EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr C Duamroh DFS Trading Limited

Heard at: **London South Employment Tribunal (Via CVP digital hearing)**

On: **14 June 2021 – 17 June 2021**
17 September 2021 (In Chambers)

Before: **EJ Webster**
Mr P Adkins
Ms A Sansome

Appearances
For the Claimant: **In Person**
For the Respondent: **Mr Zovidavi (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claims for direct race discrimination are not upheld.
2. The Claimant's claims for direct age discrimination are not upheld.
3. The Claimant's claims for harassment related to age are not upheld.
4. The Claimant's claims for harassment related to race are not upheld.
5. The Claimant's claims for unauthorised deduction from wages and/or breach of contract are not upheld.
6. The Claimant's claim for constructive unfair dismissal is not upheld.

REASONS

The Hearing

1. The hearing was held via Cloud Video Platform with all parties and witnesses appearing via video link. There were sporadic issues with connectivity but broadly, the hearing proceeded smoothly in this regard. Neither party objected to the hearing being conducted on this platform.

2. Preparation for this hearing was very poor. We allowed additional disclosure from both parties every day until the last day of evidence on day 4. The tribunal gave reasons regarding each acceptance of additional documents as and when they were allowed. The respondent had failed to disclose many relevant documents to the claimant and failed to include numerous relevant documents in the bundle. The bundle lacked such basic documents as the ACAS certificate and the Case Management Summary from a previous hearing. Mr Zovidavi worked hard to ensure that we were provided with relevant documents throughout the hearing but those instructing him and the respondent itself appear not to have made similar efforts for the disclosure exercise or in the preparation for the hearing. The majority of the undisclosed documents would have been in the possession of the respondent and given that they have been legally represented throughout, the failure to disclose those documents was concerning. Further, the respondent's solicitor had failed to appreciate that the claimant had sent them a number of witness statements in advance of the hearing and so the respondent was initially unprepared to deal with 4 of the claimant's witnesses.

3. Whilst the Tribunal made extensive allowances for the fact that the claimant was a litigant in person without access to legal advice, it is notable that he sought to rely on at least one additional document that was not in the bundle (even after all the additional disclosure that continued throughout the hearing) and appeared not to have been disclosed to the respondent. He also had no proper grasp of the documents already in the bundle and appeared not to have read many of them. Further the claimant suggested that his witness statement was not complete because he thought, despite the clear written orders to the contrary, that he would be able to supplement it with oral evidence in chief throughout the hearing. In order to ensure that the parties were on an equal footing and in accordance with the Overriding Objective, we allowed him considerable latitude with his cross examination and his submissions to ensure that we understood his case properly. We also accepted a combination of three documents as constituting his witness statement and evidence in chief to the Tribunal:

   (i) his 'Skeleton argument'

(ii) a document that was a letter dated 14 October 2020 that commenced with “I seek to ask for a total of £70,000 GBP…” but gave evidence as well as setting out the claimant’s losses and
(iii) his ET1

4. The claimant had also failed to organise his witnesses properly and this led to several not turning up and one witness having to give very hurried evidence during his lunch break. The Tribunal tried to be as flexible as possible to ensure that his witnesses were able to give evidence and be questioned.

5. We heard an application to amend the claim by the claimant on the first day which was partly allowed and partly not. Oral reasons were given at the time. The allowed changes are reflected in the list of issues below. We also considered the claimant’s application for witness orders for 2 witnesses – both of which were refused. Full reasons were given at the hearing. In brief, the applications were made on 28 May well after the witness statements had been exchanged in October 2020 and without any reason given for the lateness for the application. The claimant stated that he was aware that he wanted these two people to be witnesses at the original Case management discussion in April 2020 but gave us no good reason as to why he failed to make an application between that hearing and 28 May 2021. He was also unable to convincingly articulate what evidence they could give us that would be relevant to these proceedings and that was not being provided by the witnesses we were already hearing from.

6. As stated above, the original bundle was added to throughout the hearing. We had a digital bundle originally numbering 263 pages plus significant numbers of additional documents thereafter that were provided piecemeal. We were provided with written witness statements for:

(i) The Claimant
(ii) Mr S Kithima (for the claimant)
(iii) Mr J Higton (for the claimant)
(iv) Mr G Reynolds (for the claimant)
(v) Mr S Nicholas (for the claimant)
(vi) Mr L Fellowes (for the claimant)
(vii) Ms D Lang (for the claimant)
(viii) Mr A Rasheed (for the claimant)
(ix) Mr D Porter (for the respondent)
(x) Mr S Choudhery (for the respondent)
(xi) Mr S Cook (for the respondent)
(xii) Ms C Hargreaves (for the respondent)

7. We heard oral evidence for all of the above apart from Mr S Kithima, Ms D Lang and Mr A Rasheed. We have therefore attached less weight to their

statements as the respondent and the Tribunal had no opportunity to challenge that evidence.

8. The panel reconvened in chambers on 17 September. This was the earliest date available to all members of the panel.

The Issues

9. Constructive Dismissal

9.1 Each contract of employment has an implied duty of trust and confidence. Mr Duamroh says that the company was in breach of this duty by suspending him without due cause and/or accusing him of aggressive behaviour without proper cause. Alternatively, this was the last straw, following previous instances of bullying and harassment, which led to his resignation. The instances of bullying and harassment relied upon are:

(i) Mr Porter shouting at him as alleged that he should go back to his own country; or
(ii) He was punched by his Store Manager, Mr James Meakin
(iii) 2014-16 Mr Meakin made a racist remark – "All you guys can be British, but you can never be English."
(iv) 2014-17 A statement was fabricated by his manager that he had insulted a customer
(v) 2016-17 He was accused by the Store Manager of threatening to murder another member of staff, then told "I have got you by the balls and there is no escape."
(vi) 2016-17 He was transferred to the Croydon Store while this was being investigated and says that constant bullying began.
(vii) 2018-19 He was questioned by Mr Cook for allegedly stealing a customer from Niki, another salesperson, although the incident had been invented by her.
(viii) 2018-19 He was refused commission payments (sign off refused) four times
(ix) 2018-19 The store manager, Mr Darren Porter, saying to him "I hate you" in front of colleagues.
(x) January 19 A regional manager, Mr Sean Cook shouted at him "I hate you, I have always hated you, my daughter might like you but I hate you, come here now".
(xi) Early July 19 Mr Porter shouted at him to "shut up" and told "You can leave if you don't like what is being said by me." Further, that he could leave and get a job at McDonald's and that "people like you should go back to your own country."
(xii) 22 July 19 He was suspended. (The respondent says that it was 22 August)
(xiii) 27 August 2019 He was invited to a disciplinary hearing on a date when he was due to be on holiday in Ghana.

9.2 Did Mr Duamroh resign because of these alleged breach(es)?

9.3 Did Mr Duamroh delay too long before resigning and so affirm the contract?

10. Section 26: Harassment on grounds of race or age

10.1 Did the respondent or any of its employees engage in unwanted conduct as follows:

(i) Mr Porter shouting at him as alleged that he should go back to his own country; or (**Race)**

(ii) He was punched by his Store Manager, Mr James Meakin (**Race and age)**

(iii) 2014-16 Mr Meakin made a racist remark – "All you guys can be British, but you can never be English." (**Race)**

(iv) 2014-17 A statement was fabricated by his manager that he had insulted a customer (**Age)**

(v) 2016-17 He was accused by the Store Manager of threatening to murder another member of staff, then told "I have got you by the balls and there is no escape." (**Age)**

(vi) 2016-17 He was transferred to the Croydon Store while this was being investigated and says that constant bullying began. (**Race and age)**

(vii) 2018-19 He was questioned by Mr Cook for allegedly stealing a customer from Niki, another salesperson, although the incident had been invented by her. (**Race and age)**

(viii) 2018-19 He was refused commission payments (sign off refused) four times (**Race and age)**

(ix) 2018-19 The store manager, Mr Darren Porter, saying to him "I hate you" in front of colleagues. (**Race and age)**

(x) January 19 A regional manager, Mr Sean Cook shouted at him "I hate you, I have always hated you, my daughter might like you but I hate you, come here now". (**Race and age)**

(xi) Early July 19 Mr Porter shouted at him to "shut up" and told "You can leave if you don't like what is being said by me." Further, that he could leave and get a job at McDonald's and that "people like you should go back to your own country." (**Race and age)**

(xii) 22 July 19 He was suspended. (The respondent says that it was 22 August) (**Race and age)**

(xiii) 27 August 2019 He was invited to a disciplinary hearing on a date when he was due to be on holiday in Ghana. (**Race and age)**

(xiv) 4 September 2019 He resigned giving one week's notice. (**Race and age)**

10.2 Was the conduct related to his race or age?

Note, during the hearing, the claimant clarified that some of the above incidents were caused by race or age not both. We have therefore put the characteristic relied upon in bold and brackets.

