it was no longer investigating the allegations against him. That point had clearly been reached by April/May 2021 because at that stage the Respondent requested the Claimant to return to the night shift but he refused to do so. As we have explained the Respondent had by this stage stopped investigating Mr Mukunthan's complaint long ago as the investigation had been discontinued after the abandonment of the meeting in August 2020.

140. The Claimant was not entitled to be paid the night shift premium when he was not working the night shift and he had not been required to work away from the night shift by the Respondent. The Respondent had only agreed to pay the night shift premium during the period when the Claimant was required to move shifts. This was done.

141. The night shift premium was only properly payable to the claimant when he was either (a) working the night shift or (b) working days as a result of the request by the Respondent that he do so whilst the complaint made by Mr Mukunthan was investigated. The tribunal is satisfied that the premium was paid when either of those scenarios applied.

142. The tribunal notes that the wages paid to the Claimant for the entirety of the relevant period were set out in detail in the statement of Sarah Stacey and the sums explained. The Claimant did not seriously challenge that evidence or attempt to demonstrate how or when he was underpaid. The Claimant did not really engage with the evidence of Sarah Stacey. We accept the evidence of Sarah Stacey and find that it demonstrates that the Claimant was paid the wages that were properly payable to him.

143. In these circumstances the tribunal finds that there has been no unauthorised deduction from the Claimant's wages. A night shift premium was not part of the wages properly payable to the Claimant following his return from sick leave in February 2021 as by that stage he was no longer required by the Respondent to work on the day shift. Accordingly, the Claimant's claim for unauthorised deduction from wages must also fail and be dismissed.

Outcome

144. The Tribunal's overall conclusion therefore is that the claim brought by the Claimant fails and it is dismissed.

Employment Judge Meichen

Approved on 8.5.25