



EMPLOYMENT TRIBUNALS

Claimant

Mr. S. Ekanath

v

Respondent

**B.P.Express
Shopping Limited**

Heard at: Birmingham (via CVP) On: 26, 27, 28 and 29 July 2021

Before: Employment Judge Wedderspoon

**Members : Miss. Clark
Mr. Virdee**

Representation:

Claimant: In Person

Respondent: Mr. Sanding, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that :-

1. The claims of direct race discrimination are not well founded and are dismissed.
2. The claims of direct age discrimination are not well founded and are dismissed.
3. The claims of direct religious discrimination are not well founded and are dismissed.
4. All the claims are brought out of time and it is not just and equitable to extend time.
5. The deposit payment of £96 shall be paid to the respondent.

REASONS

1. By claim forms dated 13 June and 14 June 2018 the claimant brought a number of claims. By the date of the final hearing the only "live" claims, following a number of preliminary hearings and successful strike out applications, were direct age, race and religious discrimination claims. The claimant is an Indian, Hindu Brahmin aged 63 years of age.

List of issues

2. JURISDICTION

- a. For each allegation, was the claim form submitted more than 3 months after some of the conduct complained of?

- b. If so, for each allegation, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?
- c. For clarity, the Claimant's final working day was 6 December 2017. The Claimant was absent from work from 7 December 2017 to 2 January 2018. Upon his return to work on 3 January 2018, the Claimant was suspended until his dismissal on 17 January 2018. The Claimant contacted ACAS on 13 April 2018. Judge Parry identified in paragraph 10 of the Preliminary Hearing Judgment dated 29 May 2019, that 14 January 2018 was the earliest possible date an act could be in time, without the Tribunal being required to exercise its discretion to extend time. The Respondent's position is that as the Claimant was absent from work after 6 December 2017, all claims are out of time.
- d. If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

3. DISCRIMINATION – RACE

a. Direct discrimination

- i. Has the Respondent discriminated against the Claimant in terms of s13 of the Equality Act 2010?
- ii. Who is the Claimant's comparator (actual or hypothetical), whose circumstances must be materially the same as the Claimant's?
- iii. Is there sufficient evidence to satisfy the Tribunal that any of the following alleged events occur, namely:
 - 1. Was the Claimant questioned about his actions when customers drove away from the Respondent's premises without paying for their fuel? On which dates? (The Claimant alleges this occurred from 2014 until his dismissal on 17 January 2018.) (Allegation 4, Claim 1)
 - 2. Was the Claimant asked to work more quickly? On which dates? (The Claimant alleges this occurred from September 2015 until his dismissal on 17 January 2018?) (Allegation 5, Claim 1)
 - 3. Was the Claimant asked not to use his mobile phone whilst on duty? On which dates? (The Claimant alleges this occurred in 2016.) (Allegation 8, Claim 1)
 - 4. Were notes of a meeting between the Claimant and the Respondent in November 2017 taken incorrectly? (Allegation 21, Claim 1)

5. Was the Claimant questioned about the manner in which he asked customers to provide their nectar cards when processing their purchases during a Team Member Customer Observation on 23 February 2017? (Allegation 22, Claim 1)
- iv. If any of the above acts did occur, did the Respondent treat the Claimant less favourably than it treated, or would have treated, the relevant comparator in these circumstances?
- v. If so, was the reason for the treatment because of the Claimant's race or perceived race? (The Claimant described himself as Indian for the purpose of his race discrimination claim, as per paragraph 5 of the Case Management Preliminary Hearing record dated 4 January 2019.)

4. DISCRIMINATION – RELIGION OR BELIEF

a. Direct discrimination

- i. Has the Respondent discriminated against the Claimant in terms of s13 of the Equality Act 2010?
- ii. Who is the Claimant's comparator (actual or hypothetical), whose circumstances must be materially the same as the Claimant's?
- iii. Is there sufficient evidence to satisfy the tribunal that any of the following alleged events occur, namely:
 1. Did Baljit Bilan respond "so what?" when the Claimant expressed to the Respondent that he could not handle meat for religious reasons? On which dates? (The Claimant alleges this occurred from 2015 until his dismissal on 17 January 2018?) (Allegation 18, Claim 1)
 2. Were notes of a meeting between the Claimant and the Respondent in November 2017 taken incorrectly? (Allegation 21, Claim 1)
- iv. If any of the above acts did occur, did the Respondent treat the Claimant less favourably than it treated, or would have treated, the relevant comparator in these circumstances?
- v. If so, was the reason for the treatment because of the Claimant's religion or belief or perceived religion or belief? (The Claimant described himself as Hindu Brahmin for the purpose of his religious discrimination claim, as per paragraph 5 of the Case Management Preliminary Hearing record dated 4 January 2019.)