10.3 Did the conduct have the purpose or effect of violating Mr Duamroh's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

11. Section 13: Direct discrimination on grounds of race or age

11.1 Did the company, in;

(i) suspending him,

(ii) taking steps to justify his dismissal without proper cause, or

(iii) subjecting him to any of the treatment not found to have been harassment treat him less favourably than it treated or would have treated someone else in the same circumstances apart from his race or age?

In particular, Mr Duamroh compares him circumstances with him colleague the older colleagues dismissed in 2019: John Ogodo, Glen Reynolds and Stefan [clarified to be Stephen Johnson] (surnames unknown) for age discrimination.

For race discrimination, he relies upon John Ogodo, Chris Bentt and Stefan [clarified to be Stephen Johnson].

11.2 The company has not set out any justification defence to any age discrimination that is found to have occurred.

12. Time limits

12.1 The claim form was presented on 31 October 2019, within a month of the end of efforts at early conciliation through ACAS. That period began on 10 September 2019 and so any act or omission which took place more than three months before that date, i.e. before 11 June 2019, is potentially out of time.

12.2 To complain of any earlier events in his discrimination claim, Mr Duamroh must prove that they were part of a course of conduct extending over a period of time and ending after that date, or persuade the Tribunal that it would be just and equitable to extend the normal time limit.

13. **Unauthorised Deduction from wages**

13.1 Was the claimant contractually entitled to be paid the following:

(i) The sum of £750 in respect of an 'NPS' payment due to him in his final month of employment, September 2019?

(ii) 'Sign off' which would have resulted in a permanent pay rise

<u>Facts</u>

14. We have made findings only in relation to the facts relevant to the issues set out above. All our findings are made on balance of probabilities.

15. The Claimant was employed from 24 May 2011 as a sales-person. The respondent is a large furniture sales company. The claimant initially worked in the New Malden Store until February 2016 and then worked in the Croydon

store until his employment terminated on 11 September 2019 when the claimant resigned. The claimant resigned whilst the respondent was part way through a disciplinary process against the claimant for alleged potential gross misconduct.

Overall observations

16. The Croydon store appeared to become a very negative workplace during the claimant's employment there. It was clear from several witnesses' evidence (from both sides of this dispute), that two factions developed there amongst the workforce and this led to frequent hostility between several members of staff, not just the claimant. The respondent introduced various managers to try to 'fix' that situation, some of whom we heard from. We consider that this factional backdrop was important context for the decisions made by all parties involved in the events we had to consider.

17. The claimant was a good salesperson with positive sales figures for most of his employment with the respondent. Despite this achievement, he was nevertheless viewed as a disruptive member of staff by some managers because of his willingness to challenge management on many aspects of his working life. We examine that properly below.

18. During the hearing before this Tribunal, the claimant challenged almost every set of the respondent's internal notes of any interviews or fact-finding meetings with him. During the Tribunal hearing, the claimant was given the opportunity to comment on what was wrong with each set of notes but he was not able to specify what was wrong with them. He produced no evidence that corroborated his suggestion that the respondent would carry out numerous investigations and fact findings with the intention of falsifying every single set of notes. The claimant accepted that parts of some of the notes were accurate but could not say with any specificity which parts were incorrect. On balance we accept that the notes in the bundle reflect what occurred during the meetings and investigations they record. They were broadly contemporaneous and we had no evidence from the claimant or otherwise to determine how they were unreliable or why so many different members of staff at the respondent, across such a long period of time during several different investigations, falsify their notes.

19. We found that the respondent witnesses were patchy in their plausibility. Mr Porter and Mr Cook's witness evidence was contradicted at times by either other respondent witnesses or the documentary evidence we were taken to. However we found that Mr Choudhery's evidence was reliable as his answers were often at odds with those more senior than him but were clear and reasoned.

20. The claimant's evidence overall was so frequently changeable and fluid that it was very difficult for us to trust the validity of what he said. He often gave

answers which contradicted earlier answers because they appeared to suit the question he was being asked. We found his challenges to the veracity of many of the documents to be largely baseless.

The New Malden store

21. The claimant was a sales person at the New Malden store from 2011 until approximately February 2016. He alleges that in 2014-2016 he was punched by a store manager, Mr James Meakin. The evidence we were (belatedly) provided with of the Fact finding exercise that the respondent carried out in relation to this incident states that it was in fact in May 2013. The notes we have of the fact finding for that are at pages 201-215 and state that the incident was on 6 May 2013. We find it odd that the investigation was not carried out until much later, nevertheless we accept that the incident itself occurred on 6 May 2013.

22. We conclude that there was an altercation between the two members of staff, the precise nature of which is unknown though we note that from the meeting notes the claimant confirmed that it was a couple of slaps with an open hand as opposed to a punch. We accept that once it was investigated, Mr Meakin was chastised via a letter but no formal sanction was imposed on him.

23. The claimant was concerned at the time that the original investigation and disciplinary action were not sufficient and he escalated the matter so that Mr Roffey and Mr Dave Paley then investigated it again. This resulted in further action being taken against Mr Meakin though we were not given any specifics on this point.

24. The claimant states that Mr Meakin also made the racist comment, “All you guys can be British, but you can never be English.” This differs from the statement he made in the note at page 201 which states “Tushar came up to me and said ‘you won’t believe this. James just said he’s got lots of foreigners working in here and the only one that understands him is Tom because he is English.”

25. Mr Thakkar, in his fact finding notes of 9 February 2016, stated that the following was said,

“Me and James were in the canteen and he asked what the inside news was. He said that the only guy in the store that is proper British is Tom, everyone else is from different parts of the world and has been brought up differently with different beliefs. That’s just his view. I don’t know if he was being serious.

DB How did you take that?

TT I just laughed, I was pretty shocked. I didn't know if he was serious or joking. I said what about Geraint, he's British. James just said No, he's Welsh."

26. On balance we accept that something around people's nationality and the fact that majority of the workforce not being 'English' was said by Mr Meakin based on the notes of the interview with Mr Thakkar.

27. The claimant states in his claim form that:

2) Graham Atkinson together with Ryan Heaton, falsified a statement to say that I had insulted a customer and I use the word falsified because unfortunately for them the customer came into the store to pay the balance on his invoice (a Nigerian just for the records),and after taking his payment I asked why he lied to my employers. He was angry, left and came back the next day. ("for the records on existing member of staff still in employment who witnessed this can be call to testify or confirm my story.) [page 13/14]

28. The Claimant provided no witness evidence in chief regarding this point, the only statement he makes about it is that cut and paste above from his Grounds of Claim. However he has produced nothing further to evidence it. The respondent witness (Ms Hargreaves) stated that despite checking the systems she had not been able to find any evidence of any fact-finding notes in relation to that incident. Given the many gaps in the disclosure exercise carried out by the respondent, and the fact that later on some notes of fact-finding meetings were found by Ms Hargreaves that she had earlier said did not exist, we do not give a huge amount of credence to the assertion that the incident did not occur simply because there were no notes about it. However, on balance, in the face of no evidence whatsoever from the claimant on this point, we find that the incident did not occur.

29. There was a grievance raised against the claimant alleging that he had said that he was going to kill someone. The claimant denied that he had said this. It was investigated by Chris Clennon his then line manager at the Croydon Store. Subsequently the claimant raised a grievance (page 54) against Mr Clennon alleging that he was trying to orchestrate his exit from the business. We accept the respondent's case that this led to the claimant being moved to Croydon given the break down in his relationship with Mr Clennon (whom the claimant had also previously reported for driving whilst banned).

