JB1

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr S Sharma	**v**	**(1) Pizza Hut (UK) Ltd** **(2) Ms I Baskauskaite**

Heard at: London Central

On: 14, 15 & 16 March 2017;
17 March 2017 (In Chambers)

Before: Employment Judge Pearl

Members: Mr T Robinson
Mr D Carter

Representation:
Claimant: Mr K Diawuo, Friend
Respondent: Mr B Prajapati, Solicitor

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant's claims of direct discrimination fail and are dismissed.
2. The claim of wrongful dismissal fails and is dismissed.

REASONS

1. By ET1 received on 4 April 2016, the Claimant brings claims of race discrimination. His claim in the ET1 of religion or belief discrimination has been abandoned. It is unnecessary to cite procedural developments and it suffices to say that by the outset of the hearing there were four alleged acts of direct race discrimination. These are:-
   (a) The investigation;
   (b) Suspending the Claimant;
   (c) Taking no action against other managers who left early after the date of the Claimant's suspension; and
   (d) His dismissal.

The Claimant lacks qualifying service to bring a claim of unfair dismissal. There is also a claim of wrongful dismissal.

2. In resolving the issues, we heard evidence from the Claimant, Ms Szomko ("Ella"), Mr Noronha ("Russel"); and from Ms Baskauskaite ("Inga"), Mr Snell and Ms Balaikine ("Asta"). We have studied a bundle running to 204 pages.

Facts

3. It is necessary at the outset to reiterate that, although there are numerous disputes of detail, it is not our function to resolve each and every disputed issue of fact that has emerged during this hearing. What follow are the necessary factual findings that are relevant to the issues. Some of the basic facts are agreed.

4. The Claimant worked for the Respondent from September 2010 to December 2014. For approximately the last year of this period he was a Restaurant General Manager. He returned to the Respondent on 15 April 2015 as a salaried Deputy General Manager and he worked at the Marble Arch Branch. On 29 September 2015 he was transferred to the Piccadilly Branch. During his five months at Marble Arch he was given some cover shifts at Piccadilly and these were closing shifts, i.e. at the end of the day. Mr Kennedy was then the General Manager at the Piccadilly restaurant. When he was transferred in September, this coincided with Inga taking over as General Manager. The Claimant states that when working as cover he was told that managers at Piccadilly could leave early after they had cashed up and after all customers had left, leaving the keys with the kitchen team, one of whom would lock up after all the cleaning had been completed. In his witness statement, the Claimant also says that Mr Kennedy stated to him that this was the "normal closing procedure" at that branch.

5. This contrasts with:-

   (1) The evidence of the Respondent to which we will turn.
   (2) The process at the other branches in which the Claimant worked, namely Marble Arch and Feltham; and
   (3) The procedure set out at page 57.

   This last is the page dealing with closing security procedures and the evidence is that it imposed duties and procedures on the manager. These included the arming of the alarm system and also a "safety and security walkthrough". The Respondent's evidence that this page is directed at managers is in our view secure. Indeed, it would appear to be improbable, if not dangerous, for these duties to be assigned in the manual to back of house staff. As the Respondent's witnesses noted, those members of staff were not trained. If they were carrying out the closing procedures, this would pose obvious and serious problems for managerial accountability.

6. The evidence enables us also to make findings about the likelihood of there being any authorised departure from the closing procedures. Asta (who heard the Claimant's appeal) is an Area Manager in Central London and she said that she was not happy to hear of a breach of closing procedures in one of "my restaurants". She was both annoyed and concerned. Mr Snell, who dismissed the Claimant, organises and delivers training for managers. The procedures operate UK-wide and he told us he had never heard of the practice that the Claimant had described. Inga, gave detailed evidence as to what she expected closing managers to do. The final walk through was important because fire doors, fridges, freezers, security and cleanliness were checked. Only the manager could be responsible. All this evidence seemed to be given honestly by the witnesses. The three managers have 37 years of experience in the Respondent between them. We believe each of them when they tell us that this was an unprecedented breach of procedure in the Claimant's case and it was taken seriously. We will deal below with other challenges to Inga's overall credibility.