5. DISCRIMINATION – AGE

a. Direct discrimination

- i. Has the Respondent discriminated against the Claimant in terms of section 13 of the Equality Act 2010?
- ii. Who is the Claimant's comparator (actual or hypothetical), whose circumstances must be materially the same as the Claimant's?
- iii. Is there sufficient evidence to satisfy the Tribunal that any of the following alleged events occur, namely:
 1. Was the Claimant asked to work more quickly? On which dates? (The Claimant alleges this occurred from September 2015 until his dismissal on 17 January 2018?) (Allegation 5, Claim 1)
 2. Were notes of a meeting between the Claimant and the Respondent in November 2017 taken incorrectly? (Allegation 21, Claim 1)
- iv. If so, did the Respondent treat the Claimant less favourably than it treated, or would have treated, the relevant comparator in these circumstances?
- v. If so, was the reason for the treatment because of the Claimant's age or perceived age?
- vi. What was the aim underlying the reason for the treatment?
- vii. Was that aim a social policy aim?
- viii. Was that aim legitimate?
- ix. Was the treatment a proportionate means of achieving that aim in terms of section 13(2) of the Equality Act 2020?

6. REMEDY

- a. If the Claimant's claims are upheld:
 1. What remedy does the Claimant seek?
 2. What financial compensation is appropriate in all of the circumstances?

7. The Law

Direct discrimination

8. Pursuant to section 13(1) of the Equality Act 2010, it must be established that
 - (a) The Respondent treated the Claimant less favourably than it did or would have treated others and

- (b) The less favourable treatment must be because of a protected characteristic. The claimant relies in this case upon his race (Indian), religious belief (Hindu Brahmin) and/or his age (60s).
9. In respect of the claim for age discrimination, the respondent has a defence if it can show that the treatment was a proportionate means of achieving a legitimate aim.

Burden of proof

10. Section 136 of the Equality Act 2010, provides:

- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

11. If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efofi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

12. To establish a prima facie case, the Claimant has to show that he was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

(Madarassy v Nomura International plc [2007] ICR 867 at [56] per Mummery LJ)

13. The time limits for bringing discrimination claims is set out in section 123 Equality Act 2010. It provides:

proceedings on a complaint within section 120 may not be brought after the end of

- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable".*

14. If, however, the Claimant can demonstrate that the discrimination suffered over a period of time amounted to a continuing act of discrimination extending over the whole period then the relevant date for s.123 EqA purposes will be the end of that period (s.123(3)(a) EqA).

15. The burden is on Claimant to show that there has been a continuing act of discrimination, and in order to do so he must show that the acts complained of constituted a continuing state of affairs rather than a succession of unconnected or isolated acts (***Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 (CA)***).
16. When considering whether acts are “so linked as to be continuing acts or to constitute an ongoing state of affairs,” one relevant factor will be whether the same or different individuals were involved in the alleged discrimination (***Aziz v FDA [2010] EWCA Civ 304***).
17. Further, in order to constitute part of a continuing act of discrimination an act must actually be discriminatory. Consequently, a non-discriminatory act is not capable of extending a continuing act or the relevant period for section 123 purposes, even if it is in some way connected to a previous discriminatory act (***South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168 (EAT)***).
18. If the claimant is unable to show that there was a continuing act of discrimination extending to within the three-month time limit then he must show that it would be just and equitable to extend that time limit, and that he brought his claim within such further period as was just and equitable. The burden is on the Claimant to show that this extension should apply, and it is the exception, not the rule (***Robertson v Bexley Community Centre, T/As Leisure Link [2003] IRLR 434 (CA)***). In considering this question, the Tribunal should look at all relevant circumstances, and can be assisted by considering the factors contained in s.33 of the Limitation Act 1980 (see *Robertson*).
19. The Court of Appeal in the case of ***Adedeji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23*** held when exercising its discretion to extend time although it has been suggested (in *Keeble*) to consider the list of factors in section 33 of the Limitation Act 1980, the Tribunal is not required to go through such a list. However, the factors almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh).

The hearing

20. The Tribunal was provided with an agreed bundle of 471 pages. Although the claimant stated he had only received it recently, the respondent asserted the bundle had been provided to the claimant in December 2019 and had not changed. The claimant confirmed he was happy to proceed with the case.
21. It was evident to the Tribunal at the beginning of the hearing that the claimant was unable to hear the softly spoken Tribunal clerk. He was using a hearing aid. He was able to hear the Employment Judge. The claimant was asked if he could hear and if he was happy to proceed by video platform. He confirmed that he was.

22. The claimant represented himself and relied upon his own evidence. The respondent relied upon three witnesses namely Mike O'Shea, Retail Area Manager and dismissal appeal/grievance officer; Tracey Richards, Store Manager of the Kensington Store and dismissing officer and Baljit Bilan, deputy store manager at the Newport Store; the claimant has made a number of discrimination claims against her.

