EMPLOYMENT TRIBUNALS

Claimant: **Mr W H Lebbe**

Respondent: **Martin McColl Ltd**

Heard at: **East London Hearing Centre**

On: **10, 11 September, 1 October 2020 and (in chambers) 16 December 2020**

Before: **Employment Judge Jones**
Members: **Ms M Long**
Mr L O'Callaghan

Representation
Claimant: Mr Jawzy Lebbe (friend)
Respondent: Ms P Williams (solicitor)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The complaints of direct race discrimination, harassment and victimisation fail and are dismissed**

2. **The Claimant was fairly dismissed. The complaint of unfair dismissal fails and is dismissed.**

REASONS

1. This was the Claimant's complaints of unfair dismissal and race discrimination. The issues in the case were agreed between the parties and the Tribunal at case management discussions on 30 April and 26 June 2020 and confirmed at the start of this hearing.

2. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was V: fully remote by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a

remote hearing. The documents that the Tribunal was referred to are named below and in the trial bundle.

Evidence

3. The Tribunal heard from the Claimant in live evidence. It also heard from Andrew Odish, Area Manager and the Claimant's line manager; John Gibbs, Area Manager and the person who dismissed the Claimant; Gary North, Area Manager, who heard the Claimant's appeal against dismissal; Matthew Brown, Area Manager, who heard the Claimant's grievance; and Gary Hill, Area Manager, who heard the Claimant's appeal against the grievance outcome. The Tribunal had witness statements from the Respondent's witnesses in advance. The Claimant produced a witness statement at the resumed hearing on 1 October which the Respondent objected to. After discussion and an opportunity for Ms Williams to take instructions, the Tribunal allowed the witness statement to be entered into evidence.

4. The Tribunal had an agreed bundle of documents. The Claimant submitted additional documents late. The Tribunal did not allow all of the Claimant's documents to be entered into evidence as they were not all relevant. We finished the evidence on 1 October but ran out of time for submissions. For that reason and because the Claimant was represented by a lay person, it was considered appropriate to give both parties an opportunity to make written submissions on all the issues set out at pages 30 – 31, 38 and 39 of the bundle of documents by 1 November 2020. The Tribunal met in chambers on 16 December to consider the evidence and make its decision.

5. The Tribunal made the following findings of fact from the evidence in the case. The Tribunal only made findings of fact as necessary to assist us in making decisions on those matters in the agreed list of issues.

Findings of fact

6. The Claimant was a manager of the Respondent's store in East Ham. He started working there in 2006 as a sales assistant. The store was bought by the Co-Op and the Claimant became the manager in 2012. The Respondent bought the store in 2017 when the Claimant and the rest of the staff transferred to it under the TUPE (Transfer of Undertakings (Protection of Employment)) Regulations 2006. Because of the terms and conditions of employment that he enjoyed as a manager with the Co-Op, the Claimant was paid .50p per hour more that the Respondent's other managers. Within the Respondent, the transferred formerly Co-Op stores were known as 'Detroit' stores.

7. The Respondent is a local/neighbourhood convenience retailer. The Claimant's store was open to the public, 7 days a week, between 7am – 10pm. The Claimant was scheduled to work Monday – Friday. His evidence was that he was usually at work from 6am preparing the bakery and other items before opening up.

8. As the store manager, the Claimant was line managed by his Area Manager who would often go to the store to meet with him. He could also raise any queries on his or his staff's behalf to his Area Manager, who at the time was Andrew Odish. Area Managers report to Regional Managers. The Respondent's Area Managers had around 17 – 20 managers across the stores in their area who reported directly to them. Area Managers were responsible for carrying out commercial decisions in stores as instructed by their

Regional Managers. Area Managers also dealt with HR matters in their stores such as disciplinary and grievance issues. They would mostly to carry out the initial investigation and then assist in any other part of the process. There was also a helpdesk function and the Respondent had a contracted HR service available to anyone to contact directly, if there was anything that they were not comfortable raising directly with their local manager. Each region had an HR business partner who could support stores as needed.

The CMS – time recording system

9. On 7 September 2018 the Claimant along with other store managers, attended training on the Respondent's news CMS fingerprint recording machine. We did not have the materials used in the training but we did have the signing in sheet which showed the Claimant's attendance. The training was called the *'time attendance understanding and training session'*.

10. In his live evidence, John Gibbs stated that the training session lasted 3 hours and the Claimant would have had the opportunity to ask questions if there was anything about the system that he did not understand or which was unclear. The Claimant eventually agreed in evidence that the training lasted about one and a half hours. The Respondent's evidence was that the CMS system had already been in-place in stores but that the fingerprint recording function was the new part that was introduced by this training.

