EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr. Qasim Quraishi		Waterstones Booksellers Limited

Heard at: London Central Employment Tribunal **On**: 16, 17, 18 and 19 January 2023

Before: Employment Judge Coen
Members: Mr. D Shaw
Mr. L Tyler

Representations
For the Claimant: In Person
For the Respondent: Mr. K Wilson, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's compensatory award for unfair dismissal shall be restricted to six months in accordance with the principles set out in **Polkey v A E Dayton Services Limited [1987] IRLR 50 (HL)**;

2. The Claimant's claims for direct discrimination on the grounds of race and/or religion are not well-founded;

3. The Claimant's claim for victimisation in connection with his dismissal is not well-founded;

4. The Claimant's claim for victimisation in connection with the appeal against his dismissal is not well-founded;

5. The Claimant's claim for breach of contract in relation to his move to SFS in April 2021 fails; and

6. The Claimant's claim for wrongful dismissal succeeds.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a bookseller on 22 September 2008 from which time he worked at the Respondent's branch in Gower Street, London.

2. By a claim form filed on 31 January 2022 ("the First Claim") the Claimant brought claims for race and religious discrimination, breach of contract, harassment and victimisation.

3. The Claimant was summarily dismissed by the Respondent on 3 February 2022.

4. By a claim form filed on 5 April 2022 ("the Second Claim") the Claimant brought claims for unfair dismissal, race and religious discrimination, notice pay, holiday pay and in relation to a public interest disclosure.

5. By a claim form filed on 7 April 2022 ("the Third Claim"), the Claimant brought claims for unfair dismissal, race and religious discrimination, holiday pay, victimisation and breach of contract for wrongful dismissal.

6. At a case management hearing on 5 May 2022 the Tribunal set out a list of issues which would need to be considered at the final hearing. These issues are replicated at paragraph 149 of these Written Reasons and represent the issues considered by the Tribunal at the final hearing.

7. At the same case management hearing, the Tribunal allowed an amendment to the First Claim to include a complaint of unfair dismissal and struck out the Second Claim as an abuse of process on the basis that the Claimant had accepted that he did not

personally make a protected disclosure. The Claimant appealed the Tribunal's decision to strike out the Second Claim to the Employment Appeal Tribunal. At the date of the final hearing the status of the appeal was not known.

8. At the same case management hearing, the Tribunal made a deposit order against the Respondent in respect of the fact that the Respondent had advanced a defence that the dismissal was fair in circumstances where proper procedures had not actually been followed.

9. At the same case management hearing, the Claimant also withdrew his claims for indirect discrimination and harassment.

10. On 20 November 2022, the Claimant wrote to the Tribunal seeking to amend his claim to add claims for automatic unfair dismissal contrary to section 104 of the Employment Rights Act 1996 (in relation to the assertion of a statutory right) and section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on grounds of trade union membership). This application was not considered prior to the final hearing.

11. On 21 December 2022 the Respondent conceded liability in connection with the Claimant's unfair dismissal claim.

Procedure, Documents and Evidence Heard

12. The case came before us for a final hearing which was held in person at London Central Employment Tribunal between 16 and 20 January 2023. The Tribunal used the first day to read the witness statements and acquaint itself with the background, and to deal with a number of applications by the Claimant. The second, third and fourth days were used to hear evidence, with the final day being allocated to Panel deliberations. Further deliberations took place on 31 January 2023 and 9 March 2023.

13. In light of the volume of information provided and the detailed factual backdrop to the case, the Tribunal considered liability only, but heard submissions from the parties in respect of Polkey.

14. The Claimant appeared in person and the Respondent was represented by Mr. Kieran Wilson, Counsel. As the Claimant appeared in person, the Tribunal took additional steps to ensure that it explained procedural rules to the Claimant, clarified certain legal tests, informed him regularly of what would be required (including in relation to cross-examination of the Respondent's witnesses), allowed additional breaks and time for clarification of issues of practice. The Tribunal also assisted the Claimant with framing a number of questions in his cross-examination.

15. At the outset of the hearing, one of the Panel Members raised the fact that he was an author of fiction which was stocked in the Respondent's stores. He explained that he

had no direct dealings with the Respondent in this respect and that the number of copies stocked was small. The parties accepted that there was little prospect of bias.

16. It was noted that the Third Claim had not been considered at the case management hearing on 5 May 2022, possibly because at that point in time the Tribunal was not aware that it had been brought. To that extent, the causes of action included in the Third Claim were considered by the Tribunal. The Tribunal noted that the only additional cause of action referred to in the Third Claim (which had not been raised in previous claims) was a claim for holiday pay. The Claimant explained that this related to the fact that he had been required, following his dismissal, to repay a sum equivalent to 6.5 days' holiday as he had exceeded his proportional entitlement to holiday at the date of dismissal. The Tribunal decided that the holiday pay claim was, therefore, contained within the Second Claim, as any obligation on the Respondent in relation to notice pay (as part of the Claimant's wrongful dismissal claim) would deal with the holiday pay issue. The Claimant was, therefore, content for the Third Claim to be withdrawn.

17. The Tribunal heard submissions from the Claimant and the Respondent in respect of the Claimant's application to amend his claim on 20 November 2022. The Claimant's submissions were that the additional causes of action amounted to a relabelling of his existing claims and that he had not presented new claims. He wished to raise these issues as he felt that the Respondent had anti-Union sentiment which had affected his case. The Respondent's submissions were that the Claimant's application represented entirely new causes of action and that the section 152 claim was irrelevant as the Claimant had not been dismissed for having been a member of a Union. The Respondent raised the additional hardship to which it would be put were these claims to be admitted as it had prepared its case on the basis of the issues determined at the case management hearing on 5 May 2022. Further, the Claimant's application was substantially out of time.

18. Following consideration of the issues, the Tribunal refused the Claimant's application to amend his claim. In reaching its decision, the Tribunal considered that the proposed amendments did in fact relate to new causes of action, that the balance of hardship and injustice test (as expanded in **Selkent Bus Company Ltd v Moore [1996] IRLR 661**) operated in favour of the Respondent in these circumstances (as the Respondent would likely require a postponement of the hearing to be able to consider and respond to new causes of action). The issue of timing was also relevant, as the Claimant had not raised the proposed amendments until nine months after his dismissal. It was explained to the Claimant that, notwithstanding the Tribunal's decision, he could refer to Union-related issues in his evidence, to the extent that were relevant to any of the issues required to be considered by the Tribunal within the existing claims.

19. The Claimant sought to admit an additional bundle of evidence amounting to approximately 500 pages which he had emailed to the Tribunal on the eve of the first day of the hearing. The Tribunal refused to admit the entire bundle automatically on the basis that the existing bundle already ran to 1,000 pages (in circumstances where the case management order of 5 May 2022 had restricted the length of the bundle to 500 pages) and it was not clear that the additional pages were all relevant. The Claimant was

informed that should he wish, at any point in the hearing, to refer to certain documents in the additional bundle he should make a request to the Tribunal at that time. In the circumstances, the Claimant and the Respondent referred to a number of pages in the additional bundle at various points during the hearing.

20. It is clear that there are jurisdictional issues (in connection with time limits) relevant to the Claimant's discrimination claim. However, as the last few of the alleged discriminatory actions are in time, the Tribunal did not consider time limits as a preliminary issue. We took this view because it is often unclear until all the evidence in a case has been heard whether the conduct complained of extended over a period or amounted to a succession of isolated or unconnected acts.

21. For the Claimant, the Tribunal heard evidence from the Claimant and Bryan Kennedy, Unite the Union representative. Deborah McSweeney, a Unite the Union representative provided a witness statement but did not provide oral evidence.

22. For the Respondent, the Tribunal heard evidence from: Maxine Mould, HR Business Partner; Jonathan Green, Senior Retail Manager; Simon Bristowe, Head of Shop Operations; and Simon Lewis, General Manager, Gower Street branch.

Facts

23. It is worth noting that the factual backdrop in this case is detailed as the Claimant's complaints spanned a period of almost five years. It is also noteworthy that much of the factual backdrop was not in dispute, given that meetings had been recorded and much had been documented in writing. Where comparators are discussed, we have, for consistency, used first names only as we were not always provided with surnames.

24. The Claimant was employed as a bookseller (subsequently as a Senior Bookseller) by the Respondent from 22 September 2008. He worked at the Respondent's branch in Gower Street, London.

25. The Claimant described his race as British Pakistani and his religion as Islam.

26. His Statement of Terms and Conditions of Employment provided as follows:

> *Your Job Title is Bookseller. You may be required to carry out additional or alternative duties consistent with your position or skills in order to meet the needs of the business.*
>
> *You will be based at Gower Street. You may be required to work at any other Waterstone's site from time to time within reasonable travelling distance. Any long term variation in the location of your work place will be confirmed to you in writing with the appropriate notice period.*

27. The Statement of Terms and Conditions of Employment contained a general notice provision as follows:

> *Waterstone's is required to give you 1 months' written notice. After five year's service, this will increase by one week for each complete year of service up to a maximum of 12 weeks. In the event of summary dismissal for gross misconduct you would forfeit your right to any notice.*

28. In its evidence the Respondent drew attention to a document entitled 'Bookselling Competency Framework and Behaviours' which described the core competencies for Booksellers, Senior Booksellers, Expert Booksellers, Lead Booksellers, Bookshop Managers and Support Roles. The document divided the competencies into a number of sub-headings being Customer Service and Sales, Standards, Commercialism, Commitment and Self-Development, Flexibility and Initiative, Book, Brand and Industry Knowledge, and People Leadership.

29. A further document entitled 'Core Bookshop Processes' summarised essential bookshop systems and process knowledge required to support bookselling. It included information on customer orders, searching for books, dealing with packing and unpacking books, and online orders.

30. The Respondent's disciplinary policy provided non-exhaustive examples of Misconduct and Gross Misconduct. Examples of Misconduct included:

> *discourtesy to colleagues or customers, breaches of company policy including customer service standards, poor attendance or timekeeping, failure to follow reasonable requests or instructions, abuse, misuse or neglect of company property, equipment or facilities, whether wilful or negligent; insubordination; and gross misconduct.*

31. Gross Misconduct was defined in the disciplinary policy as misconduct which constitutes a fundamental breach of the employment contract, of which the normal consequence may be summary dismissal. Example of gross misconduct included:

> *theft, dishonesty or fraud and deliberate falsification of records; violent, indecent or unacceptable/offensive behaviour, including via electronic methods; deliberate damage to, or misuse of, company property with significant consequences; bullying, harassment, victimisation or discriminatory behaviour including via electronic methods; deliberate or negligence breaches of security or confidentiality; consumption of alcohol or illegal drugs during work time, or being under the influence of alcohol or illegal drugs whilst at work; possession of or dealing in illegal drugs at work; use of internet and/or email to access or distribute material of a pornographic, offensive, obscene or inappropriate nature; serious breach of health and safety, serious breach of the company's rule, policies and procedures, be it intentional or by negligence; conduct likely to bring the company into disrepute, including via electronic methods.*

32. The disciplinary policy listed sanctions including (a) a first written warning; (b) a final written warning (which would normally remain active for 12 months after which time it would be disregarded for disciplinary purposes); (c) dismissal; and (d) alternatives to dismissal (including demotion or the issue of an extended final written warning up to and including an indefinite duration).

Move to Finchley Store

33. The Respondent grouped stores into clusters of up to eleven local stores, with the Gower Street store being in a cluster which included Finchley, Brent Cross and the Economist Bookshop situated at Clare Market, Holborn (the "Economist Bookshop"). The Respondent's evidence was that all branches within the cluster work together, sharing resources, including employees, to best fit business needs.

34. On 30 January 2017 the Claimant had an informal discussion lasting about an hour with Zain Mahmoud (Cluster Area Manager) where it was proposed that the Claimant would move to the Respondent's Finchley store. In his evidence the Claimant stated that Zain Mahmoud was Pakistani British and that, in the course of the discussion, Zain Mahmoud had accused him of inefficiency and underperformance.

35. On 2 February 2017 the Claimant met with Anthony Nethercott (HR Manager) on the shop floor and objected to the proposal to move him.

36. On 3 February 2017, the Claimant received an email from Minakshi Patel (Rota Manager) to say that he would be expected at the Finchley Store on 6 February 2017. The Claimant wrote to Anthony Nethercott on 3 February 2017 to object to the proposed move on the basis that it represented a breach of his terms and conditions of employment. On 7 February 2017 the Claimant also wrote to Anthony Nethercott to explain that the proposals would cause him hardship because he was responsible (in part) for the care of his father, who had health issues and needed to be constantly supervised. He explained that Gower Street was more convenient than Finchley as his father spent time with cousins who lived within reasonable travelling distance of Gower Street and that this made the arrangement easier to manage.

37. A meeting was held with the Claimant, Anthony Nethercott, and Zain Mahmoud on 14 February 2017 to discuss the issue again and the Claimant reiterated his need to remain at the Gower Street branch in order to be able to support his family. There was extensive discussion about the logistics of travel. Anthony Nethercott suggested that the journey to Finchley Road appeared easier than the journey to Gower Street as it involved one bus journey (rather than two) from the Claimant's home. The Claimant explained that his parents lived in Tooting and that the journey from Gower Street to Tooting was an easier journey for him. At the meeting, Anthony Nethercott said that he had previously been unaware of the Claimant's family circumstances, offered to assist, and suggested that the Claimant submit a flexible working request.