Facts

23. The claimant was employed by the respondent from 23 January 2013 to 17 January 2018 as a customer service adviser/assistant. The claimant had been transferred from a former employer to the respondent (page 265). The claimant signed terms and conditions dated 23 January 2013 (pages 251-262). The claimant was adamant that he was an adviser and not an assistant, but the Tribunal found there was no real difference between the role of an adviser with the role of an assistant.
24. In the hearing the claimant was focused on the Tribunal seeing his probation letter. His evidence is that this would demonstrate that he was not required to do certain tasks. This document was not in the agreed bundle and neither party could locate a copy. However, it was mentioned at page 415 in a letter from Andy Kenney, North and Central District Manager of the respondent who stated in reference to the letter he saw "*..nowhere in it does it specify anything that is different to any other employee, therefore even if it was overlooked in error it would not have given any other information for the grievance chairperson to consider..*". On the balance of probabilities and considering the job description signed by the claimant, the Tribunal concluded that the claimant was required to do all the tasks in the job description.
25. The customer assistant job description signed by the claimant on 23 January 2013 (pages 266-7) sets out varied responsibilities and included "*merchandise the store with the products sold to ensure full availability (to include merchandising of alcohol and meat products)*". It is clear from this job description that the claimant's role was not merely till work. However, the Tribunal found that the claimant perceived that his role was operating the till (number one till) and his routine was that he was to sit at that till only and he was very reluctant to do any other work to the point that his manager, Ms. Bilan stopped asking him to do other tasks.
26. The respondent is a worldwide brand and is in the business of retailing vehicle fuel and produce from its stores. Due to the international nature of its remit, the business is sensitive to cultural and other differences of its employees and managers are specifically trained in issues of equality and diversity.
27. The claimant's employment was subject to an employee handbook which the claimant signed for on 3 May 2013 (page 245). At page 208 the handbook set out a policy on telephone calls and use of mobile phones. It stated "*the use of mobile phones whilst working a shift is not permitted and they should be switched off at all times. You may make personal calls on your personal mobile phone during your rest break but are not permitted to have or use your mobile phone at the till area. If a family member or friend needs to contact you urgently, a telephone call can be made directly to the*

store. Likewise, if you need to make an urgent call you should seek authorisation from your manager before making the call..” In respect of booking holidays, the handbook states (page 230) *“It is unlikely that you will be able to take holidays at Christmas and Easter as these are very busy times in store..All holidays must be authorised by your manager before being taken and booked at least 4 weeks in advance. However, the more notice you can give the more likely your holiday request will be granted. In all cases please complete the company’s holiday request form prior to booking your holiday as above there are no exceptions to this.”*

28. The respondent operated a system of providing Team Member Customer Observations which were a form of appraisal/feedback on a team member’s performance. Speed is one of the factors an employee is graded on during observations. These fell outside the disciplinary process.
29. The respondent also provided informal counselling as advice to members about conduct matters. The discussion with the employee identified issues or areas of potential improvement in their service and tried to help them to improve going forwards. An example of a counselling notice given to the claimant is on 14 March 2017 when the claimant refused to carry out an empty bin from behind the till to the back door stating *“it was not his job.”*
30. The Foley store was a busy store. Its employees were from diverse ethnic, cultural and religious backgrounds. In line with the respondent’s awareness of diversity where an employee raised a concern that he could not handle or sell alcohol because of his religion, a system was put in place by the respondent that where store customer wished to purchase alcohol, the purchase would be handled by a colleague. Further on another occasion where an employee raised the issue that he could not handle meat because of his religious faith, the respondent provided the employee with gloves to handle the product. The expectation of the respondent is that where an employee raises an issue about cultural or ethnic difference in the workplace that this will be treated respectfully and the respondent will ensure that the employee would be supported in the workplace.
31. The store had CCTV both internally and externally but no audio. The CCTV records were generally wiped after one month and up to 12 months the CCTV was available on the hard drive. In the course of the hearing, the claimant emphasised that many of the perceived criticisms of him could have been disproved and shown to be invalid had the respondent watched the CCTV. The Tribunal was unpersuaded by this as set out in its reasoning below.
32. The respondent was part of the nectar card loyalty scheme. Employees of the respondent were encouraged to introduce customers to nectar cards.
33. There is no dispute between the parties that the claimant applied in July 2017 for holiday leave for the period over Christmas and New Year. His application for leave for that period was refused. Nevertheless, the claimant did go on holiday and returned from India in January. He returned to work on 3 January 2018 and was suspended. He attended a disciplinary hearing on 17 January 2018 and was dismissed by Tracey Richards (see dismissal letter page 359-360) for disobeying a reasonable request from a line manager and taking annual leave, despite his request for annual leave having been denied. The claimant did not allege at this meeting the refusal to grant him leave was based on discriminatory grounds. In the course of the disciplinary hearing, Ben Horton (Store manager) was the note taker. Mr.

Horton noted the claimant had stated "*I said in meeting regarding I am going it wantonly.*". At the end of the meeting the claimant was given the notes to check and the claimant changed this phrase to "*I do only what I want to do.*" (page 347).