11. It is likely that the Respondent would want store managers to be properly trained on the whole CMS system and to understand it. As a store manager the Respondent was dependant on the Claimant not only to use it properly to record their own time but also to ensure that their staff used the system properly so that there was an accurate record of their time at work. After the training, each Area Manager was responsible for rolling out the fingerprint recording/CMS system across their stores. The Claimant confirmed in his statement that the system was formally launched in November 2018. Until then, time was recorded manually. The Claimant therefore had a couple of months to raise any queries he had about the system before he was expected to operate it. There was no record of the Claimant raising any queries with Mr Odish about his understanding of how to record time on the CMS system. His evidence was that he had called HR and IT for assistance in recording sickness absence for a member of his staff. Otherwise, the Claimant used the system from the time it went live without any other issue.

12. If someone worked more than their contracted hours, there was a way of recording that so that the employee could be paid for the extra hours or given time off in lieu but it was not part of the CMS system and it needed to be properly recorded and authorised by an Area Manager. The TOIL system was a different system which Mr Gibbs confirmed had been in place well before the introduction of the CMS system.

13. We find that the CMS system was a computerised time recording system with fingerprint recognition software. Every member of staff coming in and leaving each store must log in to the system with their fingerprint. It is also possible to manually input the time. Each store had a CMS machine. The system is connected to software on the Respondent's store manager's computer terminal and central payroll. It was important that attendance at work was properly recorded so that staff were paid correctly. The system also tracked the person who logged on to the computer to make changes to the software and noted the time when those changes were made.

14. The Respondent undertook an annual review of all stores. In or around November 2018 the Respondent identified the East Ham store to be sold as it was a loss-making store. After further consideration, in February 2019, the Respondent decided to keep the store but to look to reducing staffing levels and other overheads to see if it could be turned around.

The Claimant's relationship with Mr Odish

15. As a result, in February 2019, Mr Odish had a conversation with the Claimant on the telephone in which he raised with the Claimant some ways in which the Respondent wanted to reduce overheads/expenses at his store. Mr Odish described the Claimant's conduct on the call as unprofessional and emotional. It is likely that the Claimant took the discussion as a personal criticism of his management rather than a discussion on how they could work together to turn the store around.

16. The Claimant's allegation was that in a conversation with Mr Odish, Mr Odish asked him why there were so many Asians working at the store. We find that there were no further details of the incident in the Claimant's witness statement. There was a lack of clarity in the Claimant's case as to when this statement was allegedly made. In his live evidence, the Claimant stated that Mr Odish asked him this question when they had a conversation in the office. There was a suggestion that it had been made on the telephone. It was unclear in the hearing whether this was alleged to have occurred on the 3, 4 or 6 March. During the hearing, the Claimant appeared reluctant to put this part of his case to Mr Odish and his representative had to be prompted twice to challenge Mr Odish on whether he asked the Claimant the question about how many Asians worked in the store. The allegations of race discrimination were not referred to in the Claimant's written submissions. Mr Odish denied that he ever asked the Claimant this question.

17. On 6 March, Mr Odish attended the store to speak to the Claimant. He was accompanied by Eileen Lawrence, the HR Business Partner. Ms Lawrence took brief, bullet points during the meeting, which Mr Odish typed up afterwards as notes and sent to the Claimant. Mr Odish asked Ms Lawrence to accompany him because the Claimant had accused him of being racist in a previous conversation. Mr Odish wanted to speak to the Claimant about what measures could be taken in this store to reduce staffing levels to increase the store's profitability.

18. Ms Lawrence noted that the store had previously made a profit but had recently made a loss. Also, the staff hours at this store were above average for the Detroit stores in terms of the number of trading hours and turnover. They discussed ways in which the staff costs could be reduced such as accounting for the wages of the supervisor who was on maternity leave in such a way as to show a saving on the store's budget while she was on leave. The idea was to take those hours away from the store for the duration of her maternity leave. There was no suggestion of not paying her maternity pay. When the time came for her to return to the store, those hours would be available to her even if the store's total hours had been reduced in the interim period. They also discussed a reduction in core hours across the store of 12 hours, a recruitment freeze in relation to the maternity leave cover, and removal of the security guard. The Claimant was not to recruit anyone to be maternity cover for the supervisor on maternity leave. Mr Odish advised the Claimant that other managers were available to assist him if he needed help working out the rotas with this reduced number of staff.

19. The Claimant's role was unaffected by these measures. Mr Odish made it clear that this was not an investigation or disciplinary meeting. It was one of many standard management meeting which Mr Odish as Area Manager had with the Claimant as store manager, in which he gave him directions to implement in his store. We find it likely that around this time Mr Odish made many visits to the store as Alison Waterman was not happy with the store's performance.