38. At the meeting, Anthony Nethercott explained that the rationale for the request to move related to an overspend on staffing budgets and that the Gower Street store was overstaffed. When there were vacancies in other stores within the same 'cluster' it was necessary to seek to fill them internally, rather than via external recruitment. Anthony Nethercott explained that when there was a vacancy in another cluster store, Zain Mahmoud was asked to consider whether staff could be provided via an internal transfer. In these circumstances, they had considered the Claimant for transfer as he lived closer to the Finchley store and his journey to and from work would be shorter.

39. The Claimant raised concerns about the fact that were he to be based in Finchley he might be required to cover additional cluster stores (for example, Walthamstow, Barnet, or Enfield) which would move him further from his home and his parents' home. Anthony Nethercott suggested that a provision could be put in place (via a flexible working request) enabling the Claimant only to work in the Finchley store.

40. At the meeting, the Claimant explained that he felt that Zain Mahmoud did not like him and was trying to force him out of the Gower Street store. Zain Mahmoud explained at the meeting that he didn't have any issues with the Claimant but had considered the Claimant to have been very negative about the proposed move.

41. At the meeting, Anthony Nethercott suggested that the Claimant could agree with the proposed move to Finchley or, failing that, the Respondent would provide eight weeks' notice to him of the transfer.

42. The Claimant also raised the issue of Friday working with the Respondent at the meeting and explained that he did not work on Mondays or Fridays. Anthony Nethercott stated that this was not a problem.

43. A further meeting was held on 29 March 2017 between Anthony Nethercott, Zain Mahmoud, and the Claimant, where the matter was discussed again. Anthony Nethercott considered that Finchley would be a suitable workplace on the basis that the Claimant would finish earlier in the day. The Claimant objected on the basis that it would be a longer journey from Finchley to Tooting. The Respondent was of the view that the Claimant would be able to finish earlier at Finchley (as it was closer to his home) and that the Claimant could still get to his parents in Tooting.

44. On 31 March 2017 Zain Mahmoud wrote to the Claimant and provided eight weeks' contractual notice in respect of the proposed change to Finchley. The letter explained that the reason for the proposed change related to the fact that 'London is looking to reduce the base staffing hours to meet the new budget' and that in order to do so Zain Mahmoud had been asked to discuss with a number of staff the possibility of working in other shops.

45. The Claimant objected to the Finchley move and refused to accept the contractual notice. The Claimant raised a grievance on 29 May 2017 complaining that he did not wish to move to Finchley store, the Respondent had not considered his personal life and he believed another employee (who had started working at the Gower Street branch in recent

months) lived close to Finchley Store and had not been asked to move there. He also explained that Zain Mahmoud had made a number of criticisms of his efficiency. The Claimant's evidence was also that he had been asked to work longer hours at the Gower Street store.

46. A grievance hearing took place on 19 September 2017 the delay being due to the Claimant having been unwell between 25 May 2017 and 17 August 2017. It was heard by Paul Hayward (Head of HR) in the presence of Sarika Parmer (note-taker). The Claimant was accompanied by Deborah McSweeney (Trade Union representative).

47. The outcome was communicated to the Claimant by a letter from Paul Hayward (Head of HR) on 2 October 2017. The letter covered the proposed move to the Finchley store, communications from Zain Mahmoud and the fact that Zain Mahmoud had raised issues of underperformance with the Claimant. The letter explained again the rationale for the proposal i.e. that Gower Street had overspent on its payroll budgets and there was a need to fill 30 hours at Finchley, that Zain Mahmoud saw the Claimant's strengths as being pace and energy, which would benefit the Finchley shop, and that the Claimant would benefit from working in a smaller branch as it would mean that he would gain exposure to all aspects of the shop operation. The letter acknowledged that the way in which this had initially been communicated the Claimant by Zain Mahmoud had not been sufficiently extensive and that 'clear and structured communication relating to [the] move was lacking'. The letter also acknowledged that the Claimant had not had a formal review for some time and that this would be rectified with a view to identifying strengths, development needs, areas for improvement, and training needs. The letter stated that the Respondent was aware of the Claimant's ongoing care commitments and that Anthony Nethercott would meet with the Claimant to discuss adapting his shift patterns to ensure that the Claimant could meet those commitments. The letter confirmed that the move to Finchley store would go ahead on the basis of eight weeks' notice.

48. The Claimant appealed this decision on 6 October 2017 stating that he felt targeted on the basis that no one else had been asked to move to the Finchley store and that he had been accused of underperforming. He made reference to the fact that there were few ethnic minorities working in the Gower Street branch.

49. A lengthy appeal hearing was held on 13 March 2018 with the Claimant, Luke Taylor (Regional Manager), Jonathan Green (Retail Manager who acted as a note taker) and Deborah McSweeney (Trade Union representative). The Claimant aired his concerns, and it was decided at the end of the meeting to retract the proposal to move the Claimant to the Finchley store. It was proposed to carry out review processes with him and to organise a facilitation meeting with him and Roger White, one of the Respondent's managers.

50. In his evidence the Claimant stated that no formal outcome letter was provided to him of the decision to retract the proposal to move him to the Finchley store and that he only ever received verbal confirmation of this. We accept this evidence, which was not challenged by the Respondent.

XX – disciplinary issues

51. At the end of 2019 the Claimant was subjected to a disciplinary process in connection with complaints of unwanted conduct by two female members of staff. We do not feel the need to name these two members of staff on the basis that they did not provide evidence, one of them withdrew her complaint, and the other left the Respondent's employment at the time of making the complaint.

52. One of the complaints, from XX (who was described as White British by the Claimant but had an Asian surname) was pursued by the Respondent. In his evidence, the Claimant suggested that the Respondent had, in part, manufactured allegations against him. He accepted that he had sent text messages to XX but said that a document setting out details of concerning behaviour and purporting to be from XX to the Respondent was unsigned and undated. In the course of the hearing, the Tribunal was supplied with a copy of emails between XX and the Respondent which demonstrated that XX had approached the Respondent with concerns shortly before her employment with the Respondent ended.

53. XX emailed Jakleen Diab, a member of staff of the Respondent, on 1 November 2019 requesting a meeting prior to her last day of work on 2 November 2019. Ms. Diab could not meet with XX on 2 November 2019 as she was on annual leave, but they met on 5 November 2019. Following that meeting, Ms. Diab emailed XX on 7 November 2019 asking her to send in a letter outlining the events they had spoken about. On 10 November 2019, XX sent an email attaching a document which she said provided further detail of the matters complained of.

54. The Claimant's evidence was that the document was unreliable as it was unsigned and undated and that there was no proof that it had been written by XX. We did not see evidence that the document providing details of the Claimant's conduct was in fact attached to the email of 10 November 2019. Following consideration of the paperwork and the email, we find, on the balance of probabilities, that XX did indeed send this document to the Respondent. This is because we saw the email chain between the Respondent and XX and the unsigned document contained references to text message correspondence which was supported by photographs of the text messages themselves in the bundle of evidence. The Claimant accepted that he had sent these text messages.

55. The Claimant also complained that XX was not required by the Respondent to provide any additional evidence and did not have to participate in the investigation process. Jonathan Green's evidence was that the Respondent did attempt to contact XX but that she was unwilling to participate in an investigation. We find Jonathan Green's evidence credible as XX had left the Respondent's employment and it could well have been difficult to require her to participate in an investigation.

56. XX's complaints related to unwanted attention from the Claimant (by commenting or her clothing, standing close to her and asking questions about her romantic life). She said

that the Claimant had asked her whether she had ever had sex at work and whether she would ever have sex at Waterstones.

57. In a text message to XX at 23:22 on 29 October 2019 the Claimant said:

> *'Saturday you on early shift and it's your last day too... I was thinking if you want to have some fun at waterstones... do you remember when we were chatting and you told me how you had amazing fun back in Korea, at school. And remember when I asked you if you ever thought about having fun here at waterstones... well me being a direct person – I wanted to ask you this: do you want to have fun after your shift on Saturday here at waterstones?*

XX responded the following evening saying:

> *'Thanks Kas but I think I'm alright really.'*

58. At around the same time, YY (who was White British) made complaints about the Claimant. Her complaints were contained in a handwritten document which, again, was not dated or signed but from which it could be concluded that it had been written after 15 November 2019. YY subsequently withdrew her complaints and, while the Claimant was asked about YY at the initial investigation meeting on 19 November 2019, YY's complaints were not dealt with as part of the disciplinary hearing. We were not provided with evidence from either party as to why YY had withdrawn her complaints.

59. The Claimant attended an investigation meeting on 19 November 2019. The meeting was chaired by Ian Torrens (Manager) and Minakshi Patel (Rota Manager) took notes. The allegations in connection with XX and YY were put to the Claimant and he denied them. He was of the view that the reference to 'fun' in the text message correspondence was a reference to sitting down, reading books, and having coffee.

60. A disciplinary hearing took place on 9 January 2020 with Jonathan Green (manager) and Maxine Mould (HR Business Partner) as note taker. The Claimant was accompanied by a colleague. In the hearing the allegations were put to the Claimant again and the Claimant told the interviewer that he thought that they were malicious and that XX was a spiteful person. He was of the view that the Respondent was intruding on his personal life and was concerned that XX had made damaging allegations against him when she was no longer a member of staff at the Respondent. The Claimant felt that the Respondent was prioritising its duty of care to XX to that which it owed to the Claimant and had afforded favourable treatment to XX. He also complained that the procedure was unfair and that YY had breached confidentiality with other members of staff of the Respondent, thereby damaging his good name. The Claimant complained that the allegations made by YY had been withdrawn and that YY was not sanctioned for having made those allegations. The Claimant did not raise race or religion in the meeting.

61. At the meeting, the Claimant produced photographs, taken in the Gower Street store, of the Claimant and XX. The Claimant produced the photographs with a view to

showing an amicable relationship between the Claimant and XX. In all the photographs, XX's face was partially obscured either by a book or her hand.

62. On 9 January 2020 Jonathan Green interviewed YY in connection with the Claimant's allegations about breach of confidentiality and she denied having breached confidentiality. The transcript of the meeting shows that Jonathan Green impressed on her the importance of retaining confidentiality.

63. On 10 January 2020 the Claimant submitted a grievance letter about his treatment at the disciplinary hearing. He said that Jonathan Green had spit coming from his mouth, that he was treated with aggression and that he was forced to endure a disciplinary hearing in circumstances where his accuser had not clarified her allegations.

64. On 14 January 2020 the Claimant was provided with an outcome letter in connection with the disciplinary hearing. He was given a final written warning which would remain on his file for twelve months. The reasons expressed for this were the text messages referring to fun (which suggested a reference to intimate contact on work premises), the fact that XX felt uncomfortable around the Claimant and the Claimant's inability to acknowledge that a colleague had been negatively affected by the text messages.

65. On 17 January 2020 the Claimant appealed the decision made following the disciplinary hearing. His appeal related to the fact that he had not seen XX's statement or evidence, that XX had not been investigated, that the references to 'fun' were not sexual and in any event that it was within the Claimant's personal time, and that XX had acted maliciously.

66. On 19 January 2020, the Claimant submitted a second grievance statement relating to the disciplinary hearing outcome.

67. The Respondent (via an email from Nev Merriman, HR Business Partner) suggested to the Claimant that the grievance and appeal were intrinsically linked and that they should be thoroughly investigated as one case. He recommended investigating these issues via the appeals process. The Claimant responded to Mr. Merriman on 23 January 2020 to say that he did not wish to have the grievance and appeal process dealt with together.

68. A grievance hearing was held on 13 February 2020 with Neil Crockett (Retail Manager) and Nev Merriman (note taker). The Claimant was not accompanied. The Claimant was provided with an outcome on 5 March 2020. The Claimant's grievance was not upheld, and the outcome letter responded to the Claimant's concerns about process, the weight attributed to the photographic evidence, allegations of entrapment and the Claimant's feeling that he had been bullied at the hearing.

69. The Claimant appealed against the grievance, but the appeal was not actioned. The Respondent's evidence was that this related to the chaos caused by the COVID-19 lockdown in March 2020 which caused an unusually high workload for the business and, in particular, the HR team. We accept the Respondent's evidence in this regard.

Move to Economist Bookshop

70. The Claimant was furloughed at the end of March 2020 when the first COVID-19 lockdown was announced. The Respondent's stores started to reopen in June 2020. The Claimant was given the opportunity of returning to return from furlough in June 2020 but opted to remain on furlough.

71. On 18 September 2020 Gill Serocold (HR Business Partner) emailed the Claimant and set out the Respondent's request for him to return to work on 22 September 2020 in the Economist Bookshop which was in the same retail cluster as Gower Street.

72. At this point, the Respondent was operating a selection matrix to determine the order in which staff should return from furlough. The matrix scored staff against performance review rating, attendance, and disciplinary record (in decreasing order of importance).

73. We were informed by the Respondent that the communications to staff about the operation of the selection matrix provided that any data would not be retained following the process. To that extent, the Tribunal was not provided with the Claimant's actual scores on the selection matrix. We accept the Respondent's evidence that the data was not retained following the process.

74. The Respondents stated that the Claimant did not score highly on the selection matrix. It is in our view credible that the Claimant would not have scored highly on the selection matrix given his absence due to illness prior to the COVID-19 lockdown, as well as the formal written warning he received in 2019.

75. We were informed that the Claimant had a performance appraisal in 2019 but we were not made aware of any rating or score attributed to the Claimant following his appraisal.