34. The claimant submitted a grievance letter (page 325) and an appeal against dismissal (page 361). It was determined that the dismissal appeal and grievance should be heard together.
35. The dismissal appeal meeting and grievance hearing was finally scheduled for and took place on 19 March 2018 (see notes pages 369 to 374). Mr. O'Shea, Retail Area Manager chaired the meeting. The claimant was accompanied by his trade union representative. The allegations which form the subject of the Employment Tribunal claims were not raised with Mr. O'Shea by the claimant in the hearing in the same way they are now raised by the claimant. The same factual allegations were raised but the claimant did not allege that these acts had taken place as a result of any discrimination based on the claimant's race, religion or his age. Mr. O'Shea upheld the claimant's dismissal. Mr. O'Shea undertook investigation into the claimant's grievance by interviewing Sohail and Ms. Bilan. Sohail confirmed he was unaware of any allegations of discrimination in the store. The refusal by the claimant to undertake any other tasks but till work had caused conflict with other team members. Ms. Bilan was shocked by the claimant's allegations against her. Ms. Bilan is an experienced member of staff and there have been no complaints against her.
36. Due to the passage of time, and the delay by the claimant in bringing the grievance, memories of events had faded and there was no CCTV available for Mr. O'Shea to view. The Tribunal finds that the CCTV would be of limited value in any event because it does not have any audio so would not provide a full context.
37. Mr. O'Shea upheld the decision to dismiss the claimant; see letter 11 April 2018 (page 375-8) and rejected the grievance (see letter dated 24 April 2018 pages 379 to 383). The claimant was given the right to appeal the grievance outcome which he did; see pages 384 to 385. Mr. Kenney rejected the appeal; see his letter dated 12 August 2018 (pages 415 to 416).
38. The Tribunal found that all of the respondents' witnesses were credible and honest. The claimant was inconsistent in his evidence. The claimant failed to raise discrimination allegations in the course of his employment. The timing of the allegations in terms of their veracity is evidentially important. Further, the claimant told the Tribunal that he had no heart condition but a health condition and this had been wrongly recorded in the notes of Tracey Richards. However, the Tribunal noted that the claimant had actually said at the meeting with Tracey Richards page 344 "*I never mentioned any health issue with the company. I have GP here but not specialist in heart*".
39. The Tribunal were not persuaded by the suggestion from the respondent that the claimant did not like to take instructions from a female manager. Instead, the Tribunal formed the view having heard all of the evidence and in the context of the claimant's apparent dislike of being told what to do that the claimant did not like taking instructions from anyone in the workplace. He had his routine of working on the till which he perceived was his role and he was inflexible about this.
40. For convenience the Tribunal record its fact finding for each of the allegations below.

Allegation 4 : From 2014 until the claimant's dismissal he was spoken to on a number of occasions about customers not paying.

41. Part of the claimant's role as a customer service assistant was to keep any eye on the forecourt and to ensure that safety and security maintained as far as possible. When a pump is lifted a notification appears on the till system. It is then the till operator's job to look toward that pump on the forecourt and to assess whether the pump should be authorised. A warning sign to the customer assistant should be where a car has no number plate and the owner looks away from store when filling the car with petrol as this can be an indication that the customer does not intend to pay for their fuel. The customer service adviser is also required to assess the age of the customer using the pump to ensure they are old enough to use the pumps and check that it is either a car or regulated container that is being filled. If a member of staff believes that somebody is acting strangely or for safety or security reasons should not be authorised to dispense fuel, it is the policy that the customer adviser should not authorise the pump and instead ask a colleague to go to the forecourt and check. This avoids "drive offs" which occur namely where a customer drives off after filling up their car without paying for the fuel they have used. The claimant alleged in his statement the last time he was reprimanded for drivers driving off without paying is 10 May 2017.
42. On 9 February 2017 the claimant failed to follow the procedure namely failed to follow the pump authorisation process correctly which led to a potentially avoidable drive off. Although the claimant sought to suggest that in fact this incident occurred in September 2017, the Tribunal concluded that the date was 9 February 2017 because that is the date of the documentation and no party had produced any alternative dated documentation.
43. A number of drive offs had been committed by a particular car/driver. In the circumstances, a picture of the car was placed near the till. Employees had been reminded to check the cars on the forecourt against this picture and not to authorise any fuel to this car. The car drove up to the pump. The claimant pushed the authorisation button and must not have checked the car's details. On 9 February 2017 (page 297) Ms Bilan counselled the claimant about this incident and breach of procedure.
44. The Tribunal was not persuaded that the claimant was told off or spoken to on a number of occasions about drive offs. Ms. Bilan as manager was required to note any drive off incidents. It is likely that she may have clarified with the claimant the details of other incidents so to complete the appropriate documentation. However, the claimant was only subject to a counselling notice when he had failed to follow the appropriate procedure.
45. In respect of alleged comparators, the Tribunal was not persuaded that the claimant was treated differently or singled out. The Tribunal was impressed by the evidence of Ms. Bilan that others have been counselled in situations where procedures had not been followed. The fact that there were no other counselling notices for other employees in the bundle did not detract from the honest evidence of Ms. Bilan and taking into account the delay by the claimant in bringing the allegations.

