EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR D BENNETT	AND	MITIE TOTAL SECURITY LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 23RD / 24TH / 25 / 26TH /27TH SEPTEMBER 2019

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MS J LE VAILLANT
MS R KEEPING

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR T PERRY (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant' claims of:

i) Direct discrimination;

ii) Victimisation

Are not well founded and are dismissed.

Reasons

1. The Employment Judge apologises to the parties for the delay in promulgating this decision.

2. By this claim the claimant brings claims of direct race discrimination and victimisation. As is set out in the earlier case management order the claimant self describes as black Caribbean and he relies on his race as the protected characteristic for these claims. The individual claims are set out in a Scott Schedule identifying thirty-three separate claims, although some of those contain multiple allegations meaning that the actual number of complaints is significantly larger. In addition, it became apparent during the hearing that in some cases the matters set out in the schedule do not in fact set out all of the claimant's complaints which are broader than the matters set out in the schedule (see allegation 7 by way of example) . In those cases we have attempted to disentangle the basis of the actual dispute and to be fair to both parties, bearing in mind that the claimant is a litigant in person, but that the respondent can only reasonably be expected to meet the claims as they are set out in the schedule.

3. In broad terms, at an earlier case management discussion REJ Pirani identified four groups of complaint; changes to the claimant's hours between 2015 and 2017; an unjustified disciplinary investigation between February and June 2017; the failure to investigate the claimant's complaints between in October 2017 and January 2018; and the refusal of holiday requests from 2016 to 2018.

4. The tribunal has heard evidence from the claimant himself and on behalf of the respondent from Mr Darren Stevens (Retail Area Manager from September 2017 and Senior Area Manager from November 2018), and Matthew Dean (Security Operations Manager); and has considered a bundle of documents running to some 776 pages, and viewed CCTV footage of one of the incidents.

Factual background

5. In this section we will set out the overall factual background. Specific factual disputes are not set out here but will be dealt with as part of the relevant allegation.

6. The respondent has a contract with Sainsburys to provide security services at its stores. Mr Matthew Dean is responsible for the contract in Bristol and a number of other areas. He interviewed the claimant and appointed him as a security officer, commencing on 9th December 2014. For most of the period with which we are concerned the claimant was based at the store in Winterstoke Road. Two security officers were permanently based at the store. The other was Mr Kamil Ogrdony who is the claimant's comparator in respect of a number of allegations.

7. The claimant was originally employed by Securitas. In the latter part of 2016 the current respondent Mitie took over the contract and the employees including the claimant moved to them by TUPE transfer.

8. The claimant's complaints span the period May 2015 to May 2019, almost the whole of his employment. Before bringing his tribunal claim he lodged a number of internal complaints the main of which as set out below. It is not necessary to set out here any of the individual complaints as they all form part of the specific allegations dealt with below.

General

9. Before dealing with the allegations individually we should record the parties' positions as to the broader picture. The respondent asserts that the claimant has in effect taken every event or decision about which he is unhappy and attempted to recast it as an allegation of discrimination when there is either no evidence of any such thing or in fact in some cases evidence of the claimant being treated more favourably than his comparator; and that he has steadfastly refused to reduce his complaints or identify those that might have some realistic prospect of being identified as acts of discrimination. The claimant contends that viewing each incident individually may give the appearance of him being treated reasonably, but that when these events are looked at in totality a pattern of unfair treatment, mainly at the hands of Mr Dean emerges, and it is from the overall pattern that the evidence of discrimination emerges. We will of necessity deal with the allegations individually, and having done so will step back and look at the overall picture.

10. In addition, the respondent contends that many of the allegations are very considerably out of time. In respect of most though not all, however, they have not been hampered by an inability to call evidence. The claim form was submitted on 10th June 2018, with the ACAS EC certificate dated 6th April and 17th May 2018. Any allegation prior to 7th January 2018 is, therefore on the face of it out of time subject to the claimant's contention that the allegations form part of a continuing act, in the main a course of discriminatory behaviour on the part of Mr Dean who was supported by other managers.

11. We will firstly set out the factual background and then deal with the allegations individually; and then consider any time points later; and we will deal with the allegations in chronological order, which does not correspond exactly with the schedule.

Law

12. As is set out above all of the allegations are of direct discrimination and/or victimisation. The tribunal has set out the relevant sections of the Equality Act 2010 below ;-

13 Direct discrimination

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

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because–

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

13. The claims for direct discrimination require us to consider two questions; whether the claimant was treated less favourably than either his actual or a hypothetical comparator; and if so whether that was "because of" the relevant protected characteristic, in this case race. The claimant's comparator is a colleague Mr Kamil Ogrodny who is white and Polish; and in the alternative he relies on a hypothetical comparator.

14. In the case of victimisation the claimant relies in each case on a grievance he submitted on 8th December 2015 as constituting the protected act in relation to each of the allegations. The respondent does not dispute this. Accordingly, we have to determine whether the claimant was subjected to a detriment; and if so whether that was "because" he had done the protected act.