7. Inga took over from Mr Kennedy as Restaurant General Manager in September 2015. The Claimant at that point came across to Piccadilly as Deputy Manager and Hassan was also a Deputy Manager there, although he was waiting for a General Manager's job to come up as he was trained up to that level.

8. On 23 November Hassan reported to Inga that on the closing shift on 21 November, the Claimant had not been present at the close. It is not easy to understand why Hassan would report this if he had at any time previously condoned the practice of a manager leaving early.

9. Inga started to investigate and ascertained that Russel was the last person recorded to have left the premises at 2.01am. He told her that the Claimant had left at about 00.30. He apparently clocked out the five remaining staff for 1.30am (an hour later) and then he left. The interview note that Inga made of the conversation with Russel concludes with her asking if he knew about the culture in the restaurant, but we do not consider that this question assists us in resolving any factual issue.

10. On 27 November, Inga interviewed the Claimant. The first seven exchanges are as follows:-

    Inga: what time did you leave on Saturday night?
    Claimant: Around 12.30am.
    Inga: Why?
    Claimant: Had to catch my last train.
    Inga: Are you aware of Pizza Hut's policy of security measures and code of conduct?
    Claimant: Yes but I was told by previous RGM [Restaurant General Manager] and current (old) management team that it was common practice. It was even before I became a part of the management team. While I was doing cover shift.

Inga: Have you ever questioned it or told other managers about this practice – that it was wrong?
Claimant: No, because it was since before I joined the team so I followed the way it was before.

11. A little further on in the interview he was asked if he thought this was wrong and his recorded answer is that in other restaurants back of house staff can open up of a morning, for example to take deliveries. This was not directly in point and his answer suggests that he must have known that the closing procedure he engaged in was wrong. This becomes clear a little further on in the interview. Having said (page 72) that he assumed that what he did was 'ok', he then, after another question, stated: "now that we are talking I realise that it was wrong, it was a wrong and lack in my understanding and I will not be doing this again." A notable feature of the evidence is that the Claimant has never said he did this in any other restaurant when closing.

12. We find as a fact that he took advantage of the situation at Piccadilly where controls were lax and walked out about an hour early on this particular shift, when he knew that his managerial responsibility obliged him to stay. He did so in order to catch his last train home, i.e. for his own convenience. Further, he signed as completed the check list at page 58. This records that various closing tasks had been completed and by signing an hour early he was creating a document that was not at that point accurate or true; and he was abdicating an important managerial responsibility when a manager is rostered for the closing shift.

13. The Claimant was suspended on 27 November "whilst an investigation into the following allegations is carried out." This is at page 76 and the charge was framed as a failure to follow the company code of conduct by leaving at 12.30am which resulted in the premises being left unsupervised and posing a great safety and security risk.

14. Inga spoke to an employee called Ivana on 7 December which produced little of note. On 11 December she met again with the Claimant and he maintained that there was a culture or practice of leaving early at this branch. He also said that he did not leave any of his duties unfinished, which we consider to factually inaccurate. He said that the Manager was responsible however he did not think he behaved irresponsibly because of the culture he described. By this point he was saying that the whole management team knew and accepted that it was in order for Managers to leave early and leave other members of staff, such as kitchen staff, to lock up. Significantly, in light of the allegations the Claimant has made in this Tribunal, Inga asked him whether she had ever authorised this? The response was that they never had any communication about it and that he thought that she knew. He said he thought she was aware of what was going on.

15. The Claimant's stance has changed from his assertion at this interview, that he believed that Inga knew about the practice, to his further evidence in Tribunal that she did know. In our view he has no evidential basis whatsoever for the latter contention. Indeed, in this interview he specifically

stated that he thought Hassan had told her about the practice (see below) whereas, as we have recited, it was Hassan who alerted Inga for the first time to the fact that the Claimant had left early. In our view, there is no reason in the evidence to disbelieve what Inga has told us. She says that she did not know what was going on until Hassan spoke to her and we consider that to be overwhelmingly likely to be true. We will return to this and the question of her credibility below.