20. Gary Hill's evidence was that he had been the Claimant's line manager at the time the store transferred to the Respondent from the Co-Op. He confirmed that the Detroit stores were organised differently from the Respondent's stores. Staffing levels were higher and the Respondent considered that there needed to be realignment to ensure profitability. All 9 Detroit stores went through a realignment process. In the Claimant's store, the Claimant was not asked to dismiss anyone but simply not to recruit to cover the maternity leave or the security guard.

21. We find it likely that the Claimant was resistant to these suggestions. He took it as a personal criticism that the store was making a loss. He was defensive and reacted badly to these suggestions. As the Claimant continued to resist the Respondent's instructions, it is likely that Mr Odish said to him that he would be prepared to take disciplinary action to force the Claimant to take these actions, if necessary. It is likely that the Claimant expressed unhappiness over Mr Odish's management in the meeting as Ms Lawrence asked him about it and referred to it in a note of the meeting which we had at page 89 of the bundle. It was not clear to us why she had not included that exchange with the Claimant as part of the main meeting notes but it may have been because the Claimant did not want notes taken at the meeting. The note at 89 was made later, when she was asked to prepare a statement as part of the grievance process.

22. She recorded that the Claimant refused to participate in the meeting if she made notes. He agreed to her making bullet points, which she did. She recorded that the first question she asked the Claimant was whether he felt that Mr Odish was racist and whether he considered that the meetings that he held with him were racially motivated. The note recorded that the Claimant stated that he had only said that because he was upset and angry. She also recorded that during the meeting the Claimant had been extremely difficult but that Mr Odish conducted himself professionally throughout and did not make any racial references. Ms Lawrence gave the Claimant a copy of her card so that he would have her contact details, if he wanted to make further contact with her.

23. While at the store on 6 March Mr Odish noticed that a temperature check that the Claimant had been responsible for had been falsified. There was a focus on food safety at the Respondent and temperature checks had to be recorded on a daily basis, on the Routines pad. As the Area Manager this was one of the things Mr Odish would routinely check whenever he went to a store. When he arrived at the office that day he noticed that the temperature reading for the previous day had been left open. Later in the day he noticed that the Claimant had filled it in. The temperature should have been filled in on the day and not on the following day. This was potentially gross misconduct and Mr Odish's evidence was that staff had been dismissed for this on previous occasions.

24. On this occasion, Mr Odish decided that he would not take formal disciplinary action against the Claimant. In the circumstances of the difficult meeting they had just had, during which the Claimant had been quite emotional; he decided to speak to the Claimant about it. He conducted a recorded conversation with the Claimant on this

matter. This was a lesser sanction. The Claimant was apologetic and promised that he would not do it again.

25. After the meeting on 6 March, the Claimant was issued with a new budget and as far as Mr Odish was concerned, was able to work within the new budget guidelines that he set, with no issues.

26. On 2 April Alison Waterman, regional manager and Mr Odish's manager accompanied him on another visit to the Claimant's store. She found the store standards to be poor and the Claimant's compliance with the bake plan to be nowhere where it should have been. She instructed Mr Odish to speak to the Claimant to put together a plan to correct the issues that had been found in store. The Claimant was not happy about this. He telephoned Ms Waterman on 3 April to complain about the way in which Mr Odish spoke to him. He wanted her to stop Mr Odish taking any hours out of the store. Ms Waterman explained the business reasons why hours had to be taken out of the store. The store was not profitable and the Respondent had to take some action to try to cut costs.

27. Ms Waterman told Mr Odish that the Claimant complained about to her about him. In live evidence, Mr Odish confirmed that he was fine about the Claimant's complaint. He understood that complaints came as part of his role and that he knew that not everyone would be happy with the decisions that he had to make. We find it unlikely that he took it personally or that he bore any kind of grudge towards the Claimant.

Mr Odish's investigation

28. We find that the Claimant was away from the store in April on holiday. On 23 April, while the Claimant was away, a member of staff at his store made a complaint about him to the Respondent on its dedicated whistleblowing line. The complaint went to HR. The anonymous complaint was that the Claimant was in the habit of recording himself as having worked in the store at times when he had not. The allegation was that the Claimant regularly put himself down on the system as working while he had been working as a minicab driver. The whistleblower alleged that the Claimant had been doing this for a long time and that no one complained about it as they were afraid that he might dismiss them. It was also alleged that the Claimant took more holiday than he was entitled to and would cut back on colleagues' holiday and cover his holiday hours as worked time. The whistleblower advised the Respondent to check the CCTV to see how many hours the Claimant actually worked against his touch-in/touch out times on the CMS system. The complaint also included an allegation that the Claimant stole stock as freezer breakdown and that there were lots of other things happening in the store that the Respondent should look into.