15. Thus, both claims centrally require us to consider any causal link between the conduct complained of and the protected characteristic or the protected act. In considering this we bear in mind that the protected characteristic/protected act need to not be the only or even main cause but only "a cause" of the treatment. Similarly, we bear in mind the Igen v Wong two stage test. The claimant must firstly prove facts from which we could conclude in the absence of an adequate explanation that the respondent has committed the act of discrimination alleged, If the claimant does so, the burden shifts to the respondent to prove that the treatment was in no sense whatsoever on the protected ground. In both cases prove means establishing on the balance of probabilities.

16. In considering each of the individual allegations we have not engaged in a formulaic repetition of these tests. Where we refer to the absence of or insufficient evidence

and/or accepting the respondent's explanation it is by reference to the tests set out above.

Allegations

17. Allegation 2 – (Direct Discrimination /Mr Dean) The claimant did not receive a probationary review in May 2015.

18. The fact that the claimant did not receive a probationary review is not in dispute. This was investigated by Mr Bland who accepted that the claimant had not received a probationary or annual performance review but concluded that it simply resulted from Mr Dean being very busy, and applied equally to many other members of staff and not just Mr Bennett. Mr Dean advances this himself and adopts this conclusion. If this is correct the reason for the failure was not "because of" the claimant's race and the allegation must fail. In any event the respondent denies that not having a probationary review constitutes less favourable treatment in and of itself. Put simply nothing happened as a result of the absence of a probationary review, the ostensible purpose of which is to determine whether an individual should be retained on a permanent basis. If the claimant had been dismissed without such a review he may have had reasonable cause for complaint. However, the claimant was not dismissed but remained in the respondent's employment and the claimant has not identified anything that flowed from this other than the fact that it did not happen.

19. Having heard the evidence of Mr Dean we accept it, and also have concluded that we cannot identify any less favourable treatment, for the reasons set out above, and accordingly this allegation must fail on both bases.

20. Allegation 4 (Direct discrimination / Mr Dean) September 2015 – Emails being sent about the claimant to senior managers.

21. This allegation is difficult to factually draw any conclusions about. The emails in question have not been placed before us. The respondent's position is that they have been lost after a four year delay and the TUPE transfer. The claimant alleges that after he declined to work unsociable hours at the store, that his manager wrote an email discrediting him with the client stating that he was not a team player. However, the claimant himself never saw any of the emails. The only evidence before us is that they were reviewed by Mr Harrod who stated, "*I can confirm that I have read through the emails and there are no contents in there that discredits you to customers from your line manager*." As a matter of fact therefore, not only have we not seen the emails but nor has anyone who has given evidence to the tribunal. In the circumstances we simply have no means of making any primary findings of fact as to what they contained or assessing their contents. It follows that as the claimant cannot establish the primary facts to support this allegation it is bound to fail.

22. In any event the respondent submits that even if the claimants understanding of the contents is accurate that there is nothing from which the tribunal could draw any inference that the comments were in any way discriminatory. If the claimant has accurately described them they are simply a manager expressing his frustration to a

client about a specific refusal by a member of staff to work unsociable hours. The claimant may not agree with the comment but there is nothing in the comments themselves or from the surrounding circumstances that the tribunal could properly draw any inference in the absence of an explanation from the respondent. This may be correct although as we cannot make any primary findings of fact it is equally difficult to assess.

23. For completeness sake, although it is not a pleaded claim the claimant also complains about the fact that he was asked to work the unsociable hours (10.00pm to 1.00 am). Mr Dean's explanation, which we accept, is that the start time of the claimant's shift could be adjusted so that he still worked only a nine hour shift, whereas if Mr Ogrodny were asked to work those hours he would in effect have been carrying out an eighteen hour shift. To submit, as the claimant does that this constitutes less favourable treatment in comparison to Mr Ogrodny is incorrect as their circumstances in this respect were entirely different. There is similarly no evidence that a hypothetical comparator would have been treated any differently.

24. For all those reasons this allegation must be dismissed.

25. Allegations 1 and 5 (Direct discrimination/Victimisation / Mr Dean) September/October 2015 rotas.

26. As allegations of victimisation the initial allegations are bound to fail as the first protected act was the complaint of the 8th December 2015, and in any event the actions of Mr Dean about which the claimant complains are themselves the subject matter of the complaint. These complaints must therefore be, if anything allegations of direct discrimination.

27. The claimant's case in relation to allegation 1 is that his original shift pattern was late shifts on Monday, Tuesday and Wednesday, and early shifts Friday and Saturday. It appears that he and his colleague and comparator Mr Ogrodny had a private arrangement by which they would alternate late shifts on Tuesday and Saturday with the result that the claimant would in any given week either work late on Tuesday or Saturday, with the reverse being the case on the following week. The claimant's case is that Mr Dean permitted the alternating shifts on the Saturday but required he and Mr Ogrodny to work their standard shifts during the week with the result that every other week he worked four late shifts.