16. Inga (page 82) asked the Claimant why he had not brought the practice to her attention. In our view, this was a relevant and telling question because the Claimant has at no stage said that this was a practice that he encountered or indulged in at any other restaurant. The case he has asserted is that Mr Kennedy at Piccadilly allowed a different local practice to occur. If such a practice was clearly, as we find, in breach of the rules, it was a perfectly relevant question as to why he had not said anything about it to Inga. They had both started at the branch at the same time in September. His answer that he thought that Hassan had told Inga about the practice is unsupported by any piece of evidence. We consider that the likely explanation of this answer is that it was an off the cuff response by the Claimant who knew that Hassan had reported the matter to Inga in the first place. We also note at this point that it emerged in evidence that the Claimant stated clearly that he had never left early before 21 November. We therefore find that he was caught the first time that he did this.

17. On 18 December, Inga wrote to the Claimant with a summons to a disciplinary hearing to discuss an allegation of gross misconduct and this was particularised as:-

    1) Leaving the restaurant without a Manager in charge.
    2) Manipulating the clock out cards by future clocking out the staff; and
    3) Falsifying the document in which end of day cleaning jobs were signed off before they had been completed.

18. We turn next to the broad allegation that Inga is the principal source of discrimination because the investigation, her suspension and her decision to refer the Claimant to a disciplinary hearing was motivated by race discrimination. It is said that if he was of another race she would not have acted in any of these ways. Underpinning these claims is the allegation that she is a thoroughly untrustworthy and dishonest person who has (a) repeatedly lied to the Claimant; and (b) given evidence to the Tribunal which is false in virtually every particular. The case against her is that she had always known of the practice at Piccadilly of managers leaving early, if they chose to do so, and condoned it. On this theory, she has fabricated a malicious case against the Claimant.

19. Leaving aside the question of race, which we will turn to in our conclusions, we have no hesitation in rejecting this characterisation of her evidence. We had a relatively ample opportunity to assess her evidence and her responses to detailed cross examination. She impressed us as a witness who was doing her very best to tell the truth and we accept that her evidence was both

honest and accurate. A further consequence of what was put to her is that she must (on the Claimant's case) have constructed a very elaborate scheme in order to secure his exit from the business. In the judgment of the Tribunal there is not only no evidence anywhere in the case to support such a conclusion, but that conclusion ignores the clear evidence that the Claimant must have known that what he did was wrong; and that Inga and Hassan were surprised to hear that he had left early and she took the matter seriously. There is no support anywhere for the suggestion that Inga has advanced a false case against the Claimant.

20. We also pause at this point to note that early on in her investigations Inga spoke to Ella outside the premises. She admitted to leaving a couple of minutes early if she needed to catch her last bus and if the team members were changing their clothes. She did not allege at this point that there was any normal practice that managers left early. Ella maintains in her witness statement that she did say that it was normal practice. We have reservations about accepting this piece of evidence. As Ella told us, she knew that something had happened with the Claimant. We further find that all of the managerial staff must necessarily have known that the practice of leaving early was a disciplinary offence. We doubt that she openly said that everyone was doing it and we see no reason why Inga should have made up the detail about leaving a couple of minutes early while the staff were changing so that she could catch her bus. The probabilities are that Ella has in the course of this litigation firmed up the rather more conditional and qualified evidence that she gave at the time, when she was questioned. She did concede in evidence that Inga had never explicitly authorised managers leaving early.