30. It was accepted by both parties that Mr Clennon was a black man of a similar age to the claimant (55 as opposed to 53).

31. It is clear that the relationship between Mr Clennon and the claimant was fractious. We note that Mr Clennon was ultimately dismissed from the business shortly after the claimant was transferred to Croydon and whilst we

do not have any detail of the reason for leaving, the respondent's witnesses were not positive about Mr Clennon. In light of the accusations and counter accusations that were being made between the claimant and Mr Clennon, we think it is more likely than not that a threatening statement was made by Mr Clennon against the claimant. Whilst we considered the respondent's submissions that the claimant had not brought this up in writing previously, we find that he did bring it up at the fact-finding meeting with Nesha which was the first opportunity he had to discuss the situation with the investigator.

32. As a result of the grievances and counter grievances the claimant was transferred to the Croydon branch. We find that this was a reasonable step in circumstances where his relationship with his line manager had all but collapsed (particularly in light of our finding above that Mr Clennon was threatening him) and it was appropriate for HR to protect the claimant and move him as a temporary measure.

33. Further we accept that the claimant was pleased with the move within the first few months as expressed in his email to HR dated 19 February 2016 and in an interview with HR on 31 March 2016. Further, we accept that he asked to be permanently assigned to the Croydon store and in fact never worked at another premises thereafter. We consider that he agreed to and liked his move to the Croydon store at the time and it was on his request that it was made a permanent move.

Events at the Croydon Store

34. The claimant's employment in the Croydon store commenced positively. He got on with his then line manager, Mr Fellowes, and respected him. He performed well and behaved reasonably, which was at odds with what other managers had expected when they transferred him to the Croydon store. The claimant's case states that from the departure of Mr Fellowes onwards, he was subjected to unfair and discriminatory treatment. Given the lack of specificity regarding dates in some instances, we have dealt with each incident relied upon by the claimant in the order they appear in the List of Issues.

CCTV and fabricated allegation regarding customer 'stealing'

35. The issue of whether there was functioning CCTV within the Croydon store was contentious and we received several conflicting versions of how it operated. Mr Cook stated that the cameras in store were 'dummy' cameras and did not record. Mr Fellowes and Mr Higton both stated that the cameras worked and were fully operational. Mr Porter stated that they were only external cameras, though clarified on questioning from the tribunal that he meant they could only be reviewed by external contractors and that internal staff did not have the ability to view the footage unless they had a PIN and that he did not have the PIN at the relevant time.

36. Mr Choudhery stated that the cameras worked, that the manager could see the footage on a screen and that there was a processor/reviewing unit in the office too. It was not clear whether this processor allowed the manager to review the footage as it happened or whether they could review it at a later date. We find that given the existence of this equipment in the office, it was reasonable for the claimant to believe that there was operational CCTV and believe that the managers could review it.

37. However, we also consider that if the system was functioning to the extent that old footage could be reviewed in store, then it is more likely than not that the respondent would have taken those steps in respect of the incidents discuss below and in general. None of the managers we heard from gave examples of having reviewed 'old' footage or reviewing it for any purpose. We find that it is more likely than not that the live feed footage was readily accessible and that there was probably access to very recent footage in store. However, having considered all the evidence from all the managers on this matter we consider that it is not likely that archive footage was accessible in store other than via a PIN that the managers did not have for a period of time.

38. Despite those conclusions, we also find that there was no attempt made by the managers in this case to review the CCTV footage at any point regarding the incidents the claimant now relies upon.

39. With regard to the incident where Niki allegedly complained to Mr Cook about the claimant stealing her customer – we find that it is very plausible that Niki made such an allegation. We also find that Mr Cook is likely to have spoken to the claimant about this and warned him not to do it again. We accept that this was done without any formal process being followed. Given the frequency with which complaints like this were said to be raised at the Croydon store, we do not think it was unreasonable for a senior manager to informally warn a sales person about following the rules regarding customers if it had been suggested by another colleague that they were not following the rules. We do not consider that there is any reason to suppose that this situation was caused or prompted by anything other than Niki's complaint to Mr Cook. In his evidence to the Tribunal, the claimant conceded that this incident and Mr Cook's behaviour, had nothing to do with his race or age.

Commission payments and 'sign-off'

40. We were surprised that the respondent did not disclose its written policies for the commission structures at the relevant time. Given the apparent complexity and different levels of entitlement all the witnesses agreed were in operation, we find it implausible that there were no written policies or contractual documents setting out the different types of 'sign offs' and payments.

41. Each respondent witness gave a different account of the way in which 'sign off' worked. The claimant's version was different again. The claimant's other witnesses did not comment on this issue to any significant extent. The claimant's case was that he was contractually entitled to be signed off by his store manager if:

    (i) he was not subject to a disciplinary sanction,
    (ii) he hit his sales targets and KPIs for 92 days, and
    (iii) he had appropriate customer feedback.

42. The claimant was unclear as to whether he felt that satisfying these criteria triggered his contractual entitlement to pay or whether his entitlement was only triggered when the store manager signed him off.

43. The respondent witnesses stated that there was then an additional layer of sign off required whereby the Regional Manager also had to sign off on the Store Manager's sign off. Mr Choudhery stated that even once sign off by the Regional Manager had been achieved, additional targets had to be met and sustained to justify the additional payment in any given month.

44. We accept the respondent's witnesses evidence that such a substantial increase in pay (an ongoing payment of £300 per month) was subject to a Regional Manager signing it off and the additional targets as set out by Mr Choudhery. We found Mr Choudhery a reliable and helpful witness whose answers were clear and considered and he did not shy away from contradicting his colleagues when necessary.

45. The basis for a Regional Manager signing someone off was more opaque than the store manager criteria listed in paragraph **40** above. In the absence of the written policies we have found it difficult to determine this issue. On balance however we find that it is plausible that there was an overall determining factor of whether the employee was doing his job well taking into account 'soft' criteria such as behaviour and interaction with colleagues. As we will go on to comment, we find that at the time the Croydon store was experiencing a huge number of behavioural difficulties from several members of staff meaning that it was generating a large number of grievances and complaints and appeared to us to be a difficult place to work and manage - with two separate, apparently warring, factions.

46. In this context, we find that Mr Cook's decision not to trust Mr Higton's sign off of the claimant and to decide that the claimant's behaviour did not meet the vague criteria we mention above, was understandable. The claimant and Mr Higton were both in the middle of significant concerns being raised about the entire store. The claimant's relationships with various colleagues were fractious throughout his employment and Mr Higton was head of one of the

warring factions at the store. We consider that it was this difficult, store-wide atmosphere in Croydon that prompted Mr Cook's decision not to sign the claimant off.

Negative comments to the claimant

47. The claimant has accused both Mr Porter and Mr Cook on different occasions of saying 'I hate you'. He has provided no evidence to corroborate those allegations save for his witness statement. Both Mr Porter and Mr Cook deny saying it.

48. Whilst we accept that the relationships within the Croydon store and its management were strained, we do not find it plausible that managers of the seniority of Mr Porter and Mr Cook would tell an employee, even if they were angry, that they hated someone. We find it even less plausible that Mr Cook would have referred to his daughter (who had previously worked with and liked the claimant) and said that despite her opinion he hated the claimant. Whilst negative jibes may have occurred, we do not accept that this phrase was said by anyone, much less two separate managers on two separate occasions.

49. We heard evidence that the claimant was vocal during staff meetings and we accept Mr Porter's evidence that he had to be assertive to maintain control during meetings with the sales team in Croydon. We put this again in the context that there was a toxic atmosphere by this stage with at least two warring factions within the store. Mr Fellowes also accepted that the claimant needed to be dealt with firmly and it is also clear from all the documents we have that the claimant frequently spoke up and challenged behaviour from staff whatever their rank. Therefore we conclude that it is more likely than not that Mr Porter told the claimant to 'shut up' and may well have said that if the claimant did not like the rules he could find somewhere else to work. However, we find that any such conversation or challenge would have occurred because of the claimant's challenging and, at times, disruptive behaviour during these meetings. The claimant provided us with no evidence to suggest that these comments related to the claimant's race or age either directly or indirectly.