28. The respondent submits that this encapsulates the essence of a number of the disputes in this case. The claimant believes that it was reasonable for him and Mr Ogrodny to arrange their own shift patterns for their own convenience and that for Mr Dean to interfere with this is discriminatory. The difficulty with this as an allegation of discrimination is that Mr Bennett and Mr Ogrodny were treated identically. Every other week Mr Ogrodny worked his allocated shift pattern (four early shifts), no longer being permitted to work a late shift on a Tuesday, and worked the late shift on alternate Saturdays. Both were in effect treated identically; both were required to work their normal shift pattern during the week but were permitted to alternate at the weekend. There is self-evidently nothing less favourable or discriminatory in this

treatment. Moreover, the underlying complaint is ill conceived. Where employees are contracted to work particular shifts, it is not unreasonable for the respondent to require them to work those shifts. As is set out below it in fact creates extra and unnecessary work to swap shifts and affects the respondent's performance requirements with the client. In our judgment both of these propositions are correct, and we cannot identify any less favourable treatment.

29. The claimant also complains that he was told to stop bypassing the automated telephone line to log in for work. This is in reality a part of or consequence of the complaint above. As Mr Ogrodny and Mr Bennett were booked to work shifts they had privately swapped on alternating Tuesday they could not log in automatically but had to phone the control room to log in for shifts they were not rostered to be carrying out. Both were stopped from arranging their own shift pattern and bypassing the automated log in in order to do so. For the same reason, as both the claimant and his comparator being treated identically, this cannot in our judgment whether or not the claimant regards it as unfair, be an act of discrimination, as by definition this would also apply to Mr Ogrodny.

30. The claimant also complains that Mr Ogrodny was allowed to vary his shift hours to accommodate childcare commitments. Again, Mr Dean does not dispute this but contends that Mr Ogrodny produced evidence to support this, and also that when later in the month the claimant produced medical evidence to support a request to work in another store he agreed this. Again, the respondent submits that Mr Dean treated both equally and that there is no evidence of any less favourable treatment.

31. We accept Mr Dean's evidence as to the events set out above and also the respondent's submission that it is not in any event possible to identify any less favourable treatment.

32. Allegations 3 and 12 – (Direct Discrimination) Mr Dean – February/April May 2016 Not providing CCTV training to the claimant.

33. There is a requirement that security operatives must be specifically trained to view live CCTV footage, although not recorded footage. Until he had been trained Mr Bennett could not, therefore carry out live observation. The respondent submits that the failure to provide the training cannot in and of itself be less favourable treatment in any event. They had employed and continued to employ the claimant in the knowledge that he was not CCTV trained, and it had no effect on his work or pay. There is a benefit to the respondent of having sufficient staff who are CCTV trained, but it does not affect the individual security guards themselves.

34. In any event the facts, as set out by the respondent and which we accept, are that there was a course in February 2016 that the claimant could not attend because of educational commitments. These courses are commissioned from external providers as and when there are sufficient staff to attend one. The next course was in July 2017 and the claimant attended this course. In fact, therefore, and contrary to the claimant's complaint, he was put on the first course for which he was available. We

accept this evidence, and it follows that, as the respondent submits, there was no less favourable treatment.

35. Allegation 6 – (Direct Discrimination) Mr Dean - 25th November 2015 -The claimant being set home without pay from a shift.

36. There is a dispute about the date of this event, but the claimant's contemporaneous complaint alleges it took place on 25th November 2015, and the precise date is of no significance for our purpose. He alleges that Mr Dean sent him home from this shift without pay. Mr Dean's evidence, which is supported by the documentary material, is that the claimant sent a fit note saying that he was suffering from stress and would benefit from a reduction in hours, and that the claimant specifically requested a reduction in hours with immediate effect. Accordingly, when the claimant turned up for the shift he was sent home in accordance with the fit note and his own expressed wishes. In any event this was on the instruction of Claire McLellan, not Mr Dean as alleged, and he was in any event paid for the shift. Whatever the exact day we accept the respondent's evidence as to the reason for his being sent home. As there is no suggestion Mr Ogrodny was ever in a comparable situation the comparator would have to be hypothetical, and there is no evidence before us from which would conclude that such a comparator would have been treated any differently. In any event we accept Mr Dean's evidence that the reason Mr Bennett was sent home from his shift was a combination of the fit note and his own express wishes.

37. Allegation 7 (Direct discrimination/ Victimisation) Mr Dean/Mr Bland – After 18th January 2016 - The failure to address the issue of the rota in the grievance outcome.

38. As an allegation against Mr Dean this is bound to fail as he was not responsible for the grievance outcome. The respondent has been unable to call Mr Bland but it is in fact clear from the grievance outcome that it was addressed, albeit not to the claimant's satisfaction. In essence in his witness statement the claimant repeats the allegations about the rotas contained in allegation 1 and 5 above and complains of Mr Bland's failure to adequately investigate and not to conclude that they were acts of discrimination.

39. Although the respondent has not been able to call Mr Bland his conclusions are entirely rational, and ones it was clearly open to him to find on the information before him. In our judgement he fact that the claimant does not agree with his conclusions is not in and of itself sufficient to allow us to draw a discriminatory inference in the absence of an explanation from the respondent. In our judgement therefore there is insufficient evidence from which the claimant can satisfy the burden upon him.

40. In addition to those specific pleaded complaints, as is set out in the claimant's witness statement, at paragraphs 21 and 22 he complains of ongoing issues with the rota in 2016 and 2017.however, it is events after the grievance outcome in 2016 and 2017 that are essentially in dispute. It is very difficult to disentangle these, and as these are not pleaded claims we have concluded that these are not one that in the circumstances we will make findings in respect of.