76. The Claimant (in a letter dated 18 September 2020) objected to his return to the Economist Bookshop on the grounds of health, his need to care for his elderly parents, and the fact that the Economist bookshop required a more complex route to work.

77. On 2 October 2020, Sarah Houghton (Head of HR) responded to all his points and suggested quieter stores closer to his home (Brent Cross and Finchley) and advised that the move to the Economist Bookshop would, in any event, be a temporary arrangement.

78. On 14 October 2020 the Claimant submitted a grievance where he claimed, amongst other things, that colleagues, Vladimir (of unknown race and religion) and Krishna (of Indian race, religion unknown), had left Waterstones and that there was a vacancy in Gower Street. He also complained about high COVID levels in Brent Cross.

79. A grievance hearing was held on 23 October 2020 with Debbie Ross (manager) and Nev Merriman (note taker). The Claimant was accompanied by Deborah McSweeney

(Union representative). The Claimant raised his concerns again and the Respondent explained that the matrix process had been used, that while staff may have resigned from Gower Street, a corresponding budget was not given back to Gower Street to replace them, and that there were 178 people who were not working in their base shop due to the pandemic. The Claimant was also informed that there was a recruitment ban.

80. In her evidence Maxine Mould said that of the Respondent's 3,000 staff, 2,300 were on furlough in December 2020 and, of those working, 178 were not working in their base store.

81. On 4 November 2020 Debbie Ross (Senior Retail Manager) wrote an outcome letter to the Claimant explaining that the management team had followed the matrix and selection process, that there were no vacancies at Gower Street, and that the Economist Bookshop had been offered as a temporary alternative. The letter also explained that Brent Cross and Finchley stores (which had also been offered) were closer to the Claimant's home and gave assurances about COVID safety measures in the Respondent's stores. In the letter Debbie Ross accepted that a more thorough explanation (covering the way the selection process operated and the lack of vacancies at Gower Street) should have been given to the Claimant about the rationale for the proposed move to the Economist Bookshop.

82. The Claimant appealed on 9 November 2020 on health and safety grounds, because he saw himself entitled to twelve weeks' notice of any change in location, and because he felt that the matrix process had been applied retrospectively to him.

83. An appeal hearing was conducted on 3 December 2020 by Neil Crockett (Retail Manager) with Natasha Eyles acting as a note taker. The Claimant was accompanied by Chris Kenny, Trade Union Representative. The Claimant complained about the use of the matrix selection process and the fact that he perceived his role as having been taken by someone else.

84. On 11 December 2020 the Claimant received an outcome letter covering the points he had raised, being the health danger, the requirement for twelve weeks' notice, as well as the rationale for the selection matrix and the availability of hours in Gower Street. An explanation was provided for Vlad and Krishna. Krishna had scored highly on the matrix and had been asked to return to work but had resigned from the Respondent's employment. Vlad had not been asked to return to work and had then resigned.

85. In his evidence, the Claimant was of the view that the Claimant wished to move him to the Economist Bookshop because it was a failing store (which closed permanently some months after the proposal to move the Claimant there) and would allow the Respondent to make the Claimant redundant. We do not find that the Claimant proved this view partly because it would have been difficult for the Respondent to have predicted the future turnover of a shop with any accuracy, given both the disruption caused by the pandemic and the fact that it had no knowledge of future lockdowns, but also because

the Respondent offered the Claimant a move to the Finchley or Brent Cross stores, both being stores that remained open.

86. In December 2020, the Claimant was told by Minakshi Patel that ideally he would fill in a flexible working agreement if the Friday arrangement was likely to be ongoing.

87. The Claimant returned to Gower Street on 16 December 2020 where he carried out Ship-from-Shop ("SFS") duties. A further lockdown followed very shortly after this and the Claimant was furloughed again.

88. Simon Lewis took up the role of Store Manager in the Gower Street store in January 2021.

SFS Role Change in April 2021

89. Following the lockdown, the Claimant had a return-to-work meeting on 5 April 2021 with Pablo Rodriguez, an SFS manager. Pablo Rodriguez proposed to place the Claimant in SFS operations on a permanent basis.

90. SFS duties involved fulfilling online orders for customers. The SFS department was based in a separate part of the store and staff assigned to SFS moved around the store to collect books and fulfil online orders.

91. The rationale provided by Pablo Rodriguez at the meeting was that there were a huge number of SFS orders which needed to be processed. Pablo Rodriguez explained that SFS constituted a large and growing part of the Respondent's business, and that the nature of the business had, in part, changed because of the COVID-19 pandemic. At that meeting the Claimant said that he had understood that his move to SFS on 16 December 2020 had been a temporary one and he objected to a permanent move to SFS.

92. The Claimant complained that this was a breach of his contract of employment. In his evidence he claimed that the SFS role was not the same as a traditional bookseller role. He said that SFS operated in a different part of the shop which was not accessible by customers. It was necessary for SFS staff to pick books from the shop floor, take them to the SFS area, scan them, and pack them for dispatch. His evidence was that there was no direct contact with customers and that it was 'to a certain extent' a less skilled role.

93. The Respondent's evidence was that SFS staff interacted with customers if customers asked questions of SFS staff as they moved around the store. We accept Simon Lewis's evidence that nothing prevented an SFS bookseller from entering the shop floor and that SFS staff were frequently in the store. We also accept Simon Lewis' evidence that the SFS part of the business became more significant following the COVID-19 pandemic, particularly as there were fewer customers on the shop floor and more customers ordering online.

94. In his evidence, Simon Lewis said all staff were involved with SFS work to some degree and that six of thirty booksellers in Gower Street were required exclusively to fulfil the operational aspects of SFS. Mr. Lewis gave details of a number of individuals who had moved to SFS from traditional bookselling. They were all White British or White European. We accept this evidence and it was not challenged by the Claimant.

95. On 9 April 2021 the Claimant submitted a grievance on the grounds of breach of contract, as well as making complaints about Friday working. He also said that his role on the second floor of Gower Street had been replaced by a bookseller from the Respondent's Piccadilly store (Nick) who was White, whereas he, being Asian, had been relegated to SFS. In evidence, Simon Lewis stated that Nick had moved from the Piccadilly store to the Gower Street store prior to 2020 and that another individual, Tom , had volunteered to come back to work in April 2020 following the first lockdown (when the Claimant had opted to remain on furlough). We accept, therefore, that these individuals did not replace the Claimant.

96. On 26 April 2021 the Claimant raised the issue of having Mondays and Fridays off. He was informed by HR on 26 April 2021 that the Respondent did not envisage a problem with the Friday off and suggested that he go to Simon Lewis (Manager) and put this flexible working pattern in writing.

97. In an email to the Claimant on 7 May 2021 Simon Lewis said that he was not looking at changing the Claimant's pattern of having Monday and Friday off but merely wanted to record it to ensure that official policy was followed. We find that the request to complete a flexible working request was unconnected with the Claimant's religion and that it operated to create a paper trail of flexible working against the backdrop of the Claimant's return from furlough and a change in manager.

98. The Claimant attended a grievance hearing on 19 May 2021. It was conducted by Martin Eyre (Retail Manager) with Jo Halpin as a note taker. The Claimant was accompanied by Don Sear (Trade Union representative). He raised grievances in respect of: flexible working and having Mondays and Fridays off (particularly the request to submit a flexible working request); Pablo Rodriguez's behaviour in the meeting on 5 April 2021; the proposed move to SFS (which he saw as a demotion from the bookseller role); preferential treatment towards booksellers from the Piccadilly store; and unnecessary aggression by Maxine Mould.

99. On 26 May 2021 the Claimant attended a team briefing led by Ana Alvarez and Chris Bolt (both managers) in Gower Street. He queried the start time of the meeting (at 11.29) as being too early and thereby taking up his personal, rather than working, time. Simon Lewis held an investigation meeting with the Claimant on 27 May 2021. On 28 May 2021 the Claimant raised a grievance against Ana Alvarez and Simon Lewis, a separate grievance against Simon Lewis and Dave Watson and he also lodged a complaint about the investigation meeting on 27 May 2021.

100. The Claimant took sick leave from 1 June 2021 until 19 August 2021.

101. On 4 June 2021 Martin Eyre wrote to the Claimant with the outcome of his grievances in connection with the move to SFS. He provided a detailed explanation. In short, he explained that there had been a surge in SFS orders and that the shop floor was 50% down on daily sales. The letter explained that the Claimant had not been replaced by Piccadilly booksellers but that the Claimant had returned from furlough at a time when other staff had already returned and embedded themselves on the floors. The second floor of Gower Street was overstaffed and staff on that floor were used to support the whole shop and were constantly asked to support SFS. At the point of the Claimant's return, SFS needed 250 hours of staff time per week, when approximately 187.5 hours had been filled. The Claimant who worked for 30 hours per week was, therefore, asked to work in SFS. Martin Eyre recognised that the working relationship between the Claimant and Pablo Rodriguez may have been fractured as a result of the grievance and he offered a mediation meeting to be able to move forward positively.

102. The outcome letter sent on 4 June 2021 also covered the issue of Friday working. The Respondent confirmed that there had been a previous agreement in respect of Monday and Friday working. This information had not been handed over because of changes in personnel when new rotas were created following reopening of the shops in April 2021. It was clarified that Simon Lewis had asked the Claimant to complete a flexible working application, not in order to harass him, but simply to record his existing working pattern. It was noted that the issue of Fridays and Mondays had been resolved by the Respondent after the date when the grievance was raised and prior to the grievance hearing (i.e. that it had been resolved directly between the parties). The Claimant was reminded that he should seek to resolve issues with his direct manager rather than commencing a grievance. It was explained that the grievance procedure was not a substitute for good day to day communication through which employees were encouraged to discuss and resolve day-to-day working issues.

103. The Claimant appealed the outcome of his grievance on 10 June 2021 and his appeal was heard by Jennifer Shenton (Regional Manager) on 12 October 2021, with notes taken by Natasha Eyles (HR Business Adviser). The Claimant was accompanied by Don Sear (Union Representative).

104. On 21 September 2021, Liam Bowden (a manager) held a second investigation meeting with the Claimant in connection with the staff briefing on 26 May 2021.

105. On 5 November 2021 Jennifer Shenton (Regional Manager) wrote the Claimant an outcome letter which dealt with his appeal and considered the changes to his role, his hours of work, and his complaints of racial discrimination. The letter explained the need for staff to support the SFS function, that the Claimant was not contractually entitled to a specific location in his base shop, confirmed that the Claimant was not required to work on Monday or Friday, and explained the Respondent's belief that no discrimination had occurred.

106. On 5 November 2021, Jennifer Shenton wrote to the Claimant to confirm that his flexible working request had been granted and that he would not be required to work on Mondays or Fridays and that his hours of work were 30 hours per week. The letter asked the Claimant to sign and return the letter to confirm his agreement to the changes detailed in the letter. The Claimant refused to sign the letter.

107. On 16 November 2021, Simon Strand (Retail Manager) wrote a 'letter of concern' and sent a file note to the Claimant in relation to the investigation process surrounding the briefing on 26 May 2021. The letter said that the Claimant's refusal to answer questions pertaining to the concerns raised by Ana Alvarez had hindered the investigation process. The Claimant was requested to engage more openly with any future investigation or disciplinary hearings so as not to be obstructive to finding complete details and a fair outcome. The file note recorded the disruption of a shift briefing on 26 May 2021, stated that it was expected that the Claimant act in a polite and professional manner towards his colleagues, and that should there be further incidents of the same or similar nature the Claimant may be subject to an investigation and disciplinary action.

108. In early December 2021 the Claimant was put on a work rota on Friday 24 December 2021. The Claimant approached ACAS on 13 December 2021 to complain about his situation. We were not provided with a copy of the correspondence with ACAS but the Claimant confirmed at the hearing that he had raised religious discrimination with ACAS, in relation to having been put on the work rota on Friday 24 December 2021 (Friday being a day when he did not work for religious reasons).

109. The Claimant worked on Friday 24 December 2021. The Claimant was of the view that the rota requirement was an act of religious discrimination and had been deliberately done, partly because he had commenced Early Conciliation with ACAS in December 2021.

110. Simon Lewis's evidence was that the issue with the rota related to human error when formulating the rota. There were between 100 and 120 employees in Gower Street and one person was responsible for creating rotas for both Piccadilly and Gower Street. The rotas for the Christmas period used a different template to regular weeks and the Friday provision relating to the Claimant was not incorporated in the Christmas rota. Simon Lewis' evidence was that the rota had been provided several weeks in advance but that the Claimant had not raised the error but had instead chosen to work on that day. Simon Lewis's evidence was that, had he been notified, he would have rectified the matter. We accept Simon Lewis' evidence on the basis that the rota was prepared using an Excel spreadsheet as a base and required the transfer of information relating to particular individuals, which would have meant that human error was possible. We also accept Simon Lewis' evidence that he would have rectified the matter, had he been aware – he was clear in his evidence that amendments to rotas were routine matters and that there was no issue with the Claimant's working pattern. To corroborate this, further examples were provided in evidence of instances where Simon Lewis had accommodated the Claimant in respect of his religious obligations at Ramadan.

111. On 25 January 2022, the Claimant attended a staff briefing with Chris Bolt (Manager). Staff were informed that if they arrived late, they would need to fill in a late form. The Claimant made some comments complaining about having to wait after closing for managers to let staff out the store. The Claimant's view of this was that staff should not have to wait during their personal time and that it was an unnecessary hindrance to have to wait. The Respondent's view of this was that Claimant was challenging staff unnecessarily.