50. With regard to the comment 'people like you should go back to your own country' we do not accept that this was said. Even on the claimant's evidence a large proportion of the staff at the Croydon store were from a BAME background. Further we accept Mr Porter's evidence that since the claimant's departure he has employed people from many different backgrounds including people who share the same racial background as the claimant.

51. We find that had Mr Porter said something like this, it is implausible that the claimant and many other members of staff would not have complained about it at the time. This was a workforce who were raising complaints on a regular

basis and we are sure that had such a comment been made by Mr Porter, it would have been raised at the time either by the claimant or another member of staff. Reference to this comment only appeared in the claimant's claim at the time of the Case Management Discussion. It is not mentioned in his Claim Form nor is there any contemporaneous reference to this statement. By contrast the complaint about Mr Porter telling him to shut up and work somewhere else was raised by the claimant at the time in a complaint. We therefore conclude, on balance of probabilities, that this statement was not said by Mr Porter otherwise he would have raised it at the same time.

Incident with Mr Boyd

52. On or around the 8 August 2019 the claimant was involved in an altercation with a colleague, Mr Nathan Boyd. The claimant had filmed Mr Boyd whilst Mr Boyd was sleeping on the shopfloor. When Mr Boyd realised that this had happened he became anxious and kept asking the claimant to delete the photo or tried to take the claimant's phone from him. The claimant refused and Nathan Boyd asked the claimant how he would feel if his picture was shared on social media. It was alleged that the claimant became physically aggressive and shouted at Mr Boyd when he said this and said '*I'm going to change where you sleep'* or words to that effect.

53. Following this an investigation was undertaken by Mr Porter. Several members of staff were interviewed regarding what they had seen. It is apparent from the investigation that there were many members of staff in close proximity to the altercation including Mr Choudhery who says that the row took place just outside his office and subsequently moved into his office. He says that the comment about changing where someone sleeps was made in his office. We find it puzzling that if the claimant was behaving as aggressively as is now being suggested, that nobody, including Mr Choudhrey, intervened. Nowhere in the Fact Finding interviews with any of the staff, is any intervention mentioned.

54. Nevertheless it is clear from all the interviews, including the claimant's, that the claimant said something along the lines of the fact that he would change where Mr Boyd slept. The claimant's explanation for this statement during the Fact Find was:

"I said to him if you know the rules on social media and the laws I guess you will not want to take picture and defame someone on social media. I told him that could end you up in prison. I told him this in the office and outside. I repeated this again when he was around the canteen area."

55. Based on this account alone, we consider that the claimant's comment was threatening regardless of the tone in which it was said. To suggest, in any tone, that a colleague is going to end up in prison is a hostile and threatening thing to say, particularly in the context of any argument.

56. The incident occurred on 8 August 2019. We accept that the claimant continued working for the rest of the day though we are not sure when in the day this happened. On the same day, the incident was referred by Mr Choudhery to Mr Porter as Mr Choudhery was a new assistant manager and felt out of his depth. Mr Porter was on paternity leave and not due to return until the 10 August. On his return he interviewed the claimant, Mr Boyd and Courtenay Ellis, a witness to the altercation.

57. Based on the email at page107 we find that the claimant was suspended that day (10 August), not on the following day (Sunday) as suggested by the claimant. This email clearly confirms that the claimant emailed HR just after being suspended that day.

58. The incident happened on a Thursday, the claimant and Mr Porter were both absent on the Friday and so the claimant not being suspended until Saturday afternoon does not suggest any significant delay on the part of the respondent in reacting to the situation. We accept that it was due to Mr Porter's absence on the first day, then the claimant's on the second day and finally some time to carry out a preliminary investigation, that led to the claimant being suspended when he was. We do not draw any inference, from the timing of his suspension, that the claimant's behaviour was not as threatening as is now being suggested.

59. Although not particularised in the list of issues the claimant suggested that the manner of his suspension was unreasonable in that he was escorted from the building and not allowed to get his belongings. We find that it was normal practice for an individual to be escorted from the premises on suspension. We base this on common practice across many industries and the claimant's own evidence that this had also happened to Mr Meakin in the New Malden store.

60. Shortly after this the claimant was invited to a disciplinary hearing by letter dated 22 August 2019 for a meeting on 27 August 2019 which fell whilst the claimant was due to be on leave. During the hearing the claimant withdrew the allegation that the decision to have the meeting whilst he was on leave was discriminatory or a breach of his contract. It was agreed that the hearing would be rearranged for when he got back from leave. The meeting never took place because the claimant resigned on 4 September and gave one week's contractual notice. We did not hear any evidence as to whether he worked that week or not but we believe he was actually on annual leave for that period.

NPS payments

61. It is again surprising that there was no written documentation around the payment of the NPS payments. However we accept Ms Hargreave's evidence

as to how this payment was calculated and all the respondent witnesses were consistent in saying that employees were paid for the month previous in the current month but you were only entitled to that payment if you remained employed in the current month.

'Hit List'

62. We were told that there were various documents which supported the existence of a 'hit list' or a management plan to get rid of the claimant and other members of staff. The claimant stated that he had stolen Mr Atkinson's day book whilst he was at the New Malden store. He said that in that book he saw a list of employees who were to be dismissed. We conclude that the claimant did steal the daybook and did see negative comments in that book about him and several other colleagues. To say however that this amounted to evidence of a hit list is something we do not accept. Managers are expected to and entitled to make comments in their day book to record their thoughts about individual employees. However we accept that there were likely to be negative comments about the claimant and others in this book.

63. The claimant also stated that he had been given a copy of an email by a colleague called Sabria whilst at the Croydon store. We do not accept, on balance, that the email existed in the form that the claimant now suggests. There is no record of it existing. The notes of the investigation at the relevant time refer to the claimant providing the investigator with a wholly different email from Sabria which the claimant gave the investigator and therefore consider it more likely than not that the claimant is mistaken as to what documents he handed over and the existence of definitive written evidence that there was a hit list.

64. Finally, we were provided of a copy of certain pages with Mr Cook's daybook. On pg 117 the list includes the claimant and says that he is behaving for now but also in brackets it states "Big Watch" next to his name and Carl. It also has a note about Glen which was agreed to be Mr Reynolds. Next to his name it says 'To Go'.

65. There was no date on the first entry on pg 217 as to when Mr Cook wrote this list. It was definitely before Mr Reynolds was disciplined but we find it more likely than not that it was written once the disciplinary issue with Mr Reynolds had arisen. We do know it was written before 23 June and so conclude that it demonstrates that the respondent had prejudged their disciplinary decision regarding Mr Reynolds before going through the disciplinary process. We note however that the claimant had not seen this note at the time that he resigned as it was only disclosed during the course of this hearing.

66. In addition to the alleged written evidence of the hit list or plot, there were numerous references to the claimant being told orally by various members of staff and various levels of management that the respondent had a list of

people that they would like to get rid of and that this was common knowledge at the Croydon store. For example, there was reference to a colleague called Niki talking about being upset on leaving because she had apparently helped dismiss people. There was also reference to Mr Heaton telling the claimant that he wasn't going to last long when he first arrived in Croydon.

67. Mr Fellowes confirmed to us, and we accept, that there was a 'hit list'. On that list, according to Mr Fellowes, were people who had been in the business too long or had issues with their behaviour and there were a number of 'characters'. He says that he was told to manage them out and this included the claimant. We accept that at the point at which the claimant was transferred to the Croydon store, Mr Fellowes was told to manage the claimant out.

68. We find that there were management conversations about members of staff who were perceived as difficult and that there were numerous rumours about the fact that managers had certain people they would like to see leave the business.

69. We heard evidence regarding what placed people on that list. Stephen stated that you were on that list if you were black or disabled. Mr Reynolds stated that you were on that list if you were older. The claimant stated that it was primarily 'oldies' but that race played a part and in his pleadings he referred to 3 other black individuals on that list. Mr Reynolds was the only one on the written list that we saw and he is white. Stephen was 40 and had not been at the store for a particularly long time.