41. Allegation 8 – (Direct Discrimination/Victimisation) Mr Dean Mr Bland –5th February 2016 - The failure to ensure an effective response to the reference request.

42. This allegation as an allegation of discrimination against Mr Dean is extremely hard to understand. The claimant had applied for another job which required a reference. The request was incorrectly sent to Mr Dean. Individual managers are not permitted to supply references; and all such request are dealt with centrally by a dedicated team within HR. Immediately he received the request Mr Dean forwarded it entirely correctly to HR. In two subsequent investigations by Mr Bland and Mr Beddoes he was held to have acted entirely appropriately. In our judgment this is an inevitable conclusion and we cannot see that the act of receiving the request and referring it to the appropriate team could possibly constitute less favourable treatment.

43. Similarly, the allegation against Mr Bland (although for some reason not one made against Mr Beddoes) is that it was discriminatory not to uphold the complaint. Despite having not heard from Mr Bland his reasoning was that claim was not upheld because factually Mr Dean had done nothing wrong. This was at least a permissible, and in our judgment in reality an inevitable conclusion and there is no evidence before us that would satisfy Stage1 of the Igen v Wong test that Mr Bennett was treated any less favourably than a hypothetical comparator, nor that if he were that it was because of his race. The compliant was self-evidently not upheld as it was not factually well founded. Once again in our judgment this cannot be less favourable treatment.

44. Allegation 9 – (Direct Discrimination/Victimisation) Mr Dean -Being instructed on 10th February 2017 not to review live CCTV without a licence.

45. This is very difficult to understand as an allegation of discrimination. It is the claimant's own case that he required a licence to do this and he alleges (as set out above) that the failure to train him to do so was itself discriminatory. However, it is in reality simply the consequence of not receiving the training. If the failure not to provide the training was not discriminatory, (as we have held above) then the application of the policy cannot be. There is no actual comparator and again on all the evidence before us a hypothetical comparator would have been treated identically.

46. Allegation 10 – (Direct discrimination/Victimisation) Mr Dean - The refusal of a day's holiday for a doctor's appointment.

47. On 8th February 2016 the claimant requested a day's leave on 17th February to attend a doctor's appointment. On 15th February the initial decision not to allow the claimant time off was made by Mr Teagle on the basis that there was no cover, and he asked the claimant to supply an appointment slip which the claimant did not provide. On 16th February the claimant informed Mr Dean that he had a doctor's appointment the next day. However the request for holiday had already been denied by Mr Teagle. Mr Dean decided to remove the claimant from the rota so that it did not show a "blow out" (i.e. unauthorised absence). The claimant contends that a day's holiday could

have been granted and that there is no requirement to provide proof of a doctor's appointment. However, the question for us is not whether Mr Dean could have acted differently. We accept his evidence that he did what he believed at the time was of assistance to the claimant to remove the requirement to attend work, which would allow him to attend he doctor's appointment. As the annual leave had already been denied that removed the difficult choice for the claimant of missing the appointment or taking unauthorised absence. It is clear, and we accept, that this was intended to benefit the claimant and there is no evidence that any hypothetical comparator would have been treated differently.

48. Allegation 11 – (Victimisation) Mr Bland - The failure to escalate the claimant's appeal to Mr Bland's line manager.

49. This allegation is extremely unclear. The claimant alleges that Mr Bland failed to forward his appeal to Mr Bland's manager. However, Mr Bland did advise the claimant of the details where to send the appeal which the claimant did not do. The claimant suggests that here may have phone calls between himself and Mr Bland but, as Mr Bland is not available to give evidence, and as the claimant makes no specific allegation about what may have been said in conversations which may or may not have taken place anyway, there is in our judgement insufficient evidence to make any factual findings as to what occurred. On the evidence before us all that can be said is that Mr Bland did supply the claimant with the correct details and for some reason the claimant did not pursue this. In the circumstances here is no evidence of any discriminatory treatment of the claimant by Mr Bland. In the end there is simply insufficient evidence before us to determine why the appeal was never pursued and whether that was the fault of the claimant or Mr Bland.

50. Allegation 13 and 19 – (Victimisation) Mr Dean -September / November 29016 and 8th March 2017 - Refusal of 2017 annual leave.

51. The respondent's position is that it is policy not to permit both security officers to take annual leave at the same time. This policy had worked to the claimant's advantage in 2015 and 2016. In 2015 he had pre booked his holiday prior to his appointment in December 2014 which was honoured. In 2016 he had made the request before Mr Ogrodny and was successful whilst Mr Ogrodny's request was refused. For 2017 the situation was reversed with Mr Ogrodny making the request first and the claimant therefore being refused. The initial refusal was not Mr Dean's but he upheld the decision. Thus, the respondent's position is that the refusal resulted from the application of the policy and was not causally linked to the protected disclosure.

52. However, the claimant escalated the complaint to Mr Beddoes who subsequently granted the claimant's request, which immediately led to a complaint from Mr Ogrodny that the claimant was in fact being treated more favourably than him, which in this regard was clearly true. The claimant relies on Mr Beddoes decision to demonstrate that Mr Dean could have granted the holiday and chose not to, and invites to conclude that the failure to do so was discriminatory. However Mr Dean's decision had previously been upheld by Mr Bland (against whom no complaint is

made in this respect) and Mr Beddoes concluded that the correct procedure had been followed and made no criticism of Mr Dean.