112. A member of staff saw the Claimant wearing a coat and carrying a bag while working during the period between 25 January 2022 and 3 February 2022. This was viewed as being an attempt to avoid waiting to leave the store at the end of a late shift.

113. The Claimant submitted the First Claim to the Employment Tribunal on 31 January 2022. It was not received by the Respondent until late February 2022.

Dismissal

114. An investigation meeting was held on 3 February 2022 between Jonathan Green (manager), Maxine Mould (note taker) and the Claimant. The Claimant was not provided with notice of the meeting, which took place at the Gower Street branch during business hours.

115. At the outset, Jonathan Green explained that the meeting would consider certain issues relating to an incident which had happened the previous week (without specifically mentioning the staff meeting on 25 January 2022). He raised the issue of the file note and letter of concern sent to the Claimant in November 2021. The Claimant expressed concern that he was not able to bring a Union representative but was told by Maxine Mould that he had no right to be accompanied to an investigation meeting and that the meeting represented a reasonable management request. The Claimant remained in the meeting but it is clear from the transcript of the meeting that he felt anxious and concerned about having been brought to an investigation meeting without notice and without knowing the issues complained of.

116. During the meeting, the Claimant was challenged for disrupting the staff meeting at Gower Street on 25 January 2022 where management had thought that the Claimant was being difficult and disruptive and purposely obstructive and that he was trying to score points and undermine managers in front of colleagues. The Claimant was also challenged in relation to wearing his coat at work, with the Claimant referring to low temperatures in the shop.

117. Jonathan Green made reference to the file note and letter of concern dated 16 November 2021 from Simon Strand to the Claimant where the Claimant had been informed of concerns relating to the disruption of a shift briefing on 26 May 2021 and reminded that he needed to engage openly with the Respondent.

118. Much of the meeting was taken up with Jonathan Green asking the Claimant to provide his version of events and explain what had happened, with a view to facilitating a dialogue. It is clear from the transcript that the Claimant was not engaging fully during the meeting and that he gave brief and obtuse responses to direct questions. He stated that he did not recollect many of the events complained of. We find this to be due to the fact that he was (quite understandably) anxious given the manner in which the meeting had been convened and did not wish to provide information for fear of incriminating himself. We find that it was also due to the fact that the relationship between the parties had become significantly more difficult, with the Claimant adopting a siege mentality and being unwilling to engage with the Respondent except through formal processes.

119. Jonathan Green referred in the meeting to the fact that the Claimant had complained to ACAS, including in relation to overtime and Friday working. Jonathan Green said that when the complaint about overtime had been investigated it had been established that the Claimant had the fourth highest level of overtime in the Gower Street store in December 2021. He challenged the Claimant's complaint about Friday working on the basis that this could have been resolved internally with a manager. The view he expressed at the meeting was that it was clear that the relationship between the parties was fractured to the extent that the Claimant felt that he could not approach the Respondent with an issue, but had to take his complaints outside the organisation. We find that Mr. Green was concerned by the fact that the Claimant was bringing grievances in circumstances where Mr. Green was of the view that the issues in question could have more easily been resolved with management.

120. The meeting was adjourned for Mr. Green to consider what had been discussed. Mr. Green returned and read out a statement to the Claimant as follows: "*As you have indicated by your responses and lack of responses, you have no intention to abide by the implied term of trust and confidence in your contract of employment and I have no confidence that you are not going to deliberately subvert internal processes, undermine managers and generally disrupt the employment relationship, there is no alternative but to dismiss as this is a formal breach of your contract of employment and you are not entitled to notice.*"

121. The Claimant's summary dismissal on 3 February 2022 was confirmed in similar terms in a letter dated 4 February 2022 from Jonathan Green to the Claimant which stated as follows:

> '*As confirmed to you yesterday, as indicated by your responses or lack of responses, you have no intention to abide by the implied term of trust and confidence in your contract of employment and I have no confidence that you are not going to deliberately subvert internal processes, undermine managers and generally disrupt the employment relationship and so there is no alternative but to summarily dismiss as this is a fundamental breach of your contract of employment and you are not entitled to notice*.'

122. Mr. Green's evidence was that he considered that the Claimant had not been cooperative during the meeting. Although the purpose of the meeting had been an investigation, he felt that the Claimant had been unhelpful and evasive and had no intention to work cooperatively and that the implied term of trust and confidence had been irretrievably broken. Mr. Green's evidence was that he had considered other options but saw no alternative, particularly in light of the file note and letter of concern. Mr. Green's further evidence was that the problems in the employment relationship had been ongoing and would likely be repeated in the future.

123. Having considered the transcripts of the meeting, we are of the view that Mr. Green did seek to engage with the Claimant and obtain further information from him. We find that Mr. Green's frustration with the Claimant's failure to respond and engage with the Respondent during the meeting resulted in a situation where Mr. Green felt that the situation had reached a standstill such that he felt that there was no option but to dismiss the Claimant. However, we do find that Mr. Green's considerations did not take account of the fact that, in the circumstances, it was unlikely that an investigation meeting held without notice would necessarily put an employee (particularly in the circumstances in question) at ease and encourage fruitful dialogue.

124. To that extent, we find that the Claimant was dismissed because of the lack of constructive dialogue between the parties at the meeting on 3 February 2022, when combined with the long historic difficulties between the Claimant and the Respondent, particularly the Claimant's challenges at the meetings in May 2021 and January 2022, and the Respondent's perception that the Claimant had ceased engaging directly with management but instead resorting to formal complaints. We do not find that Jonathan Green came to the meeting determined to dismiss the Claimant, but instead sought to engage with him with a view to improving the situation. Regrettably, however, the meeting was held against an adversarial backdrop and only served to worsen the situation.

125. In his evidence, the Claimant was adamant that he did not consider the employment relationship to have broken down. He made much of the distinction between 'fractured' and 'broken' and argued that while the relationship may have been difficult, it was still functioning and he was fulfilling his role to the best of his abilities.

126. It was subsequently conceded by the Respondent in November 2022 that the dismissal had been procedurally unfair because the Claimant had not been accompanied to the meeting on 3 February 2022 and he had not been informed that the meeting could result in his dismissal.

127. Jonathan Green's evidence was that at the dismissal meeting on 3 February 2022 he knew that the Claimant had approached ACAS in December 2021 in connection with the Friday rota and overtime but that this had not played any role in the decision to dismiss him. His evidence was that he had made the comments about ACAS at the meeting on 3 February so as to show that the Claimant's complaints lacked substance (as he did in fact receive overtime) and to demonstrate that the complaints could more easily have been resolved internally (by a simple amendment to the rota in relation to Friday 24 December

2021). We find that while Mr. Green was aware that the Claimant had complained to ACAS about Friday working and overtime he was not aware that the complaints about Friday working and overtime amounted to a complaint of religious discrimination. It is clear to us that he perceived the issues to relate solely to practical matters, being the rota (whereby the Claimant, as part of a flexible working arrangement, did not work on Fridays) and the Claimant's overtime. This is substantiated in the minutes of the dismissal meeting, where the issues around ACAS are discussed, not in the context of discrimination, but as practical administrative issues which were capable of easy and swift resolution by the Respondent.

128. We find that Mr. Green could not at the date of dismissal have been aware of the First Claim as it was submitted to the Tribunal on 31 January 2022 and the Respondent was not notified by the Tribunal until a later date that proceedings had been commenced.

129. Following the Claimant's dismissal, the Respondent became aware of the fact that the Claimant had made covert recordings of meetings with the Respondent's management.

Appeal against Dismissal

130. The Claimant appealed against his dismissal on the grounds that he was not afforded fair process and that the decision to dismiss was neither fair nor reasonable. His desired outcome was to return to his role as a bookseller in Gower Street.

131. An appeal meeting was conducted on 6 April 2022 by Simon Bristowe (Head of Shop Operations) with Sheila Hogg (HR Business Partner) as the notetaker. The Claimant was accompanied by Bryan Kennedy, Union representative.

132. In his appeal, the Claimant argued that he had been summarily dismissed, because the meeting had been expressed as being investigatory, rather than a disciplinary meeting.

133. The Claimant referred to another member of staff (of White European ethnicity) who had carried a bag and wore a coat on the shop floor and had not been subjected to any detriment because of this. In his evidence, Simon Lewis explained that he had not seen the member of staff in question wearing a coat, but that she was diabetic and needed to carry a satchel to keep her medication close. In his evidence, Jonathan Green also made clear that the Claimant had not been subjected to a disciplinary process because of wearing a coat and carrying a bag, but because of his manner at the meeting on 25 January 2022.

134. The Claimant's appeal was not upheld, and he was sent a lengthy letter explaining the reasons for this. The letter dealt with the Claimant's complaints, including that: (a) he had been 'unlawfully detained' in the dismissal meeting because he was dismissed 16 minutes after the end of his shift; (b) the implied term of trust and confidence was wrongly applied to his circumstances and could not enforced during his private time; (c) a

disciplinary process had not been correctly followed; (d) his employment contract contained no reference to the term of trust and confidence; (e) gross misconduct was not determined at the dismissal meeting; (f) he was denied the right to bring a Trade Union representative to the dismissal meeting; (g) the Respondent did not consider alternatives to his dismissal; (h) there was a lapse of time (of approximately nine days) between the behaviour complained of and the dismissal; (I) the dismissal meeting considered irrelevant incidents between 2017 and 2022; (m) he felt stressed and uncomfortable at the dismissal meeting; (n) he had been dismissed for gross misconduct on the basis of a written warning which had expired; (o) the letter of 9 September 2021 in relation to vexatious grievances tarnished his reputation; (p) the relationship was not fractured; and (q) Maxine Mould and Jonathan Green were not impartial.

135. The Claimant's complaints were not upheld, except in relation to the fact that he was not formally invited to a disciplinary hearing and that he had not been invited to bring a Union representative, meaning that the business had not followed the correct procedure initially. In relation to his claims about race, these were strongly refuted by the Respondent who said that the rota issue on 24 December 2021 was a genuine mistake. The decision to dismiss him was upheld (on grounds that the Claimant's continued challenging behaviour made the employee/employer relationship untenable and that his actions had broken the relationship). The letter considered the issue of reinstatement and the Claimant was informed that he would not be reinstated on the basis, again, that his actions over a period of time had broken the relationship. In subsequent evidence, Simon Bristowe accepted that the dismissal had not been procedurally fair.

136. Simon Bristowe's oral evidence (which was not challenged) was that at the time of considering the Claimant's appeal against his dismissal he was aware that the Claimant had contacted ACAS but he had no information about the process. He said that he knew nothing of the Employment Tribunal claim. We weighed this evidence against the available paperwork. On the issue of the complaint to ACAS, the Claimant did refer to the complaints to ACAS around Friday working in his appeal letter (which was considered by Mr. Bristowe prior to conducting the appeal) but did not set out any detail in relation to discrimination in the context of Friday working. In his outcome letter to the Claimant on 19 May 2022, Mr. Bristowe referred to the transcript of the investigation meeting on 3 February 2022 which contained references to the ACAS complaint about Friday working and overtime. Therefore, while do consider that Mr. Bristowe was aware that the Claimant had contacted ACAS about Friday working and overtime, he was not aware of the fact that these complaints related to religious discrimination as the information available to Mr Bristowe did not label the complaints as such. To that extent, we consider Mr. Bristowe's evidence to be credible.

137. We considered Mr. Bristowe's evidence about his lack of knowledge about the Employment Tribunal claim to be plausible, on the basis that it is not unusual for HR teams to withhold this information from an individual tasked with conducting an appeal in circumstances such as these. In addition, the paperwork from the Claimant surrounding the appeal made no reference to the Employment Tribunal claim. In the absence of strong evidence to the contrary, we are not able to find that Mr. Bristowe was aware that a claim

which included allegations of discrimination had been submitted to the Employment Tribunal.

Unfavourable treatment by comparison with Janice

138. The Claimant alleged, in connection with his dismissal, that he had been treated less favourably than Janice, a White Australian bookseller in the Gower Street store. The Claimant's view was that Janice had challenged management at the staff meeting on 25 January 2022 but had not been sanctioned. The Claimant was also concerned that Janice had returned to the Gower Street store at the end of furlough and had not been placed in SFS operations.

139. In his evidence the Claimant pointed to meeting notes of an internal interview with a manager in relation to what had occurred at the meeting on 25 January 2022. The Claimant pointed to the fact that the manager had said that Janice had challenged them and said that it was illegal to make them work in cold conditions and that she had challenged the fact that the manager had said that there was no legal temperature limit. The manager had then said that he would try to get more heaters.

140. Simon Bristowe's evidence was that Janice had not disrupted the meeting on 25 January 2022 to the same extent as had the Claimant. While the Claimant had engaged in a 'back and forth' communication, Janice had asked a question. When the wearing of coats at work had been sanctioned, the Respondent's evidence was that Janice had made comments about the temperature of the building which the Respondent had said it would investigate. She had then ceased. By contrast, the Claimant's communication was perceived as being argumentative for its own sake (i.e., objecting to waiting for a manager to open the door of the store) as opposed to seeking to rectify a genuine issue. In addition, the back and forth from the Claimant had continued for a much longer time. We accept that Janice did indeed challenge the Respondent, but not to the same degree as had the Claimant.