29. The Respondent took this complaint seriously. Ms Waterman instructed Mr Odish to conduct an investigation into the allegations. There was no evidence that Mr Odish had anything to do with the complaint or that there was any collusion between him and the member of staff who made the complaint. After it was received and Ms Waterman asked him to investigate it, Mr Odish went to the store and spoke to the person who made the complaint to check her story. She was very clear that she wanted to remain anonymous and did not want the Claimant to know that it had come from her. It was agreed with Ms Waterman that the investigation would not been done until the Claimant returned from holiday.

30. On 2 May, Mr Odish went to the store to conduct an investigation into the allegations contained in the disclosure. He intended to check the CCTV to see whether there was any evidence as the complaint suggested. There were approximately 14 security cameras in and around the store, showing the store, delivery space, all entrances and exits and the parking space for two cars; which meant that there was a lot of footage for the month of April for him to view. He started by assessing the Claimant's time sheets. He was aware that he was investigating serious allegations and that the Respondent had dismissed other members of staff for falsification of their start and finish times on the CMS, which meant that it was important to conduct a thorough investigation of these allegations. In order to be fair, he did not delve further where the discrepancies were 5 or 10 minutes between the times recorded on the system and the times the Claimant actually worked. He focussed on those times where the difference was of 1 or 2 hours.

31. He went over the records for the previous month, 1 - 30 April 2019. CCTV is kept for a month so that would be the time period for which he would be able to compare the Claimant's attendance at work with the times recorded on the CMS system. Mr Odish specifically looked at the times when the Claimant manually adjusted the time and checked that against the CCTV.

32. It was agreed in the hearing that the Claimant drove to work every day. Mr Odish saw that on some of the times when he manually recorded on the CMS system that he had been at work the Claimant's car was not parked out the back of the store where he usually parked. Mr Odish checked CCTV from all the other cameras in the store and found no evidence of the Claimant being in the building. He looked for the Claimant at the back door after he moved the car but there was no evidence of him being in store. Having checked all the cameras, there was no evidence that the Claimant returned to the store. It would have been impractical for Mr Odish to back up many hours of CCTV footage in each instance, in order to show the Claimant's absence across the store.

33. Mr Odish also checked that the Claimant had been paid for the hours in question.

34. Once he completed the investigation, Mr Odish decided that he needed to meet with the Claimant to put the evidence to him and based on what he had seen, it was also likely that he was going to have to suspend him. He arranged for a store manager from another store to come to the Claimant's store to act as note-taker for an investigation meeting with the Claimant.

35. On the afternoon of 2 May, Mr Odish conducted an investigation meeting with the Claimant. It is likely that the Claimant was told that this was going to be an investigation meeting. Mr Odish went through all the days in April for which he had discovered discrepancies between the times recorded on the CMS system and the times recorded on the CCTV when the Claimant arrived and left work. They discussed the Claimant's touched-in/touch-out times and his actual work times as demonstrated by his arrivals/departures captured on the CCTV on 4, 5, 8, 11, 17, 18 and 22 April 2019. The Claimant was shown the CCTV footage related to each of those days, showing the time that his car arrived at the parking space and the time it left there.

36. We have read the notes of that meeting. There was no evidence of the Claimant having any difficulty in understanding Mr Odish or that there was any language difficulty between them. English is not the Claimant's first language but he is fluent and there was no evidence of him having difficulty understanding what he was asked or of him having

difficulty being understood.

37. Mr Odish counted a total of 7 hours and 15 mins claimed through the times recorded on the CMS, where he could see no evidence that they Claimant had actually worked those hours. He did not accept the Claimant's explanations of what had happened. For those reasons Mr Odish decided to suspend the Claimant on full pay pending a disciplinary hearing, for falsifying his attendance on the CMS system. Having checked with HR and with Ms Waterman, Mr Odish explained to the Claimant that he was suspended and the reasons why. This was reiterated in the suspension letter dated 3 May from Mr Odish.

38. When the Claimant was suspended Mr Odish took the store keys from him. As he explained on page 92, he did so for two reasons. Firstly, because the Respondent needed to give those keys to the person who was going to cover for the Claimant while he was suspended and secondly, because Mr Odish needed to protect the business, should the Claimant be dismissed. The Tribunal takes judicial notice of the fact that it is common practice for employers to take passes, computers and database access away from an employee on suspension to protect the business. Mr Brown also confirmed in his evidence that this was standard practice at the Respondent. We find it likely that Mr Odish explained these reasons to the Claimant when he requested the keys from him. It was not put to Mr Odish in the Tribunal hearing that he threatened the Claimant with dismissal when he took the keys from him. Mr Odish knew that he had to pass the investigation notes to someone else who would make a decision on the issues. It would not be his decision.

39. The letter confirmed that the Claimant was suspended pending further investigations into allegations of misconduct/gross misconduct, namely falsification of company records relation to payroll and the CMS system. Specifically, that there were a number of instances where he did not physically work the hours that he had declared himself as working on the payroll system. The letter confirmed that the Claimant's suspension would be lifted so that he could go on his pre-booked holiday and that it would resume once the holiday ended. He was told that he would be contacted once the investigation was completed. He was also advised that he needed to remain available for meetings and that failure to attend a meeting will lead to suspension of pay and further disciplinary action.