Allegation 5 : Until October 2014 the claimant was asked to work faster by Mr. George, manager and Mr. Arthur; from October 2014 the claimant was told to work faster by Ms. Bilan, duty manager, Ms. Emma Traverns, Mr. Michael, Mr. Jos, Ms. Sharon

46. The claimant's witness statement referred to two incidents only namely at paragraph 1.1.18 the claimant referred to an incident on 6 October 2016 when the claimant alleges that Michael told the claimant to stop talking to customers and speed up the work. The claimant says there was delay because of a mistake and he had to cancel the previous pump. The Tribunal did not hear any evidence from the respondent about this and find that the claimant was indeed told to speed up on this occasion. However, from the claimant's own evidence, he was working slowly because the claimant's evidence is that he had to deal with a cancellation at the pump. On the basis that speed is a factor noted in appraisals/observations it is unsurprising that the claimant's speed was raised.
47. Further on 10 May 2017 the claimant stated at paragraph 1.1.25 that Michael told him to speed up. The claimant stated he was "*not so young like you man*". The Tribunal did not hear any evidence from the respondent about these incidents. In the circumstances, the Tribunal finds that the claimant was told to speed up. However, the only suggestion that this was age related was raised by the claimant and not Michael. There was little information or context provided by the claimant about this incident. The Tribunal has already found that speed is a matter which is part of the observation/appraisals of employees.
48. During an observation of the claimant on 23 February 2017 (page 300) Ms. Bilan discussed with the claimant a number of ways he could improve his customer service including his speed of service. The Tribunal having heard the evidence do not accept that the claimant was told off for working too slowly. The feedback given to the claimant as a whole was balanced and mainly positive. Observations conducted by the respondent have the purpose of checking levels of service and assisting employees to improve. An observation does not have the function of disciplining an employee. The Tribunal found that Ms. Bilan simply pointed out ways the claimant could improve his service.
- Allegation 8 : 4 June 2015 Ms. Bilan told the claimant not to use his mobile phone at work
49. The respondent has a policy of no mobile telephone use whilst working on the till. The claimant was seen by his manager using his mobile phone whilst at the till. He accepts he was doing so. This was in breach of the policy. At the time when he was told not to use his mobile phone the claimant did not state it was because his wife was ill in hospital. Nor did the claimant raise any concerns that he felt he was being treated unfairly or raise that other employees were using their mobile phones.
50. The claimant stated that if the Tribunal had the opportunity of seeing the CCTV it could be noted that others were using their phones and were not told off. After such a considerable delay CCTV material was not available. However, the claimant had no evidence that Ms. Bilan had seen others using their phones directly or on the CCTV footage. The Tribunal were not persuaded that the claimant was targeted by Ms. Bilan or treated less favourably than others. The evidence of Mr. Bilan was accepted by the tribunal that nobody on her shift is allowed to use a mobile phone whilst on the shop floor. Occasionally managers use their phones to contact other managers or staff members but this was not a common occurrence. There is a slight difference for managers.

Allegation 18 : Ms. Bilal said “so what” when the claimant stated he could not handle meat for religious reasons

51. The claimant did not provide a date for this allegation. The Tribunal finds at some point in 2017, it is more likely than not this occurred prior to 7 December 2017 (when the claimant was last in work) Ms. Bilan requested the claimant to refill the chillers. The claimant responded that he was a Hindu and could not touch meat for religious reasons. Ms. Bilan did enquire further with the claimant about this; she asked the claimant why he was able to touch meat products when working on the till. The claimant stated that filling the chiller took longer and so that he had a longer period when he was in contact with the meat products, scanning them and putting them into a customer’s bag. Ms. Bilan left it at that and arranged for another employee to fill the chiller cabinet. The claimant did not raise any concern at the time with Ms. Bilan about this discussion or suggest he was being discriminated against because of his religion. The Tribunal reject the suggestion that Ms. Bilan said “so what”.

Allegation 21 : Ms. Bilan incorrectly noted the words of the claimant as “I will do what I want to do”

52. An investigation meeting took place with Sohail Abbasi as investigator with the claimant on 22 November 2017 about the claimant’s holiday leave request. Ms. Bilan was the note taker. In the course of the meeting Ms. Bilan perceived that the claimant stated “ *I will do what I want to do and that’s why I booked my tickets..*”. Ms. Bilan recorded this in her handwritten notes.
53. At the end of the meeting the claimant was given an opportunity to review the notes and sign and confirm the notes as a true reflection of the discussion. The claimant reviewed the notes and stated he had not said the specific phrase. At his request and on the agreement of Sohail the notes were amended. The Tribunal are satisfied that Ms. Bilal had no intention to misrepresent the notes but recorded what she believed she heard.
54. During the grievance investigation by Mr. O’Shea spoke to Sohail about the notes. Sohail explained that he felt that Ms. Bilan was struggling to understand the claimant but he felt that the notes were an accurate reflection of the meeting.
55. The Tribunal finds that Ms. Bilan did perceive that the claimant stated “ *I will do what I want to do*”. The Tribunal is in fact satisfied that the claimant did initially say “ *I will do what I want to do*” because he has used this phrase in the disciplinary meeting with Tracey Richards (the claimant amended the notes to say this); further in the context of his holiday leave; the claimant knew he had not received authority from his manager for the holiday leave but he took it anyway. The claimant did what he wanted to do. Further in the course of Mr. O’Shea’s investigation Sohail felt the notes made by Ms. Bilan were an accurate reflection of the meeting.