21. Two points have been relied upon in general terms by the Claimant to contradict Inga in her evidence. The first is that she is said to have been present when keys were handed from a member of staff to management during the day. Much has been made of this by the Claimant, but on the evidence overall we are satisfied that there could be a number of reasons why this would have to occur, such as a member of staff having dealt with deliveries earlier in the morning. A further matter that we were told about was the agreed fact that there were not sufficient numbers of keys for the number of managers; and that therefore the keys had to be passed around among them. We do not consider that the evidence of Inga being present when a key was handed to a manager to have any significance for her state of knowledge and we discount it.

22. The second matter relied upon are the entries in the schedules that record managers leaving earlier at the end of a shift than some of the employees. At first sight, this might appear to suggest that the practice was rife and that Inga knew about it. Having heard all of the evidence in the case, we have come to the opposite conclusion. Inga told us, and we found her evidence to be compelling on the point, that she had always compiled schedules in this way. This is relevant because in other locations where she had worked there is no suggestion that this practice ever occurred. For managers, the time entered in of the schedule was largely irrelevant. Whatever time was put in,

they had to stay to the end of the shift in order to complete all the checks and lock up. Furthermore, the times that were entered had budgetary consequences for each branch and there was some incentive for managers to abbreviate the times on the sheet in order to reduce labour costs and enhance the profitability of the branch. None of this affected the remuneration that a salaried manager received. We ought to note that the schedules are simply plans. The actual times that staff left were recorded by swiping a clock out machine with a plastic card. In the case of salaried managers, we accept the evidence from a number of witnesses that they would frequently clock themselves out before they left. As we have indicated this did not affect their pay. The issue is whether they were then free to go and our finding is that any manager who then left before the staff had completed the checks, and leaving a member of staff to lock the premises and set the alarm, was in dereliction of duty and would clearly have known that to be the case. In summary, neither the point about the keys nor the point about the schedules has the consequence that Inga's otherwise strong evidence should be disbelieved. On the contrary, she has adequately explained her position.

23. We will briefly also note that Inga never completed any closing shift herself and that it is evident from what we have heard that she trusted her staff. She was not checking on them and had no reason to do so until the Claimant was reported to have left early. Up to that point, our finding is that she did not know that managers were leaving early and it never occurred to her that they were. It is of some interest that Ella told us that in the eight weeks after Inga had started at Piccadilly, when Ella might have undertaken 24 closing shifts, she left early on just three occasions. We know from the Claimant that he never left early in the eight weeks before this incident. Since it could not have been in the interests of staff to inform Inga what they were doing from time to time in this regard, there seems no reasonable way in which she could have suspected that the normal procedures were being breached.

24. Mr Snell is the General Manager at Baker Street and he was the disciplinary officer in this case. As we have noted, his responsibilities include training and he is familiar with training on the closing procedures at page 57. He has in total worked at four restaurants. A manager sent to him for training has nine days with Mr Snell and they would close a restaurant together two or three times; and in addition there were tests of the manager's knowledge. Mr Snell was categorical: all managers have to stay on site until the end and they cannot delegate their security duties. They hold the alarm code and he told us they are solely responsible for both security and the health and safety of the team. Others are not authorised to set the alarm. He had never heard of this practice of managers leaving early. At one point in the Claimant's evidence he indicated that he was not making allegations of discrimination against Mr Snell. Mr Snell was not challenged in cross examination on the basis that he was lying or was seeking to set up the Claimant with a false charge. On the contrary, his evidence was clear and we have no reason to doubt the truth of what he told us, as recited in this paragraph.

25. The disciplinary hearing took place on 29 December 2015. The Claimant readily accepted that he had left at 12.30am. He said there were two or three tasks on the list that had to be signed that remained to be completed. Others were in the process of being completed at the point at which he left. He is recorded as saying "I do know that I should sign off everything once was checked." His defence was there was a culture within the branch of leaving early and that Vince Kennedy had told him that this was acceptable. He said in answer to a question as to whether this was right, that it did not click in his mind. He then added that after he returned to Piccadilly, i.e. after September 2015 he even checked by asking others. "It didn't cross my mind it was wrong." We note in passing that this is a damaging reply. It might be thought that it must have been obvious that the practice was wrong, but additionally we wonder why the Claimant had to say that he sought confirmation that the practice was acceptable if he did not think there was some breach of rules involved.