40. As part of the investigation, the Respondent took a statement from the Claimant's deputy manager at the store. The statement was in the bundle (page 173). It confirmed what the anonymous whistleblower told the Respondent. She stated that the Claimant actually worked an average of 25 – 30 hours a week rather than his contracted 39 hours, that he often left work early or started later and frequently left work at 3pm stating that he had to go to the Post Office, when he was contracted to work until 6pm. She confirmed that the Post Office was 3 minutes from the store. She also confirmed that the Claimant also worked as an Uber driver and that he would do this working his working hours – leaving work after getting a message on his mobile. He told staff that he had authorisation from management to do so.

The disciplinary process

41. Ms Waterman asked Mr Gibbs to conduct the Claimant's disciplinary hearing. Mr Odish passed all the documents to Mr Gibbs. Mr Gibbs was an Area Manager with many

years' experience with the Respondent and in conducting disciplinary hearings. He met Mr Odish in a store in Gray's Essex so that Mr Odish could give him the paperwork from the investigation. Mr Odish gave Mr Gibbs the stills from the CCTV footage, the investigation meeting minutes, the complaint from the member of the Claimant's staff team; and records from the CMS and the touch in/touch out systems.

42. During the Claimant's suspension, the payroll team questioned whether the Claimant should be paid the supplementary London rate of pay as part of his pay suspension pay. For a time, the Claimant was paid incorrectly during his suspension in addition to the period of time during which he was deemed on suspension without pay. The Respondent corrected this and in his pay on 30 June, the Claimant was paid the outstanding suspension pay. He has been paid all money due to him, at the correct rate.

43. On 13 May, Mr Gibbs wrote to the Claimant to invite him to a disciplinary hearing on 17 May. The Claimant was advised that he could choose to be accompanied to the meeting by a trade union representative or by a work colleague. He was advised that the matter to be considered at the disciplinary hearing was an allegation of gross misconduct for falsification of company records relating to payroll and the CMS system. The specific allegation was that on a number of instances he did not physically work the hours he had declared himself as working on the Respondent's payroll system. Evidence was enclosed with the letter. He was advised that Mr Gibbs would chair the meeting and that Mr Sethi would attend as note taker.

44. The Claimant asked for the hearing to be postponed. The Respondent agreed and a second invitation letter was sent to him dated 17 May for a hearing set for 29 May. However, Mr Gibbs also changed the Claimant' status to suspension – unpaid, because the Claimant failed to attend the meeting. The Claimant had been given 24 hours' notice of the disciplinary meeting as the Respondent's procedures required. On 29 May, during the meeting, the Claimant handed in a letter from his solicitors. He indicated that he was only prepared to continue the meeting in writing. The Respondent treated the letter as a grievance letter and the disciplinary meeting was adjourned.

45. Mr Gibbs wrote to the Claimant on 1 July to invite him to a reconvened disciplinary hearing on 11 July. The hearing went ahead on that day. The Respondent had previously sent to the Claimant copies of the CCTV stills and the rest of the evidence against him. The Claimant attended that meeting unaccompanied. Mr Gibbs checked with him at the start of the meeting that he was happy to proceed on his own. His evidence to us was that he wanted Mr Jawzy Lebbe to attend with him but the notes do not record him making that request. He had been told in the invitation letters that he could be accompanied by a colleague or a trade union representative. After some discussion, the Claimant agreed that he was happy to proceed on his own. The Claimant also confirmed that he understood the purpose of the meeting.

46. In the hearing the Claimant confirmed that he was contracted to work 39 hours per week. He stated that it would only be in an emergency situation of if he had to attend a managers' meeting that he might not work 39 hours in a week. He could not recall when he had last had a managers' meeting.

47. During the hearing the Claimant denied that Mr Odish had shown him the CCTV of the times when he was alleged to have inaccurately recorded his attendance at work. He stated clearly that he had not seen video evidence for the allegations that he faced. He

stated that Mr Odish had not shown him CCTV. When asked again whether he had seen any CCTV, he replied '*No, none at all*'. There was no ambiguity in that statement. At that point, Mr Gibbs adjourned the hearing.

48. During the adjournment Mr Gibbs spoke to Mr Odish to confirm that the Claimant had been shown the relevant CCTV. When the meeting resumed, the Claimant was asked again whether he was shown the relevant CCTV and he agreed that he had seen CCTV showing his car parked at the back of the store.