53. In our judgement there is no evidence from which we could infer that Mr Dean's decision was discriminatory, as he had self-evidently treated the claimant and his comparator equally in relation to booking holiday.

54. Allegation 23 – (Direct discrimination /Victimisation) September /October - Mr Dean/Mr Bland/Mr Crowhurst -The refusal of 2018 annual leave.

55. It is convenient to deal with is allegation at this point as it raises very similar issues to the allegation above. The claimant attempted in the autumn of 2017 to reserve a six week period in the summer of 2018 during which he would take his annual leave, in an apparent attempt to prevent the difficulties he had encountered the year before. He planned not to use the whole period but, when he was subsequently able to book the actual holiday within that time, the unused portion could be vacated. However, the system would not accept the request. Mr Dean clearly attempted to assist the claimant by advising him that this may be because the total period requested exceeded the claimants total annual leave entitlement and that he should reduce the time claimed at either or both ends, and not attempt to book a complete six week period. The claimant did not do so with the result that his annual leave was never booked on to the system. He was warned by Mr Dean that other people wanted holiday in the same period but failed to heed Mr Dean's advice with the result that others booked the holiday. In our judgment the respondent's submission that it is apparent that far from discriminating against the claimant Mr Dean did everything he could to help, and that the only person responsible for the failure to book the holiday is the claimant himself is simply unanswerable. There is no evidence at all that the claimant was treated les favourably or detrimentally by Mr Dean.

56. The complaint against Mr Bland and Mr Crowhurst is, in the case of Mr Bland based on his decision to uphold Mr Dean's decision; and in the case of Mr Crowhurst the failure to provide a written response to the claimant's appeal. The respondent has not been able to call either to give evidence but in our judgment the simple fact of a failure to uphold the claimant's complaint is not sufficient evidence from which we could draw any inference in and of itself, particularly in the circumstances set out above in which the complaint is apparently baseless in any event.

57. Allegation 14 (Direct discrimination/Victimisation) Mr Dean – Dec 2016/January 2017Removal of Alternate Sunday Overtime

58. The respondent submits that this claim is factually incorrect and is clearly based on a misunderstanding. Shortly after the TUPE transfer from Securitas to Mitie Mr Dean was attempting to discover the accurate situation as to who was working what shifts. To this end he sent the claimant and Mr Ogrodny a copy of the four week shift rota. In the accompanying email he stated that he could see that there was an issue as the official rota did not show the claimant working on any Sunday whereas Mr Dean knew that he worked alternate Sundays. What he did not know was which, (ie weeks

one and three or two and four and in the e-mail he specifically asked the claimant to identify which.

59. It is clear that the claimant did not understand this, as later the same day he sent a text and followed with an email asking for conformation that he had been taken off Sunday overtime and his witness statement describes the e-mail as Mr Dean saying that he had a problem with the claimant working Sunday overtime which is clearly precisely the opposite of the meaning of the email. After a series of ill tempered text exchanges the claimant asked to be removed from working Sunday overtime, which request was accepted. As a matter of fact, therefore, the removal of Sunday overtime came at the claimant's request following a clear misunderstanding of Mr Dean's email. The removal of Sunday working at his own request cannot in our judgment be less favourable treatment of the claimant.

60. Allegation 15 – Direct discrimination/victimisation) Mr Dean – After 13th January 2017 The failure to address issues regarding the claimant's work environment.

61. The claimant alleges that Mr Dean failed to come to the store to assist him as he was subject to a hostile environment from Sainsbury's staff who were unhappy about his reaction to "drive offs" (customers filling up with petrol and driving off without paying from the stores petrol station). The claimant texted Mr Dean to say he believed that Sainsburys staff had complained about him to Mr Dean. Mr Dean replied that there had been no complaints and that he was not aware of any issues.

62. The claimant's case is that he was not reassured by this and that Mr Dean should have come to the store to see him person. We accept that Mr Dean did not do so as, as far as he was aware, and as he had told the claimant, there was no issue. Once again in our judgement there is no evidence that would allow us to infer that this was discriminatory and even if there were, we in any event accept Mr Dean's evidence that the reason he did not attend was that he did not believe that there was any need to do so.

63. Allegation 16 (Direct Discrimination/Victimisation) Mr Dean - 20th January 2017 Frustrating /Failing to facilitate he claimant's grievance

64. This again is an allegation which is extremely difficult to understand. The claimant wished to lodge a grievance against Mr Dean in January 2017 shortly after the TUPE transfer to Mitie and asked Mr Dean to provide him with the address to send it to. Mr Dean provided a generic Mitie website address from which the claimant's grievance was picked up and processed. However, the claimant complains that, despite the fact that his grievance was picked up from the address that Mr Dean had advised him to send it, that the address provided with was not the correct one as set out in Mitie's grievance policy. From this he concludes, and invites us to conclude, that Mr Dean deliberately gave him what he hoped would be an incorrect address to frustrate the grievance.