141. The Respondent's evidence (via Simon Lewis), in connection with the fact that Janice was not placed in SFS, was that Janice had a physical disability which meant that the lifting and packing element of the SFS duties would have been difficult to manage and so she was not asked to work in SFS. We accept this evidence on the basis that it was a reasonable adjustment to reflect a disability.

Miscellaneous facts in respect of the Claimant's claims

142. Between 2017 and the Claimant's dismissal in February 2022, the Claimant brought a large number of grievances and a similar number of appeals against those grievances. In the nine years prior to 2017 he did not raise any grievances. In a letter from Maxine Mould (HR Business Partner) to the Claimant on 9 September 2021 she listed six grievances between January 2020 and the date of the letter. In his evidence the Claimant confirmed that the letter failed to refer to two further grievances, therefore bringing the total number of grievances in that time period to eight. In the period between September

2021 and the Claimant's dismissal, further grievances were made against managers. Generally, each grievance dealt with a number of issues and they involved lengthy correspondence.

143. Between 2017 and 2022, the Claimant made various complaints in connection with procedural matters. These complaints included the fact that note takers had signed outcome letters on behalf of the writer of the letter, note takers had asked questions of him at meetings, that he had been asked not to take notes at meetings and that the Respondent's staff were hostile to him in meetings.

144. He also complained that he had not received an appeal hearing decision in connection with the proposed transfer to the Finchley store in 2017 and that the facilitation session with Zain Mahmoud which had been promised never in fact took place.

145. The Claimant alleged that the Respondent's documents (provided as part of a disclosure exercise) had been tampered with. We were shown examples of documents which the Claimant considered to have been tampered with. It appears to us that different versions of the document were created and that there were either small differences between standard wording or that standard wording had been moved from one section of the document to another in the process of finalising a document. We were not, therefore, in a position to conclude that documents had been tampered with.

146. The Claimant complained that his appeals of 14 September 2019 and 5 March 2020 were not heard by the Respondent. We note that the Claimant did not expressly follow up on these issues and, in his evidence, said that he felt that the onus was on the Respondent to have done so. In her evidence, Maxine Mould confirmed that the failure to progress these matters related only to the COVID-19 lockdown and the fact that the Respondent's HR department had been flooded with additional work at the time in question. We accept this to be the case, on the basis that the pandemic was an unprecedented event which generated a huge amount of work for HR practitioners in respect of furlough arrangements.

147. The Respondent's evidence was that the Claimant's use of the grievance process placed a heavy burden on the Respondent's staff. The Respondent used a number of staff to investigate grievances and brought in staff from other stores to conduct hearings, with a view to ensuring independence. There were examples of occasions where the Claimant placed demands on the Respondent in connection with the process. For example, the Claimant presented a long letter at the beginning of a disciplinary hearing on 9 January 2020, which we considered to have been an attempt to stall the meeting. We accept that the volume of grievances and the difficulty in settling the grievances did indeed place a burden on the Respondent.

148. We were not provided with generic data from the Respondent in respect of the race or religion of the Respondent's staff. Neither were we provided with information about equal opportunities training. In response to a question from the Tribunal, Maxine Mould

gave evidence that the Respondent was compiling and seeking to improve equality and diversity data about employees.

Issues to be decided by the Tribunal

149. The issues to be decided by the Tribunal are set out below.

Unfair Dismissal

If the dismissal was unfair:

(a) Did the Claimant contribute to the dismissal by his conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the alleged misconduct.
(b) What difference would a fair procedure have made? (This is known as the *Polkey* question.)

Direct discrimination on grounds of race or religion

Did the Respondent, in:

(a) Attempting to move him to their Finchley store in 2017
(b) Issuing him with a final written warning in late 2019
(c) Attempting to move to another store in September 2020
(d) Requiring him in April 2021 to change to a different role
(e) Requiring him to work on a Friday
(f) Dismissing his various grievances about these issues and about the way they were handled
(g) Dismissing him and
(h) Rejecting his appeal against dismissal

treat him less favourably than it treated or would have treated someone else in the same circumstances apart from his race or religion.

In particular, the Claimant compares his circumstances with his colleague, Janice, a White Australian who worked as a bookseller in Gower Street

Victimisation

The Claimant relies on the fact that he submitted a claim form on 31 January 2022, alternatively that he had begun early conciliation, as a protected act.

Did the Respondent carry out any of the treatment mentioned at (a) to (f) above as a result?

Breach of Contract

Did the Respondent breach the Claimant's contract by changing his role in or around April 2021?

Alternatively, were they in breach of contract by doing so without giving more notice?

Did the Claimant waive the breach by continuing to work for the Respondent?

If there was a breach, what compensation is the Claimant entitled to?

Wrongful Dismissal

Did the Respondent breach the Claimant's contract by summarily dismissing him on 3 February 2022?

If there was a breach, what compensation is the Claimant entitled to?

Law

Unfair Dismissal

150. The test for unfair dismissal is set out at section 98 of the Employment Rights Act 1996. Under section 98(1) it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within section 98(2) i.e. conduct, capability, redundancy or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position in question.

151. The dismissal of an employee for a reason which relates to the conduct of the employee is potentially fair. Many workplace disciplinary policies will seek to define misconduct, its severity, and how it will be dealt with by the employer. It is for the employer to show that the conduct in question was the reason for dismissal.

152. The dismissal of an employee for 'some other substantial reason' is a catch-all potentially fair reason for dismissal. There is no statutory definition of the term, but the case law has made clear that the reason must be substantial. Procedural fairness is important in dismissals for 'some other substantial reason' (and all dismissals) as it goes to the issue of whether the employer's decision to dismiss was reasonable.

153. Personality clashes or irreconcilable differences between colleagues can amount to 'some other substantial reason'. However, the conflict would be required to cause substantial disruption to the business. (**Treganowan v Robert Knee and Co Ltd [1975] ICR 405**) The Employment Appeal Tribunal upheld a dismissal for some other substantial reason in the case of **Gallacher v Abellio Scotrail Ltd UKEATS/0027/19**. The Employment Appeal Tribunal considered the case to be a rare example of a situation where following procedures could be considered to be futile. Ms. Gallacher was a senior manager who was working at a senior level in an important part of the business which

was under high pressure and public scrutiny to deliver a public service. Substantial fines would have been imposed if targets were not met. Ms. Gallacher's relationship with her manager was critical during a difficult time for the employer's business. The Employment Appeal Tribunal found that while dismissal without following any procedures would always be subject to extra caution on the part of a Tribunal, it was satisfied that the Tribunal had exercised that caution in the circumstances in question.

154. Loss of trust and confidence has on occasion been held to amount to 'some other substantial reason' but has frequently been criticised by the Employment Appeal Tribunal. In **McFarlane v Relate Avon Ltd [2010] IRLR 196 (EAT)** the Employment Appeal Tribunal considered a situation where a relationship counsellor had been dismissed over his refusal to counsel same sex couples (which conflicted with his religious beliefs) on the basis that his refusal amounted to a breakdown in trust and confidence. The Appeal Tribunal considered it to have been a dismissal which was for some other substantial reason (and not a dismissal for breach of trust and confidence) on the basis that the employer, by virtue of its equality policy, regarded the issue as an important part of the employee's role. In **Leach v OFCOM [2012] EWCA Civ 959**, the Employment Appeal Tribunal and the Court of Appeal criticised the reliance on the loss of trust and confidence, with the Employment Appeal Tribunal stating that it is not an automatic solvent of obligations as between employer and employee and the Court of Appeal observing that it is not a 'mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal'.

155. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of the Employment Rights Act 1996, the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason (section 98(4) of the Employment Rights Act 1996). The test as to whether the employer acted reasonably is an objective one. The Tribunal has to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted. (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**) In so doing the Tribunal must not substitute its view for that of the employer. (**Midland Bank plc v Madden [2000] IRLR 82**)

156. Under section 122(2) of the Employment Rights Act 1996, the Tribunal shall reduce the basic award where it considers that any conduct of the claimant was such that it would be just and equitable to do so. Under section 123(6), where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

157. Where the dismissal is unfair on procedural grounds, the Tribunal must also consider whether, by virtue of **Polkey v AE Dayton Services [1987] IRLR 503, HL**, there should be any reduction in the compensatory award to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

158. A Polkey deduction may take the form of a percentage reduction, or it may take the form of a Tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example, a period in which a fair procedure would have been completed). Alternatively, a combination of the two approaches could be used but not in the same period of loss.

159. The question for the Tribunal is whether the particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the employee in any event had the unfairness not occurred.

160. The Tribunal must assess any Polkey deduction in two respects: (a) if a fair process had occurred, would it have affected when the employee would have been dismissed; and (b) the percentage chance that a fair process would still have resulted in the employee's dismissal.

161. Where there is a significant overlap between the factors taken into account in making a Polkey deduction and when making a deduction for contributory conduct, the Tribunal should consider expressly, whether in light of that overlap, it is just and equitable to make a finding of contributory conduct and, if so, what the amount should be. This is to avoid the risk of penalising the claimant twice for the same conduct.

Race/Religious discrimination

162. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less favourably because of race or religion (or another protected characteristic) than that person treats or would treat others. Under section 23(1) when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins. 'Religion' means any religion and a reference to religion includes a reference to a lack of religion.

163. The prohibition on discrimination against employees is found at section 39(2) of the Equality Act 2010. Employers must not discriminate: in the terms of employment; in the provision of opportunities for promotion, training, or other benefits; by dismissing the employee; or by subjecting the employee to any other detriment.

164. A detriment in the workplace arises where, by reason of the act(s) complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the workplace. An unjustified sense of grievance is not sufficient. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**)

165. Sometimes there is an actual comparator. Where there is no actual comparator it is necessary to consider a hypothetical comparator as a way of testing whether the treatment was less favourable and whether the treatment was because of the protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason

why' the claimant was treated as he was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**)

166. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**)

167. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

168. Section 136 of the Equality Act 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred unless that person can show that he or she did not contravene the provision. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another. (**Hewage v Grampian Health Board [2012] IRLR 870 SC**)

169. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142**. The burden of proof is on the claimant. The Tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, the burden of proof shifts. It is then for the respondent to prove it did not commit the act of discrimination. To discharge that burden, it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof.

170. The Court of Appeal in **Madrassy v Nomura International plc [2007] EWCA Civ 33** states: 'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

171. Despite that, it is not always necessary to apply the test in two stages. As stated in **Hewage v Grampian Health Board [2012] IR 1054**, a case may "require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.''

172. Tribunals are directed to find primary facts from which they can draw inferences and then look at 'the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of... was because of a protected characteristic". (**Anya v University of Oxford [2001] ICR 847**)

This is supported by **Laing v Manchester City Council [2006] ICR 1519** which provides that one the employee has shown less favourable treatment and all material facts, the Tribunal can then move to consider the respondent's explanation.

173. A discrimination claim must normally be submitted to a Tribunal before the end of the period of three months starting with the date of act to which the complaint relates (section 123(1) Equality Act 2010). Time will be extended where a claimant has referred the dispute to the ACAS early conciliation process.

174. Acts occurring outside the time limit may still form the basis of a claim if they are part of 'conduct extending over a period'. In such cases, time starts running at the end of that period (section 123(3) of the Equality Act 2010). Time in any discrimination case can be extended by such a period as the Tribunal thinks just and equitable (sections 123(1)(b) and 123(2)(b) of the Equality Act 2010).

Victimisation

175. Victimisation (as defined at section 27 of the Equality Act 2010) occurs where a person (A) subjects another person (B) to a detriment because: (a) B has done a protected act; or (b) A believes that B has done, or may do, a protected act. A protected act is defined as:

> Bringing proceedings under the Equality Act 2010;
> Giving evidence or information in connection with such proceedings;
> Doing any other thing for the purposes of or in connection with the Equality Act 2010;
> Making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.

176. Where a claimant alleges (whether expressly or otherwise) that the respondent or another person has contravened the Equality Act 2010, this may amount to a protected act. However, the asserted facts must be capable of amounting to a breach of the Equality Act 2010 and must be sufficiently clear. Merely making a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of discrimination legislation is not sufficient to amount to a protected act. (**Beneviste v Kingston University UKEAT/0393/05**)

177. The test for detriment in victimisation cases is the same as that in discrimination cases. The test is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**) The test for detriment has subjective and objective elements. The Tribunal must consider the subjective impact on the claimant, but their perception must also be objectively reasonable in the circumstances.

178. There is no specific timeframe within which a detriment must occur after a person has done a protected act. Under the Equality Act 2010 victimisation occurs where a claimant is subjected to a detriment 'because' they have done (or might do) a protected act. As with direct discrimination, victimisation need not be consciously motivated but the protected act must be a real reason for the detriment.