49. They discussed the entries on 4 and 5 April 2019. 5 April was the day that the Claimant stated he had a call from the school that his son had had an accident and he had left work early to attend to him. The CCTV confirmed that he left work early that day, at 12.33. The Claimant adjusted the system at a later date to show that he left work at 14.45, which was over 2 hours more than the hours he worked that day. Similarly, on 4 April, the CCTV showed that the Claimant arrived at work at 10.05 and left at 17.34. He manually adjusted the system to show him arriving at 9.30am and leaving at 18.30. He did not give Mr Gibbs a reason why he left work early that day or why he adjusted the system a few days later, on 9 April.

50. In the disciplinary hearing, the Claimant repeatedly asked to see the CCTV evidence. He did not explain why he had manually adjusted the times on the CMS system and why, if he had gone to the school to collect his son on 5 April or gone elsewhere on 4 April, he had not tapped out on the machine when he left so that his attendance was recorded correctly. In the Tribunal hearing, the Claimant referred to other days such as 25 March, and the week beginning 12 November where he worked more than 39 hours. Mr Gibbs confirmed that those entries were fully biometric and had not been adjusted. They showed that the Claimant knew how to operate the system accurately. Although the Claimant had not raised with him in the disciplinary hearing that he was entitled for him to adjust the system in the way he did because there were weeks when he worked over 39 hours; this point was put to Mr Gibbs in the hearing. He stated that it was likely that the job sometimes required the Claimant to worked more than 39 hours. As a store manager, it is likely that he will be required to occasionally work extra time but he was not at liberty to work short days to take back that time without authorisation from his manager. The Claimant did not have authorisation from him manager to do so.

51. In the disciplinary hearing, the Claimant asked about whether time off in lieu applied. In the Tribunal hearing he stated that he did not know what time off in lieu was. This was repeated in his written submissions.

52. When asked about time off in lieu in the disciplinary hearing, he did not have a record of how many extra hours he had worked and did not expand on this point. Mr Gibbs adjourned the meeting to have a look at the Claimant's car to confirm that it was the one in the CCTV images. The Claimant drove a black Toyota Prius to the meeting which was the same car shown in the CCTV.

53. The Claimant indicated that he wanted to see the full CCTV. Mr Gibbs tried to access the footage that Mr Odish had saved for that purpose but after a few adjournments in the hearing, he had to admit that he was having difficulty accessing it. He told the Claimant that he was going to adjourn to get help. Mr Gibbs spoke to HR who confirmed that it was okay for Mr Odish as the investigator, to attend the office to help him access the CCTV.

54. However, when Mr Odish arrived and knocked on the stockroom door where they were meeting and the Claimant saw that it was him in the doorway, he protested. He stated that he did not want to continue with the meeting if Mr Odish was there. It was explained to the Claimant that Mr Odish was only there to show the CCTV and would not take part in the meeting. Mr Gibbs needed Mr Odish to bring the CCTV on to the screen.

55. We find that Mr Odish did not take part in the meeting and there was no intention that he would do so. He was simply there to bring up the CCTV footage on to the screen. He stayed long enough to hear the Claimant say that he did not want him there. At that point, Mr Odish left.

56. Mr Sethi had previously worked in the same area as the Claimant and they knew each other. We find that he was a manager in one of Mr Gibbs' stores. He was there to take notes. It is unlikely that he took part in the meeting and if he spoke, it was to clarify something that was said so that his notes were accurate.

57. We find that the Respondent did not have footage of the Claimant not being at the store as it would be difficult to provide footage from 14 cameras to show that something did not happen. Mr Gibbs accepted Mr Odish's evidence in the investigation documents that he searched all the cameras around the store, including the back and front doors to see if the Claimant returned to the store but there was no evidence that he had. The Claimant confirmed that he had not returned on 5 April although later, he stated that he may have. He did not have an explanation as to where he was on 4 April and so could not be sure that he had returned.

58. On both those occasions, the Claimant made manual adjustments at a later date to put his leaving time from work as later than he had actually left. Mr Gibbs confirmed with the Claimant that he had attended the training and that he was aware that he was required to record his fingerprint whenever he arrived or left the store. This applied even if the worker is on a break. The Claimant did the shift pattern in store for the staff group. As the store manager he was expected to assist the Respondent in ensuring that everyone understood this requirement and kept to it.

59. Mr Gibbs confirmed that the CMS machine had been in place for a while. The new bit that was introduced in 2018 was the touch part. That was the only part that he needed to get used to. The fact that he had accurately recorded his work times on most occasions showed that he was well aware of how to use it. Mr Gibbs considered that the manual alterations show that the Claimant knew how to access the system on the managers' terminal in the office and alter it to his advantage.

60. After Mr Odish left, they continued their discussion of the 4 and 5 April. The Claimant did not want to discuss this anymore. He refused to answer any more questions about any other days. They did not get on to discussing the other days that had been referred to in the investigation meeting. Mr Gibbs agreed to conclude the meeting. He informed the Claimant that he would reserve his decision and let him know the outcome in due course. The Claimant read the minutes of the meeting and signed every page as an accurate record.