65. However, not only is there no evidence to support what is in any event a bold allegation on the face of it, there is specific evidence to contradict it. On 27th January

2017 Mr Dean contacted HR to tell them that the claimant had sent a second grievance and asking what the situation was with the first. The evidence before us therefore is that far from frustrating the claimant's grievance Mr Dean specifically drew to the attention of HR. In the circumstances this allegation is simply, and to put it generously, not factually well founded.

66. Allegation 17 – (Direct discrimination/victimisation) Mr Dean - 22nd January 2017 Mr Dean describing the claimant's allegations against him as unfounded.

67. The claimant complains that it is discriminatory of Mr Dean to describe the claimant's allegations as unfounded. The context was a text exchange in which Mr Dean stated…"*you use any platform you can to execute unwarranted treatment towards me along with any unfounded allegations (allocations in the original*)". We accept Mr Dean's evidence that he expressed this view as it is precisely what he believes and believed. There is no evidence from which we could infer discrimination in the absence of an explanation, and even if there were we accept Mr Dean's evidence.

68. Allegation 18 – (Direct discrimination/Victimisation) Mr Dean – 13th February 2017 Subjecting the claimant to a disciplinary process/ excessive disciplinary outcome

69. This allegation falls into two parts. The claimant was disciplined because, on a store visit, Mr Dean and a colleague Mr Kingdon claim that they observed him whilst on duty with his headphones in watching his phone. On being discovered he threw his paperwork at them. If this is true it clearly justifies disciplinary action on both counts. The difficulty for the claimant is that Mr Dean's account is supported by Mr Kingdon's which was written on 21st February 2017 and is therefore almost contemporaneous. In his initial investigatory interview the claimant firstly denied that he had been wearing headphones and was later more equivocal. Having heard Mr Dean's evidence and given that he is entirely supported by the account of Mr Kingdon we accept that he complained of the claimant's conduct because the claimant had acted exactly as he described.

70. In addition, the claimant contends that Mr Dean had fabricated the answers to a set of questions deliberately in order to obtain a basis for disciplining the claimant. Those questions were ones he put to Mr Hughes the Acting Store Manager who subsequently confirmed them. The allegation that they are fabricated simply has no evidential basis whatsoever.

71. The second part is the allegation of an excessive disciplinary outcome. This is very difficult to understand. Firstly, the allegation is made against Mr Dean who did not determine the disciplinary outcome. Secondly, Mr Harris (against whom no specific allegation is made in any event) concluded that he accepted Mr Dean's and Mr Kingdon's accounts of events but that the matter would not proceed to a formal disciplinary proceeding but would be dealt with as issues of concern. There was therefore no disciplinary sanction at all; and this allegation has no evidential basis.

72. Allegation 20 – (Victimisation) Mr Bland- 25th March 2017 - Obstructing the claimant from raising a complaint.

73. The allegation is that the claimant was prevented by Mr Bland from directing a grievance to the managing director Mr Jason Towse, and of it being head by Mr Beddoes. The respondent submits that Mr Beddoes was the appropriate person to hear the grievance and that it is not open to the claimant simply to pick and choose to whom he directs a grievance appeal. The respondent submits that it cannot be an act of victimisation for an appeal to be heard by the appropriate manager and self-evidently that it applied the same policy as would be applied to any other employee in those circumstances. In the circumstances there can be no less favourable treatment. There is no suggestion that there is any actual comparator, and no evidence that any hypothetical comparator would be treated any differently. In our judgement this must be correct.

74. Secondly the claimant complains that Mr Beddoes did not address two of the points of complaint. As the contemporaneous documentation shows this was done with the agreement of the claimant, and it follows there is therefore no factual basis for this complaint.

75. Allegation 21- (Direct Discrimination/Victimisation) Mr Dean - 2nd May 2017

76. The claimant contends that on 2nd May Mr Dean called him and spoke in “a sneering manner” and felt that this was done in order to discourage the claimant from participating in a conference call the next day. Mr Dean’s evidence is that it was a perfectly normal follow up call and that he had no intention of discouraging the claimant. Mr Beddoes subsequently accepted Mr Dean’s explanation but that is of no evidential significance for us.

77. We accept Mr Dean’s evidence and are not persuaded on the balance of probabilities that he adopted a sneering tone. This allegation must therefore be dismissed on the facts.

78. Allegation 22 – (Direct discrimination/Victimisation) Mr Dean – September 2017 Misuse of Sainsbury’s SSC consultation exercise.

79. This a very difficult allegation to understand. In June 2017 Sainsbury’s consulted about altering the pattern of hours worked in its stores. If it changed the hours and patterns, as it did, it would necessarily affect those guards employed in those stores. Winterstoke Road was one of the stores affected. All affected guards were informed of the changes in hours and that if they were not acceptable they could apply for vacancies elsewhere. None of these events were in any way in the control of Mr Dean, but resulted from decisions taken by the client, and there is no evidential basis for any allegation that any action of his was discriminatory.

80. As set out in his witness statement the claimant appears to suggest that in reality this was simply a pretext to make him accept less favourable terms and conditions of employment. However, he does not suggest that his terms and conditions did

change and in his witness states sets out that his of work increased from October 2017 about which he makes no complaint. In our judgment it is impossible to identify any evidence in support of the theory he advances or of any less favourable or detrimental treatment.