179. If it is established that the employee did a protected act and the employer subjected the employee to a detriment, the critical question will to ask why the employer subjected the employee to that detriment i.e., whether it was because they had done the protected act or whether it was wholly for other reasons. (**Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065**)

180. As with direct discrimination, victimisation need not be consciously motivated. If an employer's reason for subjecting an employee to a detriment was unconscious it can still constitute victimisation. (**Nagarajan v London Regional Transport and others [1999] IRLR 572**)

181. The protected act does not need to be the sole reason for the detriment suffered by the employee but the influence needs to be significant (**Nagarajan v London Regional Transport and others [1999] IRLR 572**). **Nagarajan** was clarified in the Court of Appeal where it was stated that for an influence to be 'significant' it does not need to be of great importance. A significant influence is, rather, an influence which is more than trivial. (**Igen Ltd and Ors v Wong [2005] ICR 931**)

182. A claim will not succeed where the true reasons for the dismissal are properly separable from the employee's protected act (**Martin v Devonshires Solicitors [2011] ICR 352**). The Tribunal must identify the reasons for particular treatment and then evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. (**Kong v Gulf International Bank (UK) Ltd [2022] ICR 1513**)

183. Detriment cannot be because of a protected act if there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. (**Scott v London Borough of Hillingdon [2001] EWCA Civ 2005**)

184. In a victimisation claim, time runs from the discriminatory action, not from the protected act.

Breach of Contract

185. Where one party to a contract repudiates the contract or commits a fundamental breach of contract, the innocent party can either: refuse to accept the repudiation and affirm the contract (i.e. treat the contract as continuing); or accept the repudiation or fundamental breach and treat the contract as discharged.

186. Under general contractual principles, a breach of contract which is not affirmed entitles the innocent party to sue for damages.

187. The starting legal position is that the terms of an employment contract are determined at its formation and any variation in the absence of agreement is likely to be a breach of contract entitling the employee to seek damages or, where the breach is fundamental, to resign and claim constructive dismissal.

188. Contractual terms may give an employer the right to make changes if they are wide enough to be construed or interpreted so as to cover the proposed changes; or if they are explicitly phrased in order to give employers a wide discretion to make changes.

189. There are a number of cases covering changes to job descriptions and titles. In **Glitz v Watford Electric Co Ltd 1979 IRLR 89** the Employment Appeal Tribunal held that the operation of a duplicating machine fell within the ambit of a role described as 'copy typist/general clerical duties clerk'. In **Haden Ltd v Cowen 1983 ICR1, CA**, the Court of Appeal held that a person employed as a 'divisional contracts surveyor' could not be transferred to a role as a quantity surveyor, despite provisions in the contract stating that he was required to carry out all duties which reasonably fell within the scope of his capabilities. The reasoning was that wider wording was restricted to the operation of his function as a divisional contracts surveyor.

190. In **Cresswell and Ors v Board of Inland Revenue 1984 ICR 508**, the High Court held that the degree of alteration of a role by computerisation, was not enough to make the position fall outside the original job description.

191. Express terms in a contract of employment giving the employer the right to vary the contract unilaterally can be limited either because implied terms (such as the implied term of mutual trust and confidence) may operate to limit the effect of a flexibility clause; or because flexibility clauses are often construed restrictively by courts and tribunals.

192. In the circumstances, it is necessary for the court or tribunal to construe the relevant contractual provision with a view to establishing whether the proposed action falls within the terms of the contract.

193. Employment tribunals in England and Wales were given power to deal with breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which allows employment tribunals jurisdiction to hear breach of contract claims which are outstanding on termination of employment.

Wrongful Dismissal

194. A claim for wrongful dismissal is based on a common law action for breach of contract. It may arise out an actual or constructive dismissal. In these circumstances, the claim relates to the failure to give the required notice of termination of employment.

195. The Tribunal is not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (**Enable Care and Home Support Ltd v Pearson EAT 0366/09**)

196. The concept of repudiatory breach is described as a situation where the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'. (**Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285**) The case also stated that the disobedience must be 'wilful' that is to connote a deliberate flouting of the essential contractual conditions.

197. A repudiatory breach has been described as conduct which 'so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. (**Neary v Dean of Westminster [1999] IRLR 288** (relating to secret profits made by an employee over a prolonged period of time) as approved by the Court of Appeal in **Briscoe v Lubrizol Ltd [2002] IRLR 607** (a case relating to fitness for work) and by the Privy Council in **Jervis v Skinner [2011] UKPC 2** (relating to a dispute over payment)).

198. The implied term of mutual trust and confidence was approved by the House of Lords in **Malik and another v Bank of Credit & Commerce International SA (in compulsory liquidation) [1998] AC 20** where it was held by Lord Steyn that the 'employer must not, without reasonable and proper cause, conduct itself in a manner calculated as likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'. As an implied term, it can overlap with other implied terms, including the employee's implied duty of fidelity. Although the case law demonstrates that the implied term of trust and confidence is used predominantly against an employer, it can be used against an employee, usually to justify summary dismissal by the employer in cases of misconduct. Cases where a breach of the implied term of trust and confidence have been considered include in relation to an employee who was not provided with a pay increase subsequently drawing up a press statement pointing out various malpractices of the employer (**Coyne v SE Derbyshire College ET Case No. 15709/95**), and where an employee failed to accept that the execution of duties fell below the standards expected (**Khan v Surrey and Sussex NHS Trust ET Case No. 2304419/06**).

199. While it is clear that conduct on the employee's part is capable of breaching the implied term of trust and confidence, employers must be careful to ensure that an employee's behaviour is serious enough to undermine such trust and confidence and warrant dismissal.

200. If the employer finds out after the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal, the employer can rely on this to rebut a claim of wrongful dismissal. (**Boston Deep Sea Fishing & Ice Co v Ansell [1888] 39 ChD 339**)

Analysis

Unfair Dismissal

201. The Respondent has accepted liability for the Claimant's unfair dismissal on the basis that a fair procedure was not followed. It is necessary for the Tribunal to consider the effect of **Polkey** on the compensatory award and in doing so to consider what the Respondent would have done had it followed a fair process.

202. The Tribunal's view is that, assuming that the Claimant had not been dismissed at the meeting on 3 February 2022, the Respondent would have been required to invite the Claimant to a disciplinary meeting to consider his conduct at the staff meeting on 25 January 2022. Our view is that such a meeting could likely have been held, at the latest, within a month of 3 February 2022 (i.e. by early March 2022). This takes into account the availability of Union representatives and considers the time taken on previous occasions for meetings to take place.

203. Were the Respondent to have dismissed the Claimant at that meeting, it is necessary to consider the grounds on which the Respondent could fairly have done so. Our view is that, with the benefit of an opportunity to reflect and take advice, the Respondent would reluctantly have accepted that the grounds for dismissal had not, at that stage, been made out.

204. Had the Respondent chosen to dismiss the Claimant at that meeting, it is likely that the Respondent's decision would have fallen outside the range of reasonable responses for an employer in these circumstances.

205. We consider that a decision on grounds of misconduct would not have been reasonable, for two key reasons. Firstly, the Claimant's conduct at the staff briefing on 25 January 2022 was unlikely to have been sufficiently serious to constitute gross misconduct as defined in the Respondent's disciplinary policy. The policy envisaged serious breaches such as in connection with health and safety or misuse of the Respondent's property. Indeed, the disciplinary policy framed 'discourtesy to colleagues' and 'insubordination or a refusal to follow instructions' (which may have been applicable in the Claimant's case) as misconduct and not gross misconduct. Secondly, the disciplinary policy refers to the provision of warnings and it would likely have been premature to have dismissed the Claimant on grounds of his comments at the staff meeting without providing a final warning in that respect.

206. We also consider a dismissal for 'Some Other Substantial Reason' with the substantial reason being either an irreconcilable difference between the parties or a breach of the implied term of trust and confidence by the Claimant. We are of the view that it would again have been challenging for the Respondent to have made out a case for dismissing the Claimant on either of these grounds at the time in question. The case law on irreconcilable differences makes clear that an employee's behaviour must cause

substantial disruption to the business. The **Gallacher** case is one of a senior employee whose work was pivotal to the business at a difficult time. The current facts do not equate to those in **Gallagher** as the Claimant was not a senior member of the Respondent's management and any disruption which he may have caused was not substantial against the backdrop of the business as a whole. When considering a breach of the implied term of trust and confidence, it is clear to us that, while the Claimant may have been difficult and had shown himself to be resistant to change, this is not in itself a justification for dismissal on the basis of a breach of the implied term of trust and confidence. In the circumstances, the Claimant was materially fulfilling the requirements of his role which involved serving customers, interacting with colleagues, complying with attendance and timekeeping requirements, and following the processes required of a bookseller. The comments made by the Claimant at the staff briefing on 25 January 2022 were insufficient, both in themselves and without the provision of a further warning, to amount to a breach of the implied term of trust and confidence. Similarly, the bringing of grievances would not in itself amount to a breach of the implied term of trust and confidence, particularly as the Claimant had not brought any further grievances following the issue of the file note and letter of concern on 16 November 2021. Finally, it is clear that the Claimant's reticence at the meeting on 3 February 2022 stemmed, in part, from the procedural deficiencies and the Claimant's anxiety about those deficiencies. It cannot automatically be assumed that the Claimant would have been similarly uncommunicative at a properly convened meeting.

207. While it is clear from the evidence that the Claimant took great pride in his work and that his role formed an important part of his life, he did not appear to understand the cumulative negative impact of his grievances and appeals on the Respondent and its staff. We view it as unlikely that the Claimant would have left the Respondent's employment of his own volition, as he had shown considerable loyalty to the Respondent's business, but we see it as more likely that he would, as a result of either frustration or habit, have brought further (possibly vexatious) grievances or committed misconduct which would have enabled the Respondent, where necessary using a final warning, fairly to dismiss him.

208. Doing the best that we can, therefore, we find that the Respondent has shown that the Claimant's employment would have ended without liability attaching to the Respondent within six months of the date of dismissal and any compensatory award should be limited accordingly.

Discrimination

209. It is clear to us that the Claimant has established facts that show that he suffered a number of detriments while employed by the Respondent between 2017 and 2022. The detriments suffered include the various proposals to move him (to the Finchley store, the Economist Bookshop and to SFS) as well as, most significantly, his dismissal in February 2022. To that extent, there are primary facts from which the Tribunal can draw inferences. It is then necessary to consider the totality of those facts in order to establish whether the

detriments suffered were because of the Claimant's race or religion. We have considered each of the issues complained of in turn.

Move to Finchley store

210. The Claimant complained that the staff in the Gower Street store were mostly White, and that Zain Mahmoud treated him harshly (neither of which were challenged by the Respondent) and sought to move him to the Finchley store. It is our view that the proposed move did constitute a detriment to the Claimant, on the basis that he had spent many years in the Gower Street branch, appeared to enjoy the stability of working in the same location, and would have been anxious as a result of the perceived impact of the move on his caring responsibilities.

211. We considered the Respondent's reason for the proposed transfer. Having examined the evidence, it is clear to us that the Respondent had a general business need to staff stores by way of internal transfer, rather than by way of an external recruitment process. When Zain Mahmoud and management at Gower Street were asked whether they could staff a vacancy at the Finchley store, the Claimant was considered on the basis that his home address was closer to the Finchley store and that the Finchley store required someone to work 30 hours per week (which was a similar number of hours to the hours worked by the Claimant at the Gower Street branch). Indeed, in his evidence the Claimant complained that he had been asked to work longer hours at the Gower Street store, which operates to refute his allegation that the Respondent was seeking to remove him from that store.

212. We are satisfied that the Respondent did not at the outset of the relocation process have an understanding of the fact that the Claimant had care commitments in respect of his parent. In our opinion, the Respondent did make efforts to accommodate those care commitments by offering shift patterns which would have finished earlier. While we appreciate that the Claimant was juggling many aspects of his parent's care, our view, having considered the transcripts of the various meetings, was that it was clear that the Claimant was excessively focused on remaining at Gower Street and did not at those meetings manage to clarify exactly what he would need in terms of a shift pattern in order to be able to make the proposed move to the Finchley store work.

213. It is also clear from the evidence that the Claimant was not the only person identified to move to another branch. In her evidence, Maxine Mould stated that numerous staff were moved to other stores at the time in question and that store moves were generally common in the Respondent's business, particularly given the operation of the cluster system.

214. As part of the grievance process, the Respondent accepted that it had handled some of the discussions in an unhelpful manner and that the rationale for the Respondent's request to the Claimant had not been clearly communicated at the outset. Our view is that this related, not to race or religious discrimination, but to the fact that the Respondent had

not anticipated such a strong reaction from the Claimant to the proposed move and had been taken aback by his negativity; as reflected in Pablo Rodriguez' comments.

215. Overall, therefore, we find a satisfactory explanation by the Respondent of the issues complained of.

XX – disciplinary issues

216. The Claimant's concern was that he was investigated in connection with complaints from a White British employee with an Asian surname who had departed the Respondent's business in circumstances where her complaints were not subjected to the same levels of scrutiny as the Claimant's conduct. The Claimant was also concerned that YY (a White British employee) made complaints about the Claimant which she subsequently withdrew, in circumstances where reasons for withdrawal were not provided. The Claimant's belief was that this treatment was on grounds of his race or religion. However, the Claimant did not assert that other employees who did not share his race or religion were afforded preferential treatment in similar circumstances to the treatment meted out to him and he did not place any evidence before us in that regard. To that extent, it was unclear as to whether the Claimant suffered any particular detriment.

217. We considered the Respondent's reasons for instituting the disciplinary proceedings.

218. The correspondence referred to in the narrative above makes clear that XX approached the Respondent with the allegations and not vice versa, thereby removing any question of the Respondent having initiated the disciplinary proceedings of its own volition or without cause. Moving to the substance of the complaint, the text message evidence was not disputed by the Claimant and it is clear to the Tribunal, from the findings above, that the statement attributed to XX was indeed her statement. Further photographic evidence was produced voluntarily by the Claimant himself from his own camera (and not by the Respondent) thereby removing any possibility that evidence had been fabricated.