26. Mr Snell did not take a decision immediately after this hearing as he wished to speak to Vince Kennedy and others. Before he did so the Claimant raised a written grievance on 29 December and this is at pages 93-97.

27. This alleged that Inga had deliberately misled the investigation and had withheld information and given false statements. She lied during the investigation meeting, he alleged, "just to make sure that I am guilty of all the charges which she pressed against me." He alleged that she was committed to getting him sacked and was acting unlawfully to that end. She was prejudiced against him (although the Claimant made no mention of race). She was lying when she stated that she was unaware of the culture. He noted that Inga has stated that from 12.30 to 1.30 there was no manager responsible for the safety of team and customers and he picked up on the point that customers had already left the restaurant. She readily accepted in evidence that this was an error in drafting. However, from the Claimant's point of view it was an example of "trying to nail me down by preparing false reports and lying in her report." He went on to say that because Inga prepared the schedules, she herself was complicit in doing exactly what she was criticising the Claimant for.

28. The Respondent took the view that Mr Snell should deal with the grievance as well as the disciplinary matter because the two were so closely linked. Mr Snell interviewed Inga and we can omit the details. He then met again with the Claimant on 9 January 2016 to discuss matters in the grievance. The Claimant gave three other dates that he wanted Mr Snell to investigate in October 2015. Mr Snell then spoke by telephone to Vince Kennedy and his evidence to the Tribunal is that Mr Kennedy forcefully denied the allegation that he had condoned the practice of leaving early. He told Mr Snell it had not gone on. Mr Snell referred to HR aspects of the grievance which did not impinge on the disciplinary charges.

29. He did not leave matters there because he went to speak to others, although it is unfortunate that he made no notes of any of these conversations. It has not been possible to ascertain whether he is correct or not in saying that he

spoke to Ella and she said she had no such conversation. In any event, we accept that both Hassan and Saiful told him that there was no practice as the Claimant had contended.

30. On 24 January 2016, Mr Snell set out his answer to the grievance letter, or at least that part of it which he had dealt with and not passed to HR. On 1 February 2016, he gave his decision on the disciplinary charges. We will take each of these in turn.

31. The grievance outcome can be seen at pages 101-102 and it is evident, as Mr Snell set out there, that he accepted what he was told by Inga. He specifically noted that there were other outstanding issues of behaviour concerning Inga which were being further investigated and this is, we infer, the reference to the matters that had been sent to HR.

32. In terms of the disciplinary outcome, the letter at pages 103-104 sets out in summary form what the Claimant had said in answer to the three charges. It recorded that the Claimant had not questioned the practice that he maintained was prevalent in the store; and that at other locations he did not leave early. The conclusion was that he knew that he was wrong to do so. "I believe that your conduct and behaviour in these matters demonstrate a severe lack of accountability and a breach of trust for the procedures we have in place … I have no alternative but to conclude that your conduct posed a risk to business and its employees, I am very concerned with your lack of awareness of your own behaviour and conduct and how they affect others and the business." Mr Snell said that he rejected lesser options such as demotion; he upheld the allegations; and he dismissed the Claimant for gross misconduct.

33. The Claimant appealed and for the first time in his letter of appeal (page 105) referred to discriminatory practices on the grounds of race, colour and/or nationality. Asta was the appeal's officer and she is an Area Manager. The hearing was on 19 February 2016. The Claimant maintained that Inga was fully aware of what he was doing. This is a little surprising, as he had not left early before during the eight weeks, but it may simply be that he was saying that she knew of the practice. In any event, he alleged that she was discriminating against him and he referred in the meeting to their work interactions which are not the subject of this claim. Although he said that he thought she was discriminating because of his ethnic background, he also referred to her favouritism in favour of Saiful and Hassan because they were from a different country (which we infer to be Bangladesh). He also thought that Ella was being treated more favourably but there is no detail given of this. Towards the end of the hearing religion was added as a ground for discrimination because the Claimant was the only Hindu manager. It appears that the only concrete example that he gave at that time concerning discrimination was being shouted at on one occasion by Inga.