81. Allegation 24 – (Direct/Victimisation) November 2017 Mr Dean Lack of sympathy / empathy regarding the death of the claimant's sister

82. The sequence of events is that is that in a text exchange starting at 7.16pm on 30th October 2017 Mr Bennett states " ..I have informed the store management regarding my sister's death in Jamaica. I will be back in work tomorrow. Thankyou." Mr Dean replies, "I called them as soon as you got of the phone. Are you sure you'll be okay for tomorrow? Let me know in the morning if not. All the best." The claimant replied "Yes I will be okay for tomorrow. It was initial shock of it that got to me so as the main support I need to process it quickly and make decisions. Thanks." On 31st October 2017 Mr Dean confirmed with the claimant that he had arranged three days paid bereavement leave. It is clear that in these initial exchanges Mr Dean's response could not be characterised as lacking sympathy or empathy and was clearly not regarded by the claimant as doing so given the tone of his own response.

83. However, the matters about which the claimant complains are that on 6th November 2017 he asked Mr Dean if he could leave at 1.00pm on 16th November to attend an appointment and make up the hours subsequently. He was contacted on 7th November 2017 by Mr Dean, along with many the members of staff according to Mr Dean whose evidence we accept, to seek clarification as to why he was not clocking on correctly for his shifts. According to Mr Dean's subsequent email this had occurred on over twenty occasions in October.

84. On 17th November 2017 the claimant complains that he had been contacted by the control room to ask why he was not on shift when that was part of his bereavement leave. He emailed Mr Dean at 08.35 and at 09.27 Mr Dean confirmed that there had been a schedule error and he was removed from the rota.

85. Clearly the claimant is and was upset at having to deal with issues such as clocking in procedures, and an unwarranted contact from the control room, in the days and weeks following the death of his sister, but the question for us is whether there is any causal connection between those matters and the claimant's race or any protected act. We accept Mr Dean's evidence that the reason for seeking the information was that it was required and that the scheduling error was simply that. There is therefore no causal connection between the events complained of and the protected characteristic or protected act.

86. Allegation 25 (direct discrimination/victimisation) Mr Dean / Mr Crowhurst - January 2018

87. The complaint is of a lack of sympathy at the death of the claimant's mother. The claimant complains that after the death of his mother he, on 2nd January 2018 informed Mr Dean of his travel dates and that he intended to leave during the week

commencing 15th January, but that thereafter he received unnecessary emails which trivialised the situation. Mr Crowhurst was copied into these emails and Mr Crowhurst jointly pressurised him to return to work.

88. Mr Dean's evidence which we accept, is that as the respondent had a policy of allowing three days bereavement leave, and as this would not be long enough for the claimant to travel to and return the form the Caribbean for his mother's funeral that he needed to know for how long the claimant would be absent. Thus, on 4th January he asked how long the claimant need off; in a separate email set out the detail of what was required and told the claimant that he was trying to help him, but that in order to do so he needed the information; on 5th January he asked when the claimant was returning. On the 5th January Mr Crowhurst reiterated that all that was being asked for was information. The emails set out above are simply examples but it is difficult to understand why the claimant believes them to be unnecessary. The claimant's managers clearly needed the information, not least as Mr Dean re-iterated, to assist the claimant.

89. Once again whilst the claimant was clearly upset at being asked for this information in the days following his mother's death the task for us is to ask whether there is any causal link between the act complained of and the protected characteristic or protected act. Again, we accept Mr Dean's evidence that the information was sought because it was necessary, and necessary not least to assist the claimant. Once again there is no evidence any hypothetical comparator would have been treated any differently.

90. Allegation 26 – (Direct/Victimisation) Mr Dean February 2018 The failure to pay sick pay on time.

91. It is not in dispute that the claimant did not receive sick pay on time. His case is that Mr Dean deliberately failed to send the fit notes which he had sent to Mr Dean to HR with the result that it was not paid on time. Mr Dean's evidence which we accept is that his was a simple mistake. The claimant had sent the sick notes via WhatsApp and Mr Dean had asked him to re- send them via email. The claimant did not do so and when at the end of the month Mr Dean sent the fit notes he had received via his email to HR for sick pay purposes he forgot that the claimant's had been sent via Whatsapp. Once this was drawn to his attention he arranged for the claimant to be paid in the next payroll run. We accept this evidence and that explanation is simple error.

92. Allegation 27 – (direct discrimination/ victimisation) Mr Crowhurst – March 2018 – The failure to investigate the complaint of victimisation.

93. The claimant lodged a complaint of victimisation in relation to the failure to forward the fit notes. It is correct that it did not procced to a grievance hearing for reasons about which we have simply no evidence. Mr Crowhurst certainly engaged with the grievance initially as he emailed the claimant on 5th March 2018 to clarify the grievance, and on 12th March to say that Mr Dean had already forwarded the fit notes to HR and that the claimant would be paid in the payroll run on 23rd March. There

does not seem to be any further correspondence from either Mr Crowhurst or the claimant and the respondent speculates that as the complaint related to the fit notes and that as it had already been resolved before Mr Crowhurst's involvement, that Mr Crowhurst may not have believed any further action was necessary. Whilst that is plausible it is simply speculation. On the basis of the evidence before us neither Mr Crowhurst nor the claimant pursued this further and in the circumstances it is not possible to make any primary findings of fact from which any inferences could be drawn.