Allegation 22 : The claimant was reprimanded in relation to the way he asked customers to provide or sign up for nectar cards

56. Ms. Bilan discussed with the claimant the observations she made about his service on 23 February 2017 (page 300). The observation was mainly positive about the claimant. The Tribunal find it was well balanced. Ms. Bilal did not give the claimant any red markings (the lowest scores) but mainly greens (the highest rating) and some amber scorings. Ms. Bilal drew to the

claimant's attention at page 300 "*offers loyalty cards..sometimes too pushy.*" In the agreed areas of focus Ms. Bilal wrote "*Generally customer service is very good, offers loyalty cards to all customers but sometimes can come across too forceful.*" Ms. Bilan explained to the Tribunal that there were occasions when the customer had actually walked away from the till and the claimant continued to suggest to the customer they should have a nectar card. The claimant signed this record on 23 January 2017 and did not appear to have any concerns about these observations. The Tribunal rejects the suggestion that the claimant was reprimanded in any way about this matter.

Submissions

57. The respondent provided a skeleton argument and supplemented it with oral submissions. The respondent submitted all claims were out of time. Mr. Sanders submitted since the claimant commenced early conciliation on 13 April 2018, any actions which took place prior to 14 January 2018 will be prima facie out of time. Applying that to each of the Claimant's claims:
- a. The last occasion about which Claimant complains in his witness statement in relation to Allegation 4 (reprimand for drivers driving off without paying) is 10 May 2017, more than 7 months out of time;
 - b. The last occasion about which Claimant complains in his witness statement in relation to Allegation 5 (being asked to work faster) is also 10 May 2017, again more than 7 months out of time;
 - c. Allegation 8 is a standalone allegation of being 'told off' for use of a mobile phone – this is alleged to have take place on 4 June 2015, more than two and a half years out of time;
 - d. Claimant has not made it clear in his claim forms, case management discussions, or witness statement when allegation 18 (that Ms Bilan responded 'so what,' when Claimant said he could not handle meat for religious reasons) is said to have taken place, but as to this allegation:
 - i. It is for Claimant to show that he has suffered less favourable treatment within the relevant time limits, C has failed to do this by not setting out any dated occasions on which this is alleged to have occurred;
 - ii. Even absent this failure to specify any dates, Claimant was absent from work from 7 December 2017 to 2 January 2018, and although he returned to work on 3 January 2018, he was invited to attend an investigation meeting on that day and suspended following the meeting, after which he did not return to work;
 - iii. The latest that this allegation can have possibly occurred therefore is prior to 7 December 2017, and as a result it is more than a month out of time at the very least;
 - e. Allegation 21 is a standalone allegation that Ms Bilan recorded words in a minute that C did not say – this is alleged to have occurred on 22 November 2017, almost two months out of time;
 - f. C has not made clear at any stage the exact date on which Allegation 22 is said to have taken place, however it is expressly pleaded to be in 2015 or 2016, and therefore more than a year out of time at the very least.

58. Consequently, every single one of Claimant's allegations are out of time, and many are very significantly out of time. As a result, the question of continuing act does not arise, since even if there was any continuing act, it did not extend to within 3 months of the claim.

59. The respondent submitted that the Tribunal will therefore only have jurisdiction over any of Claimant's claims if Claimant can show that he presented his claims within such further period as was just and equitable. As to this aspect:

- a. The burden is on Claimant to show that there should be an extension of time and this is the exception rather than the rule (*Robertson*);
- b. It does not appear that Claimant has advanced reasons within his witness statement as to why it would be just and equitable to extend time in relation to the complaints which he makes, in particular those which appear to be historic (nor has any application to extend time been made);
- c. As a result, there is no basis on which the Tribunal can extend time;
- d. To the extent that Claimant seeks to advance reasons at the final hearing, or the Tribunal would be assisted by further submissions on this issue, this will be addressed orally.

60. The respondent submitted that Ms Bilan has given a clear account in her witness statement as to the reasons why discussions were required with the Claimant about these issues, and it is submitted that her account should be preferred as to the reasons for such treatment and how other staff were and/or would have been treated in the same circumstances. C also made no complaint about any of these matters at the time that they were alleged to have been done.

61. Further, Allegation 21 is not accepted by Ms Bilan, and is a matter which the Tribunal will have to determine following oral evidence, however certain points can be made:

- (a) C's case is that he was never in fact required to handle meat products [**B/159, para.31**] (although C's position on this now appears to have changed);
- (b) Ms Bilan therefore treated C more favourably by not making him undertake the tasks of handling meat in the chiller, being sensitive to his beliefs (**Bilan/§24**);
- (c) C did not raise this allegation at the time at which it was allegedly done (although exactly when this is said to have occurred is unclear), nor even when he raised a grievance against Ms Bilan (**O'Shea/§40-43**), which tells against the credibility of this allegation.