34. After the appeal hearing Asta spoke to Hassan, Saiful and Ella as well as a number of other people. There are interview notes from six witnesses. She confirmed in one of the interviews (with Saiful) that on one occasion when

the clock out card seemed to show that he left 45 minutes before others, he was maintaining that he had never left the restaurant unattended and had not left at that time. Her own experience is that it is common for shift managers to "flex" their hours in this way and the reason is to do with the budgeted labour costs that we have referred to above. She therefore accepted what he was telling her. She asked about the practice that the Claimant had described as being widespread in the branch and her conclusion from the replies was that there was no evidence to support his case. She considered there was no evidence of such a culture as had been described and also concluded that Inga could not have know about it.

35. It is worth our noting that she spoke to employees about the race allegations and two of them confirmed that Inga could be abrupt. She also went to Mr Snell in order to examine further the allegation made by the Claimant that he had not properly investigated when he conducted the disciplinary hearing. She felt that Mr Snell should have gone further in his outcome letter: see page 36. She does not consider that the time cards that he failed to refer to would have advanced matters any further. She also says that Inga could have interviewed other shift managers as part of her initial investigation, but concluded that since the Claimant had admitted what he was accused of doing, it made little difference.

Submissions

36. We are grateful to Mr Diawuo and Mr Prajapati for their submissions which in the case of the former were entirely oral.

The Law

37. Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race, or ethnic or national origin, is a protected characteristic.

Section 23(1) provides that: "On a comparison of case for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."

Section136(2) provides that: if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) 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 sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) 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. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has

confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." Mummery LJ returned to the theme in dealing with the competing arguments that have emerged concerning the words "in the absence of an adequate explanation." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Conclusions

38. We remind ourselves that this is not an unfair dismissal claim and that, were such a claim being heard, questions such as any defects in procedure or practice would have to be examined against the provisions of Section 98(4) of the ERA 1996. The issues we are here dealing with are direct race discrimination claims. The first of these is that Inga investigating the Claimant was in itself direct discrimination and the case, as we understand it, is that she was motivated to do so because of his race.

39. The Claimant has said nothing in evidence and nor has his representative that would indicate that the case is being advanced on the basis of unconscious discrimination. Rather, the entire thrust of the claim here is that Inga was behaving so dishonestly and capriciously that, as the Claimant told us a number of times in evidence, a racial explanation is the only reason that could explain what she did. She had no reason, he says, to dislike him or take against him and no reason to fabricate a disciplinary case which, as he sets out the story, had to be wholly false. On his account Inga must have known of the practice of managers leaving early. This, in turn, means that she must have approved that practice and that she instigated from the outset a dishonest scheme to secure the Claimant's dismissal.

40. It is well established in the authorities that pointing to a difference in treatment and a difference in race will seldom be sufficient to shift the burden of proof in accordance with such authorities as Igen. The Claimant proceeds beyond stage one of Igen only if he can establish facts from which a Tribunal that is properly directing itself could either find or infer less favourable treatment on the ground of race. When analysed against our factual findings it is evident to the Tribunal, and it is our conclusion, that there is no possibility that the Claimant can succeed in showing any prima facie case, whether on the basis he asserts in evidence, or otherwise.

41. We note, first, that a prominent feature of this case is that the Claimant has barely made any references at all to race or ethnicity in his evidence, beyond saying that it must be the reason for what Inga did. There is no earlier history of racial tension; no earlier incident in which race has ever been referred to; and until the appeal he made no claim of race discrimination. Race hardly plays any part in the relevant chronology or factual background. Notwithstanding, the Respondent has been anxious to draw to our attention that it is a multiracial business employing employees from many parts of the world. Therefore, the Tribunal is obliged to ask itself whether there are any

facts from which we could find or infer that the decision to investigate the Claimant was on racial grounds.