219. Having established that the matters complained of did indeed occur, it is our view that these were complaints which were sufficiently serious to merit disciplinary action by an employer.

220. Our view is that the process followed was broadly sound and the Claimant's grievance and appeal were adequately dealt with. The email correspondence with XX demonstrated that the Respondent had taken steps to interview XX about the allegations, had met with her, and asked her to clarify her complaints in writing. As we found in the factual narrative, it would likely have been difficult for the Respondent to have compelled XX to attend investigation meetings in light of the fact that she had departed the Respondent's employment.

221. It is not clear why YY withdrew her allegations about the Claimant. While the allegations were mentioned in the investigation meeting (before YY had withdrawn them) it is clear to us that they were not subsequently considered by the Respondent and that the final written warning related only to the complaints made by XX. To that extent, we are satisfied that the Claimant was not investigated in respect of claims which had been withdrawn. In addition, the Respondent investigated the Claimant's concerns that YY had breached confidentiality and we were taken to notes of its meeting with YY where the importance of confidentiality was underlined.

222. In summary, we are satisfied that the disciplinary proceedings related to the Respondent's requirement to investigate allegations about the Claimant's conduct which were in themselves sufficiently serious to merit investigation. To that extent, the Claimant's complaints of discrimination are not sound and there was no discrimination in the acts complained of.

Move to Economist Bookshop

223. The Claimant complained that the proposed move to the Economist Bookshop amounted to a detriment, on the basis that it was a smaller store, which was not financially viable and where the journey to work would be more onerous for him, thereby impacting on his caring responsibilities. He also cited the fact that other staff had not been asked to move from the Gower Street branch. Although the proposed move was expressed as being temporary and did not materialise, we accept that, in principle, the proposal constituted a detriment to the Claimant on the basis of the impact on his daily routine and caring responsibilities.

224. We then considered the reasons for the Respondent's proposal to move the Claimant to the Economist Bookshop in September 2020. It was clear from the evidence that the Claimant was invited to return to work from furlough in June 2020 but declined to do so. By September 2020 the Respondent was operating the selection matrix and scored staff on certain criteria being performance review rating, attendance, and disciplinary record. We understood that the Claimant had a performance appraisal in 2019 but we did not have details of any rating provided following his appraisal.

225. We considered whether the criteria contained in the selection matrix might themselves have been discriminatory in respect of the Claimant's race or religion. Our view is that while the criterion of attendance may have been discriminatory in the context of a protected characteristic such as disability, it did not discriminate in terms of race or religion.

226. As referred to above, it is in our view credible that the Claimant would not have scored highly on the selection matrix given his absence due to illness prior to the COVID-19 lockdown, as well as the formal written warning he received in 2019.

227. The Claimant's assertion that Vladimir and Krishna had left Waterstones and that this would have meant that he could have worked at Gower Street (by filling the vacancies

created) did not take account of the selection matrix. Given the operation of the matrix, it was not simply the case that the Respondent could have offered the Claimant a role at Gower Street without considering the matrix scores.

228. We consider it noteworthy that the action complained of occurred at a time when business decisions were being taken following a pandemic of which no business had prior experience. To that extent, it was clear to us that the Claimant was certainly not the only member of staff to have been offered another shop and we were provided with evidence that numerous members of staff were moved around at this time.

229. The Claimant asserted that the Economist Bookshop was a failing shop with low footfall, and that the Respondent was aware of this and wished to place him there with a view to making him redundant on its eventual closure. As we have found, the Claimant has not successfully proved this view partly because it would have been difficult for the Respondent to have predicted the future turnover of a shop with any accuracy, given the disruption caused by the pandemic and the fact that it had no knowledge of future lockdowns, but also because the Respondent offered the Claimant a move to the Finchley or Brent Cross stores, both being stores that remained open.

230. In light of the above, we consider that the Respondent has provided a satisfactory explanation of the issues complained of.

Move to SFS in April 2021

231. The Claimant considered the proposed move to SFS to amount to a detriment on the basis that it was a less skilled role and that it was a unilateral breach of the terms of his contract of employment. He cited a comparator, Janice, a White Australian bookseller who was not required to move to SFS. We accept that the proposed move to SFS constituted a detriment from the Claimant's perspective on the basis that a breach of contract is a legitimate matter of concern to any employee. We then went on to consider the reasons for the proposal to move the Claimant to SFS in April 2021.

232. It was clear from the evidence that the Respondent's rationale for requiring the Claimant to move to SFS related to required changes to business practices following a surge in online orders (which had increased ten to fifteen-fold). To that extent, as far as the Gower Street store was concerned, SFS had become a crucial part of the work carried out in the store. It is, therefore, plausible that this, in turn, would have required a greater number of staff in SFS operations.

233. We have considered whether there was any discrimination at play (on the basis of race or religion) in connection with the selection of staff to work in SFS operations. Simon Lewis' evidence was that six of thirty booksellers in the Gower Street store had been asked to work in SFS operations and that all staff were, to some extent, involved in SFS. It was also clear from Simon Lewis's evidence that a number of staff members (all of whom were White British or White European) had been moved to SFS from traditional bookselling roles.

234. We have also considered whether the Claimant's move to SFS constituted a demotion to a less skilled role to which others may not have been subject. Our views on this issue are set out at paragraphs 274 to 281 below in respect of breach of contract and, consistent with the fact that we do not consider the move to SFS a breach of the Claimant's contract of employment on the basis that it represented an inferior role, we are not of the view that the SFS role constituted any form of relegation to an inferior status.

235. We considered the Claimant's allegation that Janice (a White Australian colleague) had not been required to work in SFS, by comparison with the Claimant. It is clear from our findings that Janice's circumstances were different to those of the Claimant as she had a physical disability which would have made certain tasks more difficult. To that extent, it is not immediately obvious to us that Janice is an appropriate comparator.

236. In any event, the Respondent's rationale for not requiring Janice to work in SFS was that Janice would have found the packing tasks in SFS more difficult to manage as a result of her disability. Our findings indicate that the Respondent's adjustment was reasonable and we cannot, therefore, conclude that the Respondent favoured Janice over the Claimant on the basis of race or religion.

237. To that extent, we are satisfied that the Respondent's explanation for moving the Claimant to SFS showed no discriminatory treatment.

Friday working

238. The Claimant claimed that he had been discriminated against in relation to the fact that he did not work on a Friday. He was concerned that he had been asked to submit a flexible working request for an arrangement which he believed to have been approved and the fact he was put on a rota to work on Friday 24 December 2021 having previously notified the Respondent that he did not work on Fridays for religious reasons. While the Claimant's feelings were sincere, we do not believe, on the basis of our factual findings, that the Claimant has shown that he has suffered any meaningful detriment in this respect.

239. We find that the request to complete a flexible working request was unconnected with the Claimant's religion. Our findings reflect the fact that it was an anodyne administrative request which related to a desire to record, rather than to challenge, a flexible working arrangement which had operated successfully for a number of years. The request to complete a flexible working request operated to create a paper trail of flexible working against the backdrop of business interruption, the Claimant's return from furlough, and a change in manager. We have no evidence which supports a conclusion that the Claimant suffered any detriment as a result of the provision of a flexible working request in the manner in question.

240. Our findings of fact are clear that the Claimant was requested to work on Friday 24 December 2021 as a result of an administrative error in creating the rota, rather than for any discriminatory reason. It is apparent that this was an isolated error (because the rotas

prepared for the Christmas period used a different template to those prepared for the rest of the year and that the request to work on Friday 24 December 2021 was an honest mistake, with no malign intent.

241. We consider that no detriment has been suffered by the Claimant and that his complaint of discrimination is not well founded.

Dismissing the various grievances and the way they were handled

242. The Claimant complained that the handling and dismissal of his grievances was discriminatory. With the exception of the proposed store moves to Finchley and the Economist Bookshop and an acknowledgement by the Respondent that communication with him on a number of occasions had been poor, the Claimant's grievances were not upheld. We are satisfied that this amounts to a detriment on the basis that the Claimant was upset and frustrated because of his perception that his complaints were not being considered in an even-handed and independent manner and because, owing to its long-term nature, it created a pattern whereby the Claimant continued to bring grievances with a view to seeking redress.

243. We have considered the way the grievances were handled and the Respondent's reasons for the dismissal of the grievances.

244. We believe that, on balance, the Claimant's grievances were dealt with in a procedurally fair manner. Grievances were investigated, meetings were held, and the Claimant had an opportunity to bring a Union representative to meetings. The Respondent accommodated delays due to sickness and the availability of Union representatives. Outcomes were generally communicated in a timely fashion. While there were some instances where procedure could have been better (for example, around note takers asking questions), we did not feel that these issues meant that the Claimant was denied a fair process as the number of instances was small and the breaches did not appear to impact on the decision-making. Similarly, we found the signing of letters by note takers or administrative staff to have been done for administrative ease, rather than to signify decision making by administrators.

245. For the vast majority of his appeals and grievances, the Claimant was provided with an outcome which addressed the Claimant's complaints and explained the rationale for the Respondent's decision. While most of the grievances were not upheld there were a number of instances where that was not the case. For example, the Respondent did not in fact relocate the Claimant to the Finchley store nor to the Economist Bookshop. The Respondent accepted on a number of occasions that matters had not been communicated adequately to the Claimant (for example, in connection with meetings held with Pablo Rodriguez and Zain Mahmoud), thereby demonstrating that it did not see itself as beyond reproach.

246. We considered the Claimant's complaint that YY had not been investigated in connection with breach of confidentiality and that her allegations were withdrawn. As

referred to in the factual narrative, we were taken to evidence that the Respondent's staff had indeed spoken with YY in respect of confidentiality. While we do not know why YY's allegations were withdrawn, it is clear to us that they were not considered by the Respondent in the context of the disciplinary investigation and did not feature in the disciplinary outcome letter to the Claimant.

247. It is clear that the Claimant brought a large number of grievances over a long period of time. There were occasions when fresh grievances were brought while existing grievances were being considered and appealed. It is evident to us that the management of the grievance process put the Claimant under strain as it caused him anxiety and may well have created the impression that the only safe way of asserting his workplace rights was by using a statutory grievance process. The grievances also burdened the Respondent as they created a large amount of administrative work and required independent members of staff to assess them in circumstances where the grievance process did not appear to be operating to solve the issue. Ultimately the use of the grievance process in these circumstances was destructive, rather than constructive, as it tested the patience of both parties and did not operate to move matters forward.

248. It is our view that the Claimant's grievances were not upheld for the reasons provided to the Claimant by the Respondent, all of which related to objective factors connected with the operation of the Respondent's business and, in a small number of cases, with the Claimant's conduct. We do not consider that the Claimant's race or religion formed any part of the Respondent's decision making in connection with the Claimant's grievances.

Dismissal

249. The Claimant considered himself to have been dismissed without good reason. His complaint was that he was investigated on 3 February 2022 at a meeting where proper procedures were not followed and he was denied Union representation in circumstances where the incident complained of had taken place some nine days earlier on 25 January 2022. He believed that his colleague, Janice, had challenged management at the same meeting but had not been sanctioned. He believed that the intention at the beginning of the meeting on 3 February 2022 had been to dismiss him. It is clear that the Claimant's dismissal amounted, subjectively and objectively, to a significant detriment.

250. We have considered the reasons for the Claimant's dismissal. Jonathan Green called the Respondent to a meeting with a view to investigating his conduct at the staff briefing on 25 January 2022. As we found, the Claimant did not communicate proactively during that meeting, partly because he was upset and anxious about the procedural inadequacies, but also because the relationship between the parties had become entrenched and fractious. To that extent, it is not difficult to see how Jonathan Green became frustrated during the meeting and could see no clear path forward, resulting in the Claimant's dismissal.

251. To that extent we believe that the Claimant was dismissed primarily because of the ongoing lack of constructive dialogue and cooperation between the parties, which continued at the meeting on 3 February 2022, combined with significant historic difficulties in the relationship between the parties. Had the meeting been held against a different backdrop (with notice or less formally) or had the Claimant felt able to be more discursive, the Claimant may well have continued in employment at the end of the meeting.

252. In deciding to dismiss the Claimant, it is abundantly clear that Jonathan Green also considered historic aspects of the relationship, including the fact that the Claimant had challenged management on two occasions in May 2021 and January 2022 and that there were significant communication difficulties between the parties. The Respondent considered that the situation was not improving, and found itself at an investigation meeting which operated to worsen, rather than improve, the situation.

253. We considered the Claimant's allegation that Janice had not been investigated following her comments at the staff meeting on 25 January 2022 with a view to establishing whether the Respondent acted in a discriminatory manner. As referred to in the factual findings, we found that the Claimant's comments were of a different nature and degree to those made by Janice as Janice had sought clarification of one discrete issue (being the temperature in the store), rather than engaging in a back-and-forth discussion about procedures in connection with closing the store. On the basis of those findings, the comments by the Claimant and Janice were not comparable. Further, it is clear from our findings that the Claimant was dismissed, not just because of his comments at the staff meeting on 25 January 2022, but for wider reasons including communications at the meeting on 3 February 2022 and historic difficulties between the parties..

254. To that extent, we are satisfied that the reasons for the Claimant's dismissal were not connected to his race or religion.

Appeal against Dismissal

255. The Claimant considered that the refusal to allow the appeal against his dismissal was due to his race or religion. Viewed subjectively and objectively, this refusal clearly amounts to a detriment. We considered whether the refusal to allow the Claimant's appeal against his dismissal was in any way connected with his race or religion.