62. As to Allegation 22, regarding the minutes of the meeting on 22 November 2018:

- a. The minutes of a meeting will never be a perfect verbatim record of the meeting – managers cannot be expected to be court stenographers;
- b. C was given an opportunity to review the minutes and asked to change the relevant phrase, which was immediately done [**B/323**];
- c. Even if the phrase was wrongly recorded, there is no basis for any inference that this was done in any way deliberately;

- d. In any event, the Claimant used identical words to those recorded by Ms Bilan in the course of his disciplinary hearing (with those words being specifically and directly added to the minutes by him) (**Richards/§8; [B/347]**) – this suggests that Ms Bilan’s original note may have in fact been correct;
- e. Even if it was not correct however, the Tribunal is invited to accept Ms Bilan’s account that this was due to the speed and clarity of Claimant’s comments rather than any deliberate action (the Tribunal will of course have an opportunity to observe the speed and clarity of answers given by the Claimant in order to further assess this explanation).

‘Something more’

63. With the exception of Allegation 18, which is linked to C’s religion, C appears to have put forward little basis from which the Tribunal could conclude that there was a ‘something more’ to indicate that the alleged actions were done because of any protected characteristics, rather than, for example, because of genuine shortcomings in his work which were addressed by management.

64. The claimant made oral submissions. He submitted that he obtained an ACAS certificate to bring his claims and this was not out of date. He stated he took leave because he had registered the holiday leave and he was discriminated against it by being refused the leave. The claimant stated his probation document recorded what he had to do in his role and it was an important document that the tribunal should have seen. He said he had complained to managers about discrimination but they did not forward it or record it. The CCTV could be obtained from the hard drive from the manufacturer. He submitted he can not handle meat because of religious reasons and no one gave him a separate till like the other employee who could not handle alcohol. He was forced to do this job to earn his bread. If the CCTV was watched it would show customers come to his till that affects his speed. He is the only person with a counselling notice for drive offs. The respondent has not produced any drive off counselling notices for other employees. The respondent submitted late papers. He was using the phone when his wife was in hospital this could be verified by the CCTV. As for nectar cards, he did not financially benefit to provide these to customers. He was not forceful. This has affected his life and he deserved compensation. The Tribunal should take action to support him and future staff. The claimant felt that the Tribunal had given him a fair opportunity to put his case.

Conclusions

65. Allegation 4 : From 2014 until the claimant’s dismissal he was spoken to on a number of occasions about customers not paying.
66. The claimant pursues this as an allegation of direct race discrimination. The Tribunal has already found that there was one occasion when the claimant was counselled by Ms. Bilan because the claimant had failed to follow procedure. Insofar as the claimant was spoken to about drive offs this was merely for the collation of information. Taking into account the evidence namely this context, the evidence of Ms. Bilan that other colleagues were spoken to about drive offs and/or counselled where there was a breach of procedure, the Tribunal do not find the claimant has established a prima facie case. The Tribunal do not find that

the claimant was subject to less favourable treatment on grounds of his race. The claimant was counselled because he did not follow the procedure.

67. Allegation 5 : Until October 2014 the claimant was asked to work faster by Mr. George, manager and Mr. Arthur; from October 2014 the claimant was told to work faster by Ms. Bilan, duty manager, Ms. Emma Traverns, Mr. Michael, Mr. Jos, Ms. Sharon

68. The claimant raises this allegation as acts of direct race and age discrimination. The issue of the speed of an employee in the respondent's business is a matter reflected in observations. The respondent has not called any evidence about the two incidents referred to in the claimant's witness statement namely 6 October 2016 and 10 May 2017. However, the claimant on his own evidence has explained there was a delay in his working that day because of a mistake. The Tribunal consider the mere comment of working faster made to the claimant without something more does not establish a prima facie case of discrimination of either grounds of age or race. If there was a comment that day (6 October 2016) to the claimant to speed up it was more likely to be because there was a delay due to a mistake. In respect of 10 May 2017 there is sparse evidence from the claimant save that it is him who attaches his age to his speed. There is no evidence to link the comment to his race. Again, the Tribunal finds a mere comment to speed up does not establish a prima facie case of discrimination on the grounds of race or age. Ms. Bilan had cause to discuss the claimant's speed in her observation of him on 23 February 2017 at page 300. This was nothing to do with race or age.

69. Allegation 8 : 4 June 2015 Ms. Bilan told the claimant not to use his mobile phone at work

70. The claimant has identified the date of this allegation as 4 June 2015 and alleges it is an allegation of direct race discrimination. There is policy prohibiting the use of mobile phone use at the till. The claimant was seen by his manager using his phone at the till. He did not explain at the time that his wife was in hospital or state others use their phones on the tills or state that it was unfair that this issue was raised. The claimant is unable to establish that Ms. Bilan had seen others using their mobile phones on the tills and not spoken to them about it. The fact that the claimant was spoken to about a breach of procedure was appropriate and reasonable by management and in itself does not establish a prima facie case. The treatment from Ms. Bilan was because the claimant breached policy and for no other reason.