42. In the light of our findings, it is impossible for that conclusion to be reached. The only way in which the case can realistically be asserted by the Claimant is, as Mr Prajapati submits, on the basis that Inga knew all about the local practice at Piccadilly whereby managers left early. This is a correct submission because, if the practice was in flagrant breach of the Respondent's procedures and she did not know about it, that gives the complete answer to this first claim of race discrimination.

43. We conclude that it is not open to us to find other than that she has testified honestly and that she knew nothing about managers leaving early. As we have noted, Hassan reported the matter to her at the outset and there is no reliable evidence at all that he was leaving early. Some allegations have been made to that effect during the course of the various statements taken during the investigations, but the balance of evidence is firmly against Hassan having done this. It also would make inexplicable his reporting it to his manager.

44. The Claimant's case therefore would involve Inga engaging in a false disciplinary process in order (we have to presume) to protect her own position because she knew about the practice. In our view this is an absurd interpretation of the evidence. No witness who has either been interviewed by the Respondent or given evidence has ever said that she approved of their leaving early. There is no possible basis for any suggestion that she was complicit in the earlier practice allegedly condoned by Vince. In our view Inga would have had no basis for fearing that an allegation would be made that she had approved early leaving. Further, she took over after Vince had gone and her experience elsewhere (an experience mirrored by all the other managers we heard from) is that managers do not leave early and are not allowed to do so. Our conclusion is that it is irrational for the Claimant to allege that Inga knew of or approved of the early leaving. This allegation is unsustainable. However, that is not the only basis upon which the initial suggestion of race discrimination fails. Improbable though it is, the Claimant's case necessarily would have to be that she acted dishonestly towards him because she feared for the consequences of a wider investigation that might implicate her. On this basis, race has absolutely nothing to do with what she did and she would, hypothetically, have behaved in exactly the same way whoever was first caught leaving early. The mere fact of Hassan making the report to her would have forced her hand; and the allegation of direct race discrimination cannot survive any scrutiny. There is no doubt in our view that the first part of this claim does not raise any prima facie case and that the burden of proof cannot pass to the Respondent.

45. We would not wish to detract from our positive conclusions that Inga knew nothing of what was occurring in the branch in relation to early leaving; that she was shocked to hear about it; that she took the matter seriously; and then carried out a reasonable investigation.

46. The second part of the claim is that she (or the Respondent) took no action against managers who subsequently left early. The simple answer to this claim is that the Claimant has established no incidents when anyone subsequently left early. Nor is it likely that they ever did. The suspension and disciplinary action against the Claimant was widely known at Piccadilly and anyone leaving early would have foolishly been jeopardising their continued employment with the Respondent.

47. Perhaps bound up with the way in which the case has been put is that Ella was not disciplined. Her position has become more prominent in final submissions and the Claimant relies upon her as his comparator. His case is that he was disciplined and she was not and the reason is race. Our conclusion here is that the Claimant again cannot get beyond the first stage of Igen because he has not established facts from which the inference of race discrimination could be drawn.

48. When spoken to outside the premises, Ella told Inga that she had left a few minutes early because she needed to catch her night bus and they were infrequent. She said she may have done this three times and she told us much the same thing. In our view Ella's position was not the same as the Claimant's and there were material differences. First, we were repeatedly told that she is a more junior manager. Second, she is hourly paid. Third, what she was admitting to was very different in nature from the Claimant's default. If she left a very few minutes earlier than she should have, while the staff were changing before they themselves were about to leave, this does not connote any falsification of the check sheets and involves no clocking out of staff at least one hour before they left. In addition, there is a clear difference in seriousness between a few minutes and a period of one hour. In short, the factual circumstances are sufficiently different so as to undermine Ella as a valid comparator. In any event, even were she to be a comparator for these purposes, we do not consider that it would be open to a Tribunal to infer that the difference in treatment was because of race or nationality. The Tribunal is entitled, and obliged, to consider all of the evidence in the case and that evidence establishes that the reason that the Claimant was disciplined was because the Respondent genuinely believed, in the person of Inga, that what he had done was serious and potentially gross misconduct; and there was an equally genuine belief that Ella had only breached the rules in a minor manner. In our view, it cannot credibly be concluded or inferred that race had anything to do with any difference in treatment. There is no inadequacy in the Respondent's explanation.