61. After the meeting, Mr Gibbs considered all the evidence and concluded that the Claimant had falsified the company records. He had deliberately gone on to the CMS system records and adjusted his work times for at least the 4 and 5 April 2019 so that he

was paid for time that he had not worked.

62. Mr Gibbs considered that this was intentional fraud and was gross misconduct. As the dismissal letter makes clear, he then considered what would be the appropriate sanction to impose on the Claimant. He considered the Claimant's conduct record. There were no previous issues. He also considered the Claimant's length of service. The Claimant had been employed since 2006 and had a clean disciplinary record. Mr Gibbs confirmed that he had considered a lesser sanction than dismissal but as this was gross misconduct and an issue of fraud and trust in the Claimant as the store manager, he did not consider it appropriate.

63. Mr Gibbs considered it appropriate that the most severe sanction should be imposed as this was gross misconduct, committed by a manager by deliberate action for which he had no explanation. The Claimant had been properly trained and had operated the machine properly on other occasions. He wrote to the Claimant on 15 July to confirm his summary dismissal for gross misconduct from 26 July 2019.

64. Just before he wrote to the Claimant with the outcome, Mr Gibbs was off sick and asked Mr Brown if he could arrange for the Claimant to come in to the office and see the CCTV images that had been saved. Mr Brown telephoned the Claimant and left him a voicemail to try to arrange a time when he could come in and see the footage. The Claimant got the message but he responded to say that he wanted a copy of the CCTV to take away and view at his own convenience. He later complained that Mr Brown had been unprofessional by leaving a voicemail message. The Respondent was unable to give him the CCTV as it is likely that members of the public and other staff could be seen on it and their data would be in his possession. This could put the Respondent in breach of its responsibilities under the Data Protection Act.

65. The Respondent's HR service advised that CCTV stills of his car in the car park space which confirmed the times that he was there and when he left, could be sent to the Claimant. Copies of those were enclosed with Mr Gibbs' outcome letter. They were also in the hearing bundle. They show the times that the Claimant drove in and out of the car parking space in the loading bay, on 4 and 5 April.

66. The Claimant appealed against his dismissal. His solicitor wrote to the Respondent on 29 July 2019. In this letter the Claimant accepted that he had entered incorrect details on the time sheets but stated that on other occasions he had worked extended hours and that should have been taken into account. He alleged that the internal process had been flawed as Mr Odish had been involved at the investigation and disciplinary hearing stages and that this meant that the disciplinary hearing was not independent. He found Mr Brown's offer to arrange for him to view the CCTV as inappropriate. The Claimant considered that the sanction of summary dismissal was too harsh, considering his length of service and clean disciplinary record. He considered that he should have been given a written warning.

67. Ms Waterman asked another Area Manager, Mr Gary North to conduct the appeal hearing. Mr Gibbs prepared a pack of evidence and sent it over to him. The pack contained all the statements, the disciplinary hearing notes, the investigation notes and the dismissal letter.

68. Mr North wrote to the Claimant on 9 August to invite him to a disciplinary hearing on 3 September. He was told of his right to be accompanied and advised that the appeal hearing would be an opportunity for him to provide full details of his reasons for appealing and allow all relevant facts to be considered.

69. Mr North decided to hold the hearing at the Southend Road store as it had a private office and he considered that would be appropriate. He asked an HR officer from a different region to attend as a notetaker. The Claimant confirmed that he was happy to continue with the meeting on his own.

70. The Claimant's first appeal point was that he had not been able to see the CCTV at the disciplinary hearing. The disciplinary hearing had been held at a different store to the one the Claimant worked at which meant that it was not on the hard drive of that store's computer. Mr North knew from experience that Mr Odish was better at IT then either he or Mr Gibbs and he also knew that at the time that Mr Gibbs was looking for assistance with the footage, the IT people would have left for the day. Although the Claimant stated that he considered that Mr Odish may have been able to influence the meeting in some way if he had stayed, he could not say how or who he would have influenced.

71. The Claimant complained that it was unprofessional and against the Respondent's policy that Mr Brown contacted him to see if he could arrange for him to see the CCTV footage that had been saved. He was unable to clarify in what way that breached company policy.

72. Mr North concluded that the Claimant had seen the relevant CCTV footage during the investigation and that efforts had been made to let him have another opportunity to see it during the disciplinary hearing and afterwards but the Claimant did not cooperate with those efforts.