70. We accept that the claimant was viewed as problematic by senior management. We accept Mr Fellowes' evidence that when the claimant was transferred to the Croydon store Mr Fellowes was told by other managers that the claimant was 'one to watch' (our phrase) and that he should be dismissed.

71. However we also find that the claimant was not dismissed by Mr Fellowes, Mr Higton or by Mr Porter; the three managers he had at the Croydon store. The claimant got on well with all three managers initially. He outstayed Mr Fellowes and Mr Higton without any disciplinary action being taken against him. He worked with Mr Porter for 18 months or so without facing and disciplinary action.

72. Therefore whilst we find that managers were indiscrete in their discussions around people they perceived as difficult and how they would deal with them, the claimant survived for over 3 years from the point at which senior management had apparently said that he should be dismissed. We therefore conclude that whilst managers had a list of problematic employees of which the claimant was one, the respondent was not in the habit of dismissing people simply for being on the list. The claimant would have been dismissed far earlier had that been the case as by his and Mr Fellowes' evidence he

remained on the list for 3 years or more and was not dismissed or disciplined during that period. He therefore knew that any such list, rumoured or real, was not something that put him at any great risk because he had known about it for the entire period of his employment at the Croydon store, he had not suffered any negative effects for being on the list, and he continued to be content to go to work and carry on as normal, without apparently changing his behaviour, for a very considerable period of time despite knowing that managers perceived him as difficult.

The Law

73. s13 Employment Rights Act 1996 — Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision” , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

72. S 13 Equality Act 2010 Direct discrimination

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

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

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

73. s 26 Equality Act 2010 - Harassment

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

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

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

(i)violating B's dignity, or

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

……

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

(a)the perception of B;

(b)the other circumstances of the case;

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

(5)The relevant protected characteristics are—

(i) age;

(ii) disability;

(iii) gender reassignment;

(iv) race;

(v) religion or belief;

(vi) sex;

(vii) sexual orientation.

74. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

75. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

76. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

77. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

78. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

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

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

74. Constructive Unfair dismissal

74.1 S95(1)(c) Employment Rights Act 1996 (ERA 1996)

(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) … only if)

….

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

74.2 In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 Lord Denning stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

74.3 An employee can resign in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. It is possible for the final incident in the chain to be, in itself insubstantial. The test is whether, viewed objectively, the course of conduct showed that the employer, over time, had demonstrated an intention to no longer be bound by the contract of employment.

74.4 In *Waltham Forest v Omilaju [2004] EWCA Civ 1493*, the Court of Appeal had to decide whether there can be a constructive dismissal where the employer's final act which prompted the resignation is found by the tribunal to be reasonable conduct. The Court of Appeal ruled that the key question was whether the final straw was the last in a series of acts or incidents that cumulatively amounted to a repudiation of the contract by the employer.

74.5 In their judgment for Omilaju the Court of Appeal gave the following guidance.

(i) The final straw must contribute something to the breach, although what it adds might be relatively insignificant:
(ii) The final straw must not be utterly trivial.
(iii) The act does not have to be of the same character as earlier acts complained of.
(iv) It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
(v) An innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

75.5 This guidance and other aspects of how to consider a constructive unfair dismissal case were summarised in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal listed five questions that need asking in order to determine whether an employee was constructively dismissed:

(i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(ii) Has he or she affirmed the contract since that act?
(iii) If not, was that act (or omission) by itself a repudiatory breach of contract?
(iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
(v) Did the employee resign in response (or partly in response) to that breach?

Conclusions

Breach of Contract/ Unauthorised deduction from wages

76. The claimant was not contractually entitled to be 'signed off and then paid an additional £300 per month as he argued. We have had to reach this conclusion based on the witness evidence alone as there was little or no paperwork which reflected the contractual arrangements.

77. The claimant was not clear as to at what point he says he became contractually entitled to the pay rise. We conclude that he would have become contractually entitled at the point at which the area manager signed him off, not at the point that he had satisfied the criteria at paragraph 40 above. We accept the respondent's case that this was a necessary step in the process towards becoming contractually entitled to the additional monthly payments.

78. That 'sign off' had not happened at the point at which the claimant resigned. We have accepted the respondent's reason for that which was that the area manager's discretion included exercising an overall judgement of whether the claimant was doing his job well. We find it reasonable that the manager took into account the overall status of the Croydon store, its toxic and warring factions and the numerous complaints and grievances in that assessment. We conclude therefore that he exercised his discretion reasonably in all the circumstances.

79.. The claimant was not able to establish before us, any contractual entitlement to area management sign off based on fixed and certain criteria that he had met. The evidence provided to us demonstrated that there was several exercises of discretion involved and whilst the claimant had met the numbers aspect of any targets, he did not demonstrate that he met other criteria which would have entitled him to the pay rise. We found that the area manager's sign off was part of the process and as that had not happened, the claimant was never contractually entitled to the pay rise.

80. We find that the claimant received his pro rata entitlement to the NPS payment. It was paid to him in his last month's wages. He was not able to evidence to us that he had been underpaid in his first month and therefore was entitled to the full month's NPS payment on termination. We therefore conclude that the payment of £250 which he received represented his pro rata entitlement to the £750 that would have been paid had he worked the entire month. There has therefore been no breach of the claimant's contract and no failure to pay him his wages.

Harassment on grounds of age/race and Direct Race and Age Discrimination

81. The claimant relied upon several acts as being unwanted conduct that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and in the alternative as being acts of direct discrimination. We address the incidents relied upon for both types of discrimination together.

82. Direct race discrimination occurs when an individual is treated less favourably than an appropriate comparator on grounds of their race. The claimant did not identify a comparator, but relied upon the treatment of John Ogodo, Chris Bentt and Stephen Nicholas as being people who were treated badly as well who were also black. We have therefore identified a hypothetical comparator which is someone who was in the same circumstances as the claimant but not black. When considering his dismissal, we consider this to be someone who was also suspected of threatening a colleague at work but was not black. With regard to the age discrimination claim, we consider that the appropriate hypothetical comparator is someone who was younger than the claimant. The claimant did not specify how much younger. His primary argument was that it was about people who had been employed for a long period of time and were therefore likely to be older as opposed to their actual age. Nevertheless, for the purposes of creating the hypothetical comparator, we have considered that it was someone who was younger than the claimant by more than a year.

83. Harassment claims do not require a comparator. However it can sometimes be useful to consider whether someone without the relied upon protected characteristic would have been subjected to that treatment when considering whether the treatment was related to the protected characteristic or not.

84. We address each allegation separately. We have approached them in a slightly different order to those in the List of Issues, grouping together first the ones where we found that they did not happen.

85. *Mr Porter shouting at him as alleged that he should go back to his own country*;

    On balance of probabilities we have found that this did not happen.

86. *2014-17 A statement was fabricated by his manager that he had insulted a customer*

On balance of probabilities we have found that this did not happen.

76. *2016-17 He was accused by the Store Manager of threatening to murder another member of staff, then told "I have got you by the balls and there is no escape."*

On balance of probabilities we have found that the comment *"I have got you by the balls and there is no escape."* did not happen.

77. *2018-19 The store manager, Mr Darren Porter, saying to him "I hate you" in front of colleagues.*

On balance of probabilities we have found that this did not happen.

78. *January 19 A regional manager, Mr Sean Cook shouted at him "I hate you, I have always hated you, my daughter might like you but I hate you, come here now".*

On balance of probabilities we have found that this did not happen.

79. *He was punched by his Store Manager, Mr James Meakin*

It is clear that there was a physical altercation between Mr Meakin and the claimant though not a punch based on the claimant's evidence to the fact finding enquiry at the time. This would clearly amount to unwanted conduct. However the claimant provided us with no evidence whatsoever to show that it was related to his age or his race. We accept that there was a difficult relationship between Mr Meakin and the claimant but we have been provided with no evidence to suggest that the reason for the punch or slap was the claimant's age or race.

80. We have also not been provided with evidence that this matter amounted to direct discrimination. He has not evidenced that he has been treated less favourably than a hypothetical comparator and not provided any evidence that the altercation occurred because of his race or age.