49. The suspension of the Claimant is, in reality, no different from the decision to investigate him and we are satisfied that at the point at which he was suspended there was further investigation to be carried out and every reason for the Respondent to believe that he had committed an act of serious misconduct.

50. This leaves the last matter said to be direct discrimination and that is the dismissal itself. Although the claim up to this point is a weak one, in relation to dismissal it is arguably even weaker. This is because the Claimant

seemed disposed in evidence not to make any allegations of direct discrimination against Mr Snell. We are not obliged to be bound by what he said and it might have been a throwaway remark on his part. In any event, it is obvious to the Tribunal that on a proper consideration of the evidence, Mr Snell's decision to dismiss followed a detailed investigation in which he took account of all of the Claimant's arguments and rejected each of them in turn. In particular, he did not consider that Inga had lied to him or in giving earlier statements. He was particularly knowledgeable about the training aspects of the case and there can be no doubt in the minds of the Tribunal that he took an extremely dim view of what the Claimant had done. His evidence, which we have accepted, is that he believed that the Claimant was a very experienced manager who had been properly trained and that he knew very well that he should not have done what he did. He had a duty to uphold standards, as he put it, and not to undermine Inga by colluding with unauthorised practices. His conclusion was that the Claimant had committed a serious act of misconduct and he rejected any sanction short of dismissal.

51. In the circumstances, we conclude that Mr Snell would have dismissed the Claimant regardless of his race. Put another way, if somebody else in identical circumstances of a different race, or who was white, had been disciplined at a hearing that he held, we have no doubt that precisely the same result would have occurred. Both Mr Snell and the Respondent widely regarded this as gross misconduct and any suggestion that this was direct race discrimination must inevitably fail in the absence of any evidence upon which such a conclusion could be based. Again, the prima facie case has not been made out by the Claimant.

52. For avoidance of all doubt, there is nothing in the conduct of the appeal that would upset any of these conclusions.

53. We turn to wrongful dismissal and as is well recognised, and the parties accept, the issue is here whether or not the Respondent has established by evidence that the Claimant repudiated his contract. Our conclusion is that this does not turn on whether or not there was at any time before Inga took over some form of local practice within the branch that allowed managers to leave early. We have some considerable doubt that this has been established, but even if there were such a practice it must have been apparent to the Claimant that it was in breach of all the rules. There are really two points here that are relevant. First, he never did this elsewhere and the only sensible explanation is that he knew that it was not permitted and he would be in considerable trouble if he were to leave early. Secondly, leaving an hour early is of itself an act of such reckless disregard for his managerial responsibilities that it amounts to gross misconduct even if it only happened once. The entire purpose of the closing procedures for which the Claimant had been trained was to ensure that the restaurant was properly closed. Those procedures are not mere formalities. They are connected with health and safety, for example because of the supervision of cleaning duties. They are also concerned with security. The training included closing two or three times and that is in itself indicative of the thoroughness with which managers are trained and the importance of the closing task. To leave one hour early

for his own convenience, in order to catch a train, and depositing the keys with a member of kitchen staff who had not been trained, is a serious item of misconduct and amounts in our view to gross neglect of his managerial responsibilities. Accordingly, we conclude that the Claimant was in repudiatory breach of contract and that the denial to him of notice or pay in lieu of notice was lawful.

Employment Judge Pearl
31 March 2017