256. It is the Tribunal's view that the Respondent went to considerable lengths to deal with the Claimant's issues on appeal and provided him with a lengthy letter to explain its rationale. The letter also responded to a number of procedural issues and issues relating to contractual interpretation which the Claimant had raised.

257. The reasons provided for the refusal to allow the appeal and/or to reinstate the Claimant referred to real difficulties in the relationship between the Claimant and the Respondent's managers. In its response, the Respondent pointed to various issues and provided examples to demonstrate its reasons for having reached the conclusions which it had reached. Those issues concerned behaviour at team meetings, a failure to

communicate with managers, a focus on the submission of grievances, rather than on seeking to resolve situations with managers, as well as on the Claimant's perceived distrust of the Respondent and its staff. In the Respondent's view all of these issues made the ongoing relationship untenable.

258. We, therefore, consider that the Respondent has demonstrated satisfactorily that the refusal to allow the Claimant's appeal was for reasons other than his race or religion.

Victimisation

259. We considered detriment in respect of victimisation and conclude that, subjectively and objectively, the detriment alleged by the Claimant (being his dismissal and his unsuccessful appeal against his dismissal) satisfied the legal test on the basis that both alleged detriments involved significant adverse impact on both the Claimant and an employee in general.

260. It is necessary to consider whether the Claimant carried out a protected act in approaching ACAS and in bringing an Employment Tribunal claim. Taking the ACAS complaint first, we were not supplied with a copy of the Claimant's complaint to ACAS and are not aware of the language in which the complaints were couched. The Claimant's evidence (which was not challenged) was that the approach to ACAS was indeed a protected act, on the basis that the Claimant raised concerns connected with religious discrimination (in the form of Friday working). To that extent, we accept that the approach to ACAS was indeed a protected act.

261. It is clear that the First Claim constituted a protected act as discrimination was pleaded in the claim form for the First Claim.

262. For a victimisation claim to succeed, the Claimant is required to demonstrate that the fact of having made a protected act had a more than trivial influence on his dismissal and his unsuccessful appeal against the dismissal.

263. We first consider the Claimant's dismissal. Assuming (as we have done) that the Claimant's approach to ACAS constituted a protected act (by complaining about racial or religious discrimination), our findings were that Mr. Green was only aware that complaints (and not necessarily complaints of discrimination) had been made to ACAS. To that extent, Mr. Green was unaware that there had been a protected act and so it could not have influenced his decision-making.

264. However, had we found that Mr. Green was indeed aware that the Claimant's complaint to ACAS related to matters of religious or racial discrimination, we would still not have been of the view that the test of causation between the act and the detriment is sufficiently well made out in this case.

265. We considered whether, had Mr. Green been aware of a protected act, this awareness would have had an influence on the Claimant's dismissal. We have found that

the reasons for the Claimant's dismissal were the lack of constructive dialogue at the meeting on 3 February 2022, along with historic difficulties including disciplinary matters, challenging management at meetings and a tendency to make excessive use of formal grievance processes, rather than engage with management. We have also found that Mr. Green did not go to the meeting intending to dismiss the Claimant but that the Claimant's lack of engagement precipitated the dismissal. The references by Mr. Green to ACAS were very minimal in the context of the meeting as a whole. They were made with a view to demonstrating that the Claimant was bringing grievances in respect of uncontentious issues which could properly and more expediently be dealt with by management. Mr. Green made mention of the fact that the Claimant had the fourth highest overtime in the shop, with a view to demonstrating that the complaint about overtime was unmeritorious. We are satisfied that the references made by Mr. Green to ACAS were made in a spirit of seeking to demonstrate to the Claimant that the issues he complained of could have been dealt with more swiftly and effectively by raising them internally. We considered whether the approach to ACAS (whether consciously or unconsciously) could have operated to influence the dismissal and conclude that it did not – the Respondent and its management had found the Claimant to be difficult for a long period of time but had dealt patiently with management issues. It was the Claimant's behaviour at the meeting on 3 February 2022, combined with these historic difficulties, which caused his dismissal.

266. In light of the above, we are satisfied that the complaint to ACAS did not amount to a material influence on the Claimant's dismissal and it was properly separable from the reasons for the Claimant's dismissal.

267. We move on to consider whether the complaint to ACAS had a material influence on the appeal decision. Again, our findings were that Mr. Bristowe was only aware that complaints (and not necessarily complaints of discrimination) had been made to ACAS. We are also satisfied that Mr. Bristowe was not aware of the Employment Tribunal claim. To that extent, our view is that Mr. Bristowe had no awareness that a protected act had been made.

268. Had we found that Simon Bristowe was aware of protected acts having been made, we would still have been unable to make a causal connection between the relevant acts and detriments. The appeal decision did not involve a *de novo* hearing where all the issues were considered afresh but rather represented an opportunity for the Claimant to raise concerns about his dismissal and for those concerns to be considered by a person unconnected with the original decision. The appeal hearing necessarily considered (as a result of the Claimant's lengthy appeal documentation) a much wider set of circumstances than the dismissal decision because the Claimant's letter of appeal required consideration of the history of the Claimant's employment as well as allegations made by the Claimant around bias, procedure, and the express and implied terms of his employment contract. Therefore, any purported protected acts played an even smaller role than they would have played in the context of the dismissal decision. We are of the view that, even had Mr Bristowe been aware of any protected acts, they held very limited weight when he considered the multiple points raised by the Claimant (many of which were unconnected with grievances) and deciding whether the Claimant ought to be reinstated.

269. We are required to consider whether the First Claim constituted a material influence on the Claimant's unsuccessful appeal against his dismissal. As we noted in the factual findings, we are satisfied that Simon Bristowe was not aware, at the time when the Claimant's appeal was considered, of the fact of the First Claim having been made. To that extent, it could not have been considered by him in his decision making.

270. In conclusion, we do not consider the Claimant to have been victimised in respect of either his dismissal or the appeal against his dismissal.

Burden of Proof

271. It can be seen that we have reached our conclusions without applying the two-stage burden of proof test set out in **Igen Ltd. v Wong [2005] EWCA Civ 142**. This is on the basis that the burden of proof provisions had nothing to offer (**Hewage v Grampian Health Board [2012] UKSC 37**) as we were able to weigh the evidence and reach findings and conclusions in the usual way. However, had we applied the burden of proof provisions we would, for all the reasons cited in the analysis above, either have found that: (1) the Claimant had not proved facts to shift the burden of proof to the Respondent; or (2) where the Claimant had proved facts so as to shift the burden to the Respondent, that the Respondent had satisfactorily discharged the burden.

Time limits

272. The earliest possible date of discrimination in respect of which the discrimination could have been presented within the statutory time limit (ignoring the question of continuing acts and extensions of time) was 31 September 2021 (on the basis that the ACAS conciliation process afforded an additional month to comply with deadlines in circumstances where the First Claim was submitted on 31 January 2022. To that extent, the alleged actions contained within the statutory time limit comprised only the Claimant's claims about Friday working, his dismissal and his appeal against the dismissal. The Claimant's earlier claims were outside the statutory time limit.

273. Those claims which related to periods outside the statutory time limit failed for the further reason that they are out of time and the Tribunal does not have jurisdiction to consider them without bringing them within the Tribunal's jurisdiction either by establishing that the conduct complained of extended over a period (so that the separate incidents were deemed connected) or by the application of the just and equitable test to allow them to be admitted out of time.

Breach of Contract for moving the Claimant to SFS in April 2021

274. The Claimant's position is that the Respondent breached the terms of his contract of employment by requiring him to move to SFS in April 2021. His argument focussed on the fact that the SFS work was not shop-floor work and did not fall within the remit of 'additional duties' consistent with his role on the second floor of the Gower Street branch.

His evidence was that he had spent many years as a bookseller on the second floor of Gower Street and that the provisions of the Core Bookshop Processes document made no reference to SFS. He was also of the view that the SFS role was a less skilled role.

275. The Respondent's position was that the Claimant's move to SFS fell within the terms of his contract. The Respondent's evidence pointed to changing business requirements and the need to deploy staff to SFS to meet demand. The Respondent was of the view that the Core Bookshop Processes (which formed a role outline for booksellers) included several operational matters, stock handling matters, back-of-house processes and online ordering all of which were included in the SFS role. It was clear from the Respondent's evidence that it considered SFS staff to be booksellers.

276. Having considered the evidence and the contractual paperwork it is the Tribunal's view that the Respondent did not breach the Claimant's contract by requiring him to move to SFS in October 2021.

277. The Claimant's contract made clear that he was required to 'carry out additional or alternative duties consistent with his position or skills in order to meet the needs of the business'.

278. In respect of 'the needs of the business', we are satisfied that the deployment of staff to SFS operations constituted a genuine business need on the Respondent's part. This need reflected both the impact of the pandemic on in-person retail sales but also a general move by customers towards online purchasing.

279. We have considered whether the SFS duties were 'consistent with the Claimant's position or skills'. It is clear to the Tribunal that the SFS work differed in some aspects from the traditional bookseller role in that it did not involve solely working on the shop floor and processing purchases for customers physically present in the store. It is likely that the SFS role involved less customer interaction than a traditional bookseller role as aspects of the purchasing process were conducted online. However, the SFS role did retain many of the features of the traditional bookseller role in that it involved picking books on the shop floor (which involved a knowledge of stock and subject matter) and arranging for the order to be fulfilled and the book sold. It was also clear from the evidence that the SFS role did involve customer interaction as the Respondent expected SFS staff to respond to queries from customers physically present in the store while SFS staff were picking orders. Many of the core competencies detailed in the Core Bookshop Processes were included in the SFS role. It is also the case that, in view of the number of staff performing the SFS role, SFS staff would doubtless have interacted with their SFS colleagues while working.

280. To that extent, the Tribunal is of the view that, to the extent that the SFS duties were in addition to, or in contrast with, the Claimant's traditional bookseller duties, they were consistent with his position or skills. We do not consider that the Claimant's contract was breached by the Respondent.

281. Had we found that the Respondent had breached the Claimant's contract it would have been necessary to assess whether the Claimant had waived the breach by continuing to work in SFS, having been placed there on a temporary basis in December 2020. The Claimant raised a grievance in relation to the proposed move which was completed on 5 November 2021 with a negative outcome for the Claimant. The Claimant alleged that he raised a complaint of breach of contract with ACAS on 13 December 2021, which process did not conclude until 13 January 2022. We were not provided with evidence that the Claimant's complaint to ACAS included a complaint of breach of contract and so cannot reach a conclusion on the timing of any waiver with a view to establishing whether the claim was indeed outstanding on termination of employment.

Wrongful Dismissal

282. It is finally necessary to consider whether the Claimant was wrongfully dismissed by the Respondent. This involves considering whether the Claimant committed a repudiatory breach of the employment contract such that the Respondent was entitled to dismiss the Claimant without notice. A repudiatory breach is a breach which goes to the heart of the contract.

283. It is worth noting again the reasons we find for the Claimant's dismissal were his history of a lack of cooperation, including at the meeting on 3 February 2022, coupled with the fact that he had generally become difficult to manage. The letter dismissing the Claimant stated the Respondent's view that the Claimant had no intention to abide by the implied term of trust and confidence, that he had subverted internal processes, undermined managers and generally disrupted the employment relationship. The Respondent did not expressly allege any misconduct by the Claimant and, as we explained in our Polkey analysis, would have struggled fairly to have dismissed the Claimant on the basis of misconduct.

284. The Tribunal is of the view that the circumstances in question did not give rise to a repudiatory breach of contract by the Claimant. This is because the Claimant's conduct did not go to the heart of the employment relationship and did not, therefore, breach the implied term of trust and confidence. The Claimant, throughout his employment, carried out the functions required of him in terms of his role. We saw no evidence of complaints against him by customers or in relation to the direct fulfilment of his contractual duties. While we recognise that his grievances certainly placed a burden on the Respondent and that the relationship between the parties was difficult, this alone is insufficient to amount to a repudiatory breach of the contract of employment.

285. The disciplinary issue complained of by the Claimant (being the comments made at the staff meeting on 25 January 2022) were, in our view, not sufficiently serious to amount to misconduct or gross misconduct (constituting a repudiatory breach). This is substantiated by the fact that the Claimant's behaviour (referred to as 'undermining managers' in the Respondent's letter of dismissal) was not sufficiently serious to reach the threshold of gross misconduct; the comments made at the staff meeting on 25 January

2022 involved some back and forth argument where he did not appear to have materially raised his voice and did not shout expletives or issue any form of ultimatum.

286. Further, while the Claimant was asked to seek to raise grievances directly with management in September 2021 and was sent a file note and letter of concern in November 2021 requesting that he seek to resolve issue with management, rather than by way of the grievance process, he was not provided with a final written warning or any kind of formal warning to the effect that a continuation of his grievances would ultimately result in his dismissal.

287. We have considered the fact that the Claimant covertly recorded meetings with the Claimant (copies of which formed the evidence in the bundle of documents). While we are of the view that this behaviour is reprehensible and underhand, we do not believe that it goes so far as to repudiate the contract of employment because it operated to record discussions which took place, rather than, for example, misrepresenting or publishing them.

288. A case management order will be issued setting out preparatory steps for a remedy hearing.

EJ Coen

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Dated: 3 April 2023……..

Judgment and Reasons sent to the parties on:

03/04/2023