81. He has in respect of both claims, failed to shift the burden of proof to the respondent by failing to provide any evidence whatsoever that links the behaviour in any way to either protected characteristic.

82. In any event, this incident occurred in 2013. It is therefore out of time as it was a one off incident, that occurred significantly more than 3 months before the claimant submitted his claim to the tribunal. We do not find that it was part of a continuing act. Even taking into account the remark made by Mr Meakin that we discuss below, both incidents occurred many years before the claimant submitted his claim to the Tribunal and there was a significant gap between the two incidents. The Tribunal could extend time but we do not find that it would be just and equitable to do so in all the circumstances. The claimant has not given any explanation whatsoever as to why he did not seek to enforce his rights at this time or why it would be just and equitable for us to extend time in the circumstances. This was a one off incident that occurred a very long time ago and the claimant did not choose to enforce his rights at the time. We conclude that the claimant chose not to bring a claim regarding this because he transferred stores and was

happy with the transfer and felt, for a time, that the negative treatment had stopped. We therefore find that for such a historic act, after which there was a significant period of time when we have found that nothing capable of being an act of harassment or less favourable treatment occurred - that was not part of a continuing act or even occurred at the same store, it is not just and equitable to extend time.

83. *2014-16 Mr Meakin made a racist remark – "All you guys can be British, but you can never be English."* (**Race)**

We have found that a statement regarding the nationality of the staff at the store was made by Mr Meakin at some point. This was investigated by Mr Mr Bensley in 2016 though it is not clear from any of the evidence we heard as to when it actually happened.

84. If this remark, or a remark about people from other countries never being capable of being English, then it could amount to direct race discrimination and/or harassment related to race.

85. However, although this incident may have occurred up until the claimant transferred to the Croydon store, for the same reasons we give at paragraph 79 above, we consider that this incident is considerably out of time. It is not part of a continuing act for the same reasons as given above regarding the 'punch'. The claimant knew how to enforce his rights (hence his successive grievances and the claim before us today) but chose not to exercise them on this occasion. Therefore given the considerable period of time that has lapsed since this occurred and the fact that it was a one off incident, we find that it is not just and equitable to extend time in all the circumstances.

86. *2016-17 He was transferred to the Croydon Store while this was being investigated and says that constant bullying began. (**Race and age)***

The claimant was transferred to the Croydon store whilst the allegation was being investigated though we have found no evidence that any bullying behaviour began at this point. The fact of 'constant bullying' was not evidenced by the claimant during these proceedings. His reference to the ongoing situation has been vague and without detail. The specific incidents he has provided us with have been considered carefully but we consider that the claimant has failed to establish that there was an ongoing campaign of treatment against him. He had what he has accepted was a good period of employment initially under Mr Fellowes. At some point after Mr Fellowes left things deteriorated but it was not a constant situation given that he has accepted that he got on well with all three managers that he had at Croydon for considerable periods of time at the outset of their management periods. We have found that the store as a whole was a toxic working environment for some separate periods of time and do not repeat

those findings here. It is therefore clear that there was not 'constant' bullying towards the claimant by anyone.

87. The deterioration of the claimant's relationship with his manager Mr Clennon was the reason for the claimant's transfer. We note that Mr Clennon was black and broadly similar in age (55 as opposed to 53). The claimant's age discrimination claim was based on the idea that he was treated badly because he was 'an oldie', yet the manager he was being 'protected' from during the investigation, was older than him.

88. It is arguable that in many circumstances, the person against whom a grievance is brought ought to be removed from the situation as opposed to the person bringing the grievance. However, we find that the claimant agreed to the transfer at the time, that he liked the transfer once it had occurred, and that he asked for it to be made permanent – which it was. This is therefore not 'unwanted' conduct as described in s26 Equality Act 2010. Further it is not related to his age or race, it was related to his relationship with Mr Clennon who was also black and a similar age and who was treated differently and allowed to remain in store. We therefore find no evidence whatsoever that the transfer to Croydon was related to his race or age.

89. We have also not been provided with evidence that this matter amounted to direct discrimination. He has not evidenced that he has been treated less favourably than a hypothetical comparator and not provided any evidence that the altercation occurred because of his race or age.

90. *2018-19 He was questioned by Mr Cook for allegedly stealing a customer from Niki, another salesperson, although the incident had been invented by her.* (**Race and age)**
We have found that Mr Cook did speak to the claimant about potentially stealing a customer from Niki but we had no evidence to suggest that the incident had been invented by Niki. We have not been provided with facts from which we could infer that there is a prima facie case that this treatment amounted to harassment related to race or age. The claimant conceded during his evidence to the Tribunal that Mr Cook's treatment of him had nothing to do with his race or age.

91. We therefore conclude that this treatment was not related to the claimant's race or age nor that he was treated less favourably than a comparator because of his race or age.

92. *2018-19 He was refused commission payments (sign off refused) four times (**Race and age)***

We have concluded that the claimant was not signed off for the £300 per month commission payments. It was not clearly demonstrated to us that this occurred 4 times but we found that he was not signed off on at least one occasion.

93. As set out in our conclusions regarding the breach of contract/ unauthorised deduction from wages claims above, we find that the claimant was not signed off for these commission payments because of the overall toxic atmosphere at the Croydon store and that the manager exercised his discretion in this matter reasonably. There was no evidence to suggest that this treatment was in any way related to the claimant's race or age.

94. We have also not been provided with evidence that this matter amounted to direct discrimination. He has not evidenced that he has been treated less favourably than a hypothetical comparator and not provided any evidence that the failure to sign him off occurred because of his race or age.

95. E*arly July 19 Mr Porter shouted at him to "shut up" and told "You can leave if you don't like what is being said by me." Further, that he could leave and get a job at McDonald's and that "people like you should go back to your own country."* (**Race and age)**

    We have found that although the claimant (and others) may have been told that if they did not like working there they could leave and work at McDonalds, we have found that the overtly race-related statement about 'going back to your own country' was not said.

96. We heard witness evidence from Mr Porter who accepted that he may have said something like, "you can leave if you don't like it here" in order to control a difficult team meeting. We conclude that it was said to the whole room full of staff and it occurred because of the significant staff morale and management issues that were occurring at the time in the store. This statement was not made because of the claimant's race or age and we were provided with no evidence to suggest that it was that might shift the burden of proof to the respondent. This was a statement said to an entire meeting where the workforce was very diverse in terms of age and race and we have not been provided with any evidence to link this statement to the age or race of any of the participants in the meeting.

97. We have also not been provided with evidence that this matter amounted to direct discrimination. He has not evidenced that he has been treated less favourably than a hypothetical comparator and not provided any evidence that the altercation occurred because of his race or age. In fact, given that the comment was said to a room full of people who were ethnically diverse and diverse in terms of age, it is clear that everyone in the room was treated in the same way.

*98. 22 July 19 He was suspended. (The respondent says that it was 22 August) (**Race and age)***
    It is not in dispute that the Claimant was suspended.

99. We find that the claimant was suspended on 22 August 2019 because of the argument he had with Mr Boyd. This was a potentially serious disciplinary matter which the manager had conducted an initial investigation into and formed the opinion that the claimant ought not to be on the premises until the disciplinary process was concluded. Our factual findings regarding the argument are that even though the claimant may not have been as threatening as is now being argued by the respondent, he made a threatening statement to a colleague whilst at work and it was reasonable for the respondent to follow its disciplinary process and suspend the claimant. Whilst suspension is not necessarily a neutral act, the decision to suspend the claimant in the circumstances was not an unreasonable one. Our primary finding is that the argument with his colleague and the need to carry out a subsequent disciplinary process were the reasons for the claimant's suspension and he has provided us with no facts or evidence to suggest that this decision was related to his race or age.

100. The claimant relied upon the fact that the hit list he evidenced to us was made up of older people and black people. This was not strictly true as one of the people on the list was considerably younger than the claimant at the age of 40 (Mr Nicholas) and included Mr Reynolds who is white. Our factual findings regarding any hit list are worth repeating here as they demonstrate that the evidence we heard suggests that the list was attributed to different characteristics by different people.