71. Allegation 18 : Ms. Bilal said "so what" when the claimant stated he could not handle meat for religious reasons

72. The claimant says that this was direct religious discrimination. It could not have occurred after 7 December 2017 when he flew to India. The claimant has not provided any evidence to establish it is contrary to his Hindu faith to handle meat. The Tribunal reject any suggestion that Ms. Bilan stated "so what" when the claimant said he could not handle meat for religious reasons. She engaged in a discussion entirely reasonably about his assertion on the basis that he was handling meat at the till. The Tribunal find what the claimant was saying was inconsistent; he could not stack the meat in the chiller but he could handle it on the till. The Tribunal reflect that this discrepancy is probably explained by the fact the claimant liked to work on

the till and only the till and was not prepared to undertake other tasks he perceived were not his role.

73. Allegation 21 : Ms. Bilan incorrectly noted the words of the claimant as “I will do what I want to do”

74. The claimant asserts this is an allegation of direct race, religious and age discrimination. The Tribunal have already found as a fact that Ms. Bilan perceived the claimant said this because he did say this. There was no intention on the part of Ms. Bilan to misrepresent what the claimant said. To note a comment genuinely heard (and as the Tribunal finds was heard) can not show a prima facie case of discrimination on any basis. The words were noted because the words were said.

75. Allegation 22 : The claimant was reprimanded in relation to the way he asked customers to provide or sign up for nectar cards

76. The claimant alleges that this was direct race discrimination. The Tribunal has found the claimant was not reprimanded but his manager observed this behaviour; discussed with the claimant and he signed off the record. To simply observe and discuss this issue of performance with an employee is entirely reasonable and appropriate of management. It is not less favourable treatment. There is no evidence that an actual or hypothetical comparator would have been treated differently. It does not indicate without anything more a prima facie case of discrimination. This claim is rejected.

Time

77. All allegations of discrimination have been rejected by the Tribunal. There are no continuing acts of discrimination extending over a period established by the claimant. For completeness it now considers the issue of time.

78. The Tribunal finds that all alleged acts of discrimination relied upon by the claimant are out of time. The claimant commenced early conciliation on 13 April 2018, any actions which took place prior to 14 January 2018 will be prima facie out of time. The last occasion about which Claimant complains in his witness statement in relation to Allegation 4 (reprimand for drivers driving off without paying) is 10 May 2017, more than 7 months out of time. The last occasion about which Claimant complains in his witness statement in relation to Allegation 5 (being asked to work faster) is also 10 May 2017, again more than 7 months out of time. Allegation 8 the allegation of being ‘told off’ for use of a mobile phone is alleged to have taken place on 4 June 2015, more than two and a half years out of time. The claimant has not established the date in his evidence as to when allegation 18 (that Ms Bilan responded ‘so what,’ when Claimant said he could not handle meat for religious reasons) is said to have taken place, but as to this allegation. However, since the claimant was absent from work from 7 December 2017 with no further managerial instruction from Ms. Bilal it must have occurred before 7 December 2017. In the circumstances it is at least one month out of time. Allegation 21 namely that Ms Bilan recorded words in a minute of a meeting is alleged to have occurred on 22 November 2017, almost two months out of time. In respect of allegation 22 although the claimant has not put forward an exact date, the documentation of the observation would indicate the discussion took place on 23 February 2017 some 11 months out of time.

79. The burden rests upon the claimant to persuade the Tribunal that it is just and equitable to extend time. The Tribunal is mindful of the guidance of the Court of Appeal in **Adedeji** which cautions against using section 33 of the Limitation Act 1980 in a mechanical way but guides the Tribunal to assess all relevant factors which will always include the length of and reasons for delay. There is no evidence provided by the claimant to explain the length of the delay or the reasons for delay. These are critical factors in exercising the discretion to extend time. In the absence of such evidence there is no material for the Tribunal to exercise its discretion to extend time. It is not just and equitable to extend time.
80. All the discrimination claims are dismissed.
Deposit order
81. Employment Judge Perry at a Preliminary Hearing on 15 August 2019 made deposit orders in respect of all the allegations in the sum of £16 each, a total of £96. In his order Judge Perry made it very clear about the significant difficulties the claimant faced in establishing discrimination in respect of these matters.
82. At the end of the hearing the respondent applied for the payment of the deposit to the respondent pursuant to rule 39 (5) (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. The respondent's application was based on the fact that the reasons given for the deposit order were substantially the reasons given by the Tribunal to dismiss the claims at the final hearing. The respondent sought to reserve its position as to costs.
83. The claimant responded that he had lost.
84. The Tribunal took into account the reasoning of Employment Judge Perry and the difficulties he had clearly identified to the claimant in August 2019 of succeeding in the allegations of discrimination. The Tribunal concluded that the reasons given by Employment Judge Perry for the deposit order were substantially the reasons given by the Tribunal in rejecting the claimant's claim. Insofar as it is necessary, the Tribunal further considered the overriding objective and concluded that in all the circumstances that matters had been made clear to the claimant that his claims had little reasonable prospect of success and he continued to litigate these issues for nearly two further two years, it was in the interests of justice that the deposit totaling £96 should be paid to the respondent. In any event pursuant to the rule the deposit will be paid to the respondent.

Employment Judge Wedderspoon

29 July 2021

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