94. Allegation 28 and 31 – (Direct discrimination/ victimisation) Mr Dean 5th December 2018 – Failing to consult about the removal of the podium chair and its subsequent removal.

95. These are allegations of failing to consult the claimant about the removal of the podium chair, and its subsequent removal. They form part of the events of 5th December 2018 about which the claimant complains but can be sensibly considered together. The respondent has a policy of security officers not sitting on the podium chair, but standing or patrolling, in the absence of a medical reason. Neither the claimant or his comparator Mr Ogrodny provided any medical evidence to support the use of the chair and Mr Dean took the decision to remove the chair. Accordingly, the respondent submits that there can be no less favourable treatment, at least in relation to the removal of the chair, in that as the chair was removed neither the claimant nor Mr Ogrodny could use it and that each was self-evidently treated identically.

96. Although it is not entirely clear the claimant's complaint as to failure to consult about this appears to rest on the fact that he was on annual leave until 4th December 2018 and was not consulted, nor given the opportunity produce any medical evidence. However, as the claimant has never before or since suggested that he required a chair or could produce any evidence to support that contention the question appears somewhat academic. In our judgement it is not a detriment or less favourable treatment not to be consulted about something when the absence of consultation has not affected him in any way and the outcome would have been identical in any event.

97. Allegation 29 and 30 – Direct discrimination/ Victimisation Mr Dean – 5th December 2018 – Malicious allegations of aggressive behaviour being made against him, and that the visit to deliver training was a pretext

98. These allegations bot relate to a visit to the store on 5th December 2018. The claimant alleges that the purported reason for the visit to the store was a pretext designed to provoke him and that the subsequent allegations made against him were malicious.

99. Mr Dean's evidence is that he and Mr Greening (Team Leader) genuinely attended to deliver STAR/ACT refresher training. He is supported by the contemporaneous account of Mr Greening and, in respect of the need to do so and the purpose of the training, he is supported by Mr Stevens. There is no evidence to contradict this and we accept that it is true.

100. In relation to what happened in the store Mr Dean complained in a detailed email of 6th December 2018. Mr Greening had emailed a lengthy account on the day itself. Both the accounts are in their important particulars the same and each recounts aggressive behaviour on the part of the claimant. The claimant contends that this is untrue and that the CCTV footage (which the tribunal has viewed) supports his account. In our judgement the footage neither supports nor contradicts either party's account. It is silent and it is therefore impossible what was being said or the tone in which it was being said.

101. As once again Mr Dean's account is supported by the contemporaneous account of his colleague, and as we accept the evidence of Mr Dean, we accept that the events occurred as described by Mr Dean and that the allegations were not therefore malicious. It follows that as we do not accept the factual basis of either allegation these too must be dismissed.

102. Allegation 32 – Victimisation Mr Dean 24th April 2019 – rejecting the claimant's pay queries.

103. The respondent accepts that the claimant's pay queries were rejected but that this was not done by, or at the behest of, Mr Dean but by the payroll department (against whom no allegation is made) who required them to be presented in a particular format. The claimant may be aggrieved and consider the process overly bureaucratic, but the documentary evidence demonstrates clearly that this explanation is correct. As an allegation against Mr Dean it is bound to fail as the rejection of the queries was not done by him in any event; and given that this was the application of the payroll departments internal procedures the evidence shows that any employee would have been treated identically. In our judgement this must be correct and there is no evidence that a hypothetical comparator would have been treated differently.

104. Allegation 33 – Victimisation – Mr Dean/ Mr Stevens 17 May 2019 – Reducing the claimant's hours and or changing his shift times without consulting him or obtaining his agreement.

105. In April 2019 Sainsbury's requirements changed and a new shift pattern was to be implemented for the claimant and Mr Ogrodny. This was sent to Mr Stevens by Mr Dean on 9th April 2019. On the same day Mr Stevens met the claimant and emailed him a copy of the schedule. A formal meeting to discuss the schedule was arranged for 28th May but on 18th May the claimant emailed Mr Stevens to cancel the meeting saying " I have changed my mind about having a meeting with you and wait for you to make the changes to my hours of work and whatever hours I cannot work because of my commitments that is what my hours will be reduced to".

106. It follows that as a matter of fact that the new shift pattern was imposed as a result of the customer's requirements; the claimant was informed of, and sent, the proposals and invited to take part in the a consultation meeting; and it was the claimant himself who declined to attend, and who invited the respondent to impose a

new rota of which he would work the shifts he could. In our judgment there is no factual basis to the claimant's allegations that anything was done without consultation or his consent. As he has not established the factual basis of these allegations they too must be dismissed.

Conclusion

107. For the reasons set out above all of the allegations have been dismissed on their merits. Standing back and looking at the overall picture does not cause us to alter any of those conclusions and we cannot identify any pattern of discriminatory behaviour either specifically on the part of the Mr Dean or generally. As the claims have been dismissed on their merits it is not necessary to deal with the time points.

EMPLOYMENT JUDGE CADNEY

Dated: 29th January 2020