> *"We heard evidence regarding what placed people on that list. Mr Nicholas stated that you were on that list if you were black or disabled. Mr Reynolds stated that you were on that list if you were older. The claimant stated that it was primarily 'oldies' but that race played a part and in his pleadings he referred to 3 other black individuals on that list. Mr Reynolds was on the only written list that we saw and he is white. Mr Nicholas was 40 and had not been at the store for a particularly long time."*

101. We were not provided with any information by the claimant, save for the existence of the hit list and the fact that other black colleagues had been disciplined and/or dismissed, as being the reason he considered his treatment occurred because of his race.

102. As discussed above, we find that the hit list was not evidence that supported the assertion that black people or older people were treated differently or less favourably. There was a white person on the list. Other witnesses for the claimant said that the reason for the presence was age. Those for the respondent said it was on the basis of being a trouble maker as opposed to race or age. The claimant himself seemed to accept that the people being targeted were people who had been there a long time as opposed to their actual age.

103. The claimant did not give us sufficient information to understand whether the treatment of John Ogodo, Chris Bentt and Stephen Nicholas to understand if their

treatment was on grounds of race. Mr Cook in his witness statement said that he considered that Chris and Stephen both left of their own accord and that Chris had been re-employed. We accept that evidence. We were provided with no evidence to the contrary. We have already found that Mr Ogodo was dismissed for gross misconduct which the respondent has evidenced. It is not clear to us if any of them were suspended thus demonstrating similar treatment specifically with regard to the claimant's suspension as opposed to simply the initiation of disciplinary action against them.

104. We therefore consider that the claimant has not shifted the burden of proof and established a set of facts from which we could, on balance, find that discrimination has occurred as he has not established that two of the three were disciplined in the same way that he was and/or that any of the treatment of him or these three individuals was carried out was discriminatory.

105. However, if we are wrong and the burden of proof has been shifted by the fact that other black people who worked for the respondent were disciplined, we conclude that the respondent has proven a non-discriminatory reason for their behaviour namely that the claimant's suspension was not done because of his race but because he was suspected of threatening a colleague at work. The respondent evidenced that there was sufficient investigation to establish that it was reasonable decision for them in all the circumstances to suspend the claimant and that their actions had nothing to do with the claimant's race but was based on his behaviour.

106. They established, regarding the named individuals, whom the claimant said supported his case that black people were not treated less favourably by the respondent, that any disciplinary action taken against those other black individuals was also justified by behaviour as opposed to occurring because of their race. The claimant failed to establish that a comparator, real or hypothetical would have been treated differently – and we see that Mr Reynolds, who is white, was put through a disciplinary process when he was suspected of gross misconduct.

107. Turning to the age discrimination claim, we also consider that the claimant has failed to establish that any of his treatment was related to or because of his age. He has not set out a factual basis which supported his assertion that the 'oldies' were treated differently from their younger colleagues when it came to disciplinary action. He stated that John Ogodo, Glen Reynolds and Stephen Johnson were also treated badly and relied upon this as demonstrating that older people were treated badly by the respondent. However, Stephen was 40 years old at the relevant time. We have found that both John and Glen were dismissed for gross misconduct, all of which was well evidenced before us at the Tribunal. His comparison to these three individuals was the only evidence the claimant relied upon to demonstrate that his treatment was related to age. We find that he has therefore failed to shift the burden of proof.

108. However, if we are wrong and the burden of proof has been shifted by the fact that two other older people (Glen Reynolds and John Ogodo) who worked for the respondent were disciplined, we conclude that the respondent has proven a non-discriminatory reason for their actions both with regard to the other two individuals but more importantly with regard to the claimant's suspension which we find occurred because he was suspected of threatening a colleague at work. The respondent evidenced that there was sufficient investigation to establish that it was reasonable decision for them in all the circumstances to suspend the claimant and that their actions had nothing to do with the claimant's race but was based on his behaviour.

109. We therefore do not uphold the claimant's claim that the decision to suspend him was direct race or age discrimination or harassment related to his race or age.

*110. 27 August 2019 He was invited to a disciplinary hearing on a date when he was due to be on holiday in Ghana. (**Race and age**)*
This did occur but the claimant has withdrawn this element of his claim saying that he accepts that it did not occur on grounds of race or age.

95. *On 4 September 2019 He resigned giving one week's notice. (**Race and age**)*

It is not in dispute that the claimant resigned. He states that he resigned because he knew he was going to be dismissed because of the existence of the hit list which was made up of 'oldies' and black people and that it amounted to a constructive dismissal. We do not agree that the existence of the hit list was related to race or age as stated above. Further we do not consider that the Claimant has established that he has been treated less favourably than a comparator by being included on the list. This is because it is clear that white people and younger people were also on the list. We therefore do not consider that the claimant has established a set of facts from which we could find, setting aside any explanation by the respondent, that discrimination could be found.

111. Nevertheless, as above, given that the list existed and given that several black employees and several older employees were on the list and some were dismissed prior to the claimant who had also been on the list, it is possible that the claimant has shifted the burden of proof and provided facts from which we could determine that the situation related to the claimant's race or age. We have therefore considered whether the respondent has discharged the burden of proof of showing that there was a non-discriminatory reason for its treatment of the claimant.

112. In submissions the respondent summarised the reasons for the dismissal of the other employees whom the claimant says were dismissed because of their race or age which prompted him to think he was next. Their summary of the reasons for those dismissals was:

(i) John Ogodo was dismissed for sexual harassment
(ii) Mr Bennt remained employed by the respondent
(iii) Mr Nicholas resigned and went back to his former career in car sales after being issued a warning for an altercation with a colleague on the shop floor.
(iv) Mr Reynolds was dismissed for gross misconduct after he covertly recorded a customer.

113. We were provided with evidence of all of the above and accept that these were the reasons for the termination of employment of all these individuals apart from Mr Bennt who we accept still worked for a different part of the respondent. This, coupled with the findings we have made regarding why the claimant was suspended and was going to be subject to a disciplinary process (though not necessarily a disciplinary sanction) means that we conclude that the respondent has shown that any disciplinary action taken against these people was motivated by their behaviour as opposed to related to their race or age or because of their race or age. Further it shows that the claimant was wrong in asserting that none of their dismissals were justified and that the respondent was prone to taking unnecessary and manufactured disciplinary processes against individuals because of their race or age or related to their race or age. The respondent adequately proved that either they had not been dismissed (Mr Bennt) or that they had behaved in such a way as to justify any disciplinary sanctions. Against this backdrop we therefore also accept the respondent's explanation to us that their treatment of the claimant in commencing a disciplinary process against the claimant was not related to his race or age. There was no policy of targeting people because of their race or age and the existence of the 'hit list' and the age or race of the others on that list do not support the claim that the claimant has brought.

114. Overall therefore we find that the claimant's claims for harassment regarding the above matters do not succeed as even where we have found that an incident occurred, he has failed to show that any of them were related to either his race or his age. We have therefore not gone on to consider whether it created an intimidating, hostile or degrading environment for the claimant as none of the treatment relied upon related to the protected characteristics.

115. We also consider that the claimant has failed to demonstrate that any of the above incidents were less favourable treatment because of his race or age. He provided us with no real information regarding a comparator. He relied upon similar treatment being meted out to others that share the characteristic of race and age with him as opposed to anyone experiencing different treatment to him. Nevertheless we have considered whether a hypothetical comparator would have been treated differently and found no evidence to establish that they would.

116. The claimant's claims for harassment and direct race discrimination regarding these incidents therefore fail on all counts.

Direct Discrimination

117. The claimant also relied upon one further act as being an act of direct discrimination;

(i) taking steps to justify his dismissal without proper cause

118. We do not find that the respondent took steps to justify the claimant's dismissal without proper cause. The respondent did not dismiss the claimant. He resigned. They were proposing to follow a disciplinary process but that did not occur as he resigned. We address the claimant's constructive unfair dismissal claim properly below. It is not clear what steps the claimant says that the respondent took to justify his dismissal without proper cause. They did continue an investigation after the claimant had resigned into the incident with Mr Boyd. We were provided with witness statements from that investigation. We consider that the respondent took steps to investigate the situation as was appropriate in the circumstances. We recognise that some of that investigation continued after the claimant had resigned which we would not normally expect and that this could be seen to be an attempt to retrospectively justify their decision to commence a disciplinary process. However that disciplinary process was never finalised. Had it been, the claimant would have been given an opportunity to challenge the witness statements as part of that process had he wished to do so. We have already stated that we find that the decision to suspend the claimant was not related to the claimant's race or age and that it occurred because of the claimant's behaviour towards another colleague and was reasonable in all the circumstances.

119. Therefore the fact that the claimant relies upon the fact that the respondent took steps to justify his dismissal is not correct firstly because he has not said what he believes those steps were and secondly, the argument that any such steps had 'no proper cause' is not correct as the cause for the initiation of the disciplinary process and investigation was their preliminary investigation into the incident with Mr Boyd and the claimant's alleged behaviour.

120. The factual basis for this part of the claimant's claim is therefore flawed and this claim does not succeed.

Constructive Unfair Dismissal

121. The claimant relied upon the same list of incidents as being breaches of his contract of employment and acts of harassment. We will therefore not repeat our conclusions regarding the incidents that we have found did not occur.

122. We consider that any of the incidents that did occur whilst the claimant was working at the New Malden store occurred a long time ago and with a significant

period of time after that when the claimant was happy at work in the interim to say that the claimant did not resign in response to those breaches and that they were not part of a continuing state of affairs or a series of breaches of contract that culminated in the final straw that the claimant now relies upon - namely his suspension.

123. We consider therefore that even if they were fundamental breaches of his contract of employment, he waived those breaches by continuing to work for such a long period of time and/or he did not resign in response to them in any event.

124. Turning to the incidents that we found occurred at the Croydon store.

125. 2016-17 He was transferred to the Croydon Store while this was being investigated and says that constant bullying began.
As set out more fully above, the claimant agreed to the move, liked working in the Croydon store and asked for it to be made permanent. Therefore this was not a breach of his contract and if it was, he agreed to it and/or waived any such breach at the time.

126. 2018-19 He was questioned by Mr Cook for allegedly stealing a customer from Niki, another salesperson, although the incident had been invented by her.
This was a normal management conversation with a member of staff. The claimant was not disciplined, he was simply spoken to by his manager and reminded of the rules. We accept that he disagreed with his colleague reporting his behaviour or that he ought to have been spoken to at all. However, even if the manager and Niki were mistaken in their interpretation of events, we do not consider that a manager speaking to a member of staff about the rules regarding 'ownership' of a customer, amounts to a breach of the contract of employment at all and even if we are wrong in that it was not a fundamental breach of contract that could reasonably have negatively affected the claimant's trust and confidence in the respondent.

127. 2018-19 He was refused commission payments (sign off refused) four times
We have found that the claimant had no set contractual right to be signed off at these times. The claimant did not demonstrate to us that he had a contractual right for his area manager to exercise his discretion in his favour. The respondent had identified its concerns regarding the claimant's overall performance within a problematic store where the line manager who had signed him off was not necessarily trusted in terms of his judgment because of the factional way the store was being run. We have accepted that the area manager's sign off was a part of the process and without it the claimant had no contractual right to the payments. In circumstances where discretion is to be exercised then an employee has the right that any such discretion ought not to be exercised capriciously however we have found that there were reasonable grounds for Mr Cook to exercise his discretion in the way that he did. In this

instance we do not accept that the claimant's contract was breached, fundamentally or otherwise.

128. *Early July 2019 Mr Porter shouted at him to "shut up" and told "You can leave if you don't like what is being said by me." Further, that he could leave and get a job at McDonald's and that "people like you should go back to your own country."* We have concluded that only the first part of this statement was said. It is possible, that such a response to an objection by an employee in a team meeting, could undermine an employee's trust and confidence in his employer. However we find that this comment was said in a workplace where there were frequently robust exchanges of views at team meetings and that this was not necessarily aimed exclusively at the claimant. We find that the claimant was not upset by the statement nor was it unusual for him to engage in frank exchanges of views or stand up for himself or cause difficulties at team meetings and that it was said in that context. We therefore do not conclude that this was a breach of the claimant's contract. At its highest, this could be found to be a minor breach of the implied clause of trust and confidence.

129. *22 July 19 He was suspended. (The respondent says that it was 22 August)* We have found that the claimant was suspended on 22 August 2019. The respondent's suspension letter stated that the claimant's suspension was a neutral act and was done pending the outcome of the disciplinary process. We accept that suspension is not necessarily a neutral act. We have very carefully considered the claimant's argument that he could have no faith in the ensuing disciplinary process because of the existence of the 'hit list' which meant that he considered that any decision regarding his continued employment had already been made at the point of suspension. His argument was that the respondent was simply waiting for an opportunity to dismiss him and that given what had happened to other colleagues on the list, and that he knew about the existence of the list, he could have no trust and confidence in the outcome of the disciplinary process once he had been suspended.

130. We do not accept that argument. We have accepted that there was a 'hit list', but it was not a list of people that managers had to get rid of. Instead it was a list of people for the managers to watch because they were challenging. The claimant had been put on the list because he had fallen out with his manager at the New Malden store and had a physical altercation with him. When he joined the Croydon store Mr Fellowes had been told to manage him out. However he did not do so because the claimant behaved.

131. It is not clear if the claimant remained on the list throughout his period at the Croydon store and after Mr Fellowes left. However even if he did, it is clear that successive managers did not discipline or dismiss him. The claimant had known, (based on his own evidence) that he was on the list for several years and it had not caused him to resign and meant that he knew that he had not been disciplined or dismissed during that period despite being on that list. We do not consider

therefore that he could reasonably have believed that the respondent was going to get rid of him regardless of circumstances or without proper cause because had that been the case they would have dismissed him far earlier. We therefore consider that the claimant could not, at this stage, reasonably believe that the respondent was not going to follow a disciplinary process and that the decision to dismiss him had been pre-judged. The fact that other members of staff had previously been dismissed for gross misconduct does not mean that an employee can infer that no fair process is going to be followed. The respondent has evidenced to us that the decision to suspend him in all the circumstances was a reasonable one in accordance with their disciplinary policy. It was therefore not a breach of contract even in light of the 'hit list' because we do not consider that the claimant's trust and confidence in the employer had been fundamentally breached by the existence of the list or that the existence of the list fundamentally undermined any subsequent disciplinary process.

132. 27 August 2019 He was invited to a disciplinary hearing on a date when he was due to be on holiday in Ghana.

The date of the meeting was rescheduled as soon as the claimant pointed out that he was on holiday on that date. There was no breach of the claimant's contract given that he was given the opportunity to attend the meeting after his holiday but did not do so because he had resigned beforehand. Had the employer denied the claimant the right to attend the meeting then this would have been a breach of his contract – but this is not what occurred.

133. We conclude that the respondent did not fundamentally breach the claimant's contract of employment either by way of a series of breaches culminating in a final straw or by any of the breaches individually being capable of being a fundamental breach of contract. We have found that the majority of the incidents relied upon were not breaches of the contract at all. Any remaining breaches were minor at best and the claimant did not resign in response to them.

134. We find that the reason the claimant resigned was that he did not want to go through the disciplinary process. The respondent was not in breach of the claimant's contract by initiating that disciplinary process or suspending the claimant as discussed above. We understand that any final straw does not have to be significant in itself but there does have to be a cumulative position that renders the claimant's contract of employment irredeemably damaged such that there is no trust and confidence remaining. That was not the case here.

135. Whilst the claimant's fear of dismissal may have been genuine, it was not caused by the respondent fundamentally breaching his contract of employment, it was caused because the claimant had been involved in a serious altercation with a colleague and knew that the respondent disciplined staff if they misbehaved. The respondent was not breaching the claimant's contract of employment by following a disciplinary process regarding this incident, including the decision to suspend him.

136. For these reasons we do not uphold the claimant's claim for constructive unfair dismissal as the respondent did not fundamentally breach the claimant's contract of employment nor did the claimant resign in response to any breach but resigned in order to ensure that he did not have a gross misconduct dismissal on his record.

Employment Judge Webster

Dated: 16 October 2021