73. They discussed the entries on the CMS system that had led to the Claimant's dismissal. The Claimant stated in the appeal hearing that when he was absent from the store he would still be doing work for the Respondent such as banking or shopping for cleaning supplies. Mr North contacted Mr Odish after the appeal meeting to check whether that was possible. Mr Odish checked the expense claims and they were not for expenditure on 4 or 5 April. There was a banking entry for 4 April but it was done at 5pm so he could not have left work at 5.30 to go to the Post Office. Mr Odish emailed Mr North to confirm that the Post Office was 3-4 minutes away and that the high street was a 10 minute walk although he would not expect a manager to finish their shift early or start late in order to purchase products for store use. He would expect staff to order any items they wanted online and have them delivered to the store.

74. Mr North checked the records at head office and could see that the majority of banking slips for this store showed that they had not been processed late in the day, which meant that it was unlikely that the Claimant was in the habit of leaving work early at the end of the day to do the banking.

75. Mr Odish also confirmed that there were other store managers who had been investigated and/or dismissed for inaccurate and false payroll entries. He referred to cases in his area that he had been responsible for investigating and three in another area, one of whom had been dismissed for falsifying hours on the CMS system and working less hours than declared on the system while another had resigned while under

investigation for the same conduct, while the third manager had been investigated for this but had been dismissed for something else.

76. Mr North also considered that where the Claimant had a valid reason for leaving early on 5 April when his son had had an accident, there was no explanation as to why he did not tell someone or ask for compassionate or special leave, either on the day or subsequently. Instead, he went out of his way to make it seem as though he had been at work until the end of his shift. He had no explanation for doing so.

77. Mr North satisfied himself that the investigation had been launched because of a complaint from one of the Claimant's staff and had nothing to do with the fact that he was a member of staff who had TUPE'd across from the Co-Op. Mr North confirmed that there were a number of managers in Detroit stores who were still employed by the Respondent. There was no policy at the Respondent of making those staff redundant or dismissing them because of their rates of pay.

78. Mr North checked the records to confirmed that the Claimant had been trained on fingerprint recording and the CMS system in September 2018. He also checked that the Claimant understood it. He used it without difficulty on a number of occasions. The Claimant also discussed with Mr North how his deputy manager had to be sent home early because he was owed hours. That showed that he understood that the fingerprint system captured the time an employee is at work and then links up with the CMS payroll system which works out how much to pay the employee based on the number of hours he worked. Lastly, although the Claimant complained that the sanction of summary dismissal was too harsh, Mr North was aware of the individuals that Mr Odish referred to who also worked for the Respondent and had been dismissed for similar conduct. This has happened again following the Claimant's dismissal.

79. Mr North wrote to the Claimant on 27 September 2019 to inform him of the result of the appeal hearing. The letter discussed all the points raised in the appeal and discussed above. Mr North did not address the allegations of racial language by Mr Odish as that had already been considered as part of the grievance. All other aspects of the appeal letter were addressed in his outcome letter. Mr North concluded that a written warning would not have been more appropriate as the acts of falsification of company records and claiming payment for hours not worked were serious issues and gross misconduct and dismissal was an appropriate sanction. He was satisfied that the matter had been dealt with properly and thoroughly at the disciplinary hearing and the correct decision had been made. The appeal failed.

The grievance process

80. The solicitor's letter was dated 29 May and addressed to Mr Gibbs. It did not call itself a grievance letter but it complained about Mr Odish's treatment of the Claimant in management meetings. The letter alleged that Mr Odish's treatment of the Claimant may be racially motivated because he speaks to the Claimant in a patronising manner and appears to treat him differently to other employees. No examples of this were given. The letter did not mention the allegation that Mr Odish had asked him how many Asians work in the store.

81. The solicitor alleged that the reason why the Claimant left work early on 5 April was because his child had had an accident at school and he had to leave work early as the

child needed urgent medical attention. There was no explanation as to why he had not clocked-out at the time he left that day and clocked back in whenever he returned to the store. He also alleged that the Respondent may be looking at dismissing him because he was paid more than the Respondent's other store managers. The letter ended by informing the Respondent that the Claimant would bring an unfair dismissal if he were dismissed and urging it to reconsider its decision.

82. The Respondent decided to treat the letter as a grievance under its company grievance procedure and Matthew Brown, another Area Manager was assigned to conduct the grievance process. Mr Brown wrote to the Claimant on 5 June by special delivery, to invite him to a meeting to discuss his grievance. The Claimant was advised of his right to be accompanied and the meeting was set for 7 June 2019. The letter enclosed a copy of the grievance procedure.

83. The Claimant texted Mr Brown on the following day to say that he required more notice. He also asked for the Respondent to put questions to him about his grievance in writing as he preferred to respond to them rather than attend a meeting.

84. Mr Brown wrote to the Claimant on 10 June with a series of questions seeking clarification of the serious allegations made in the Claimant's solicitor's letter. Some of the questions he was asked were as follows: for examples of Mr Odish speaking to him in a dismissive, abusive and patronising manner; why he considered that Mr Odish had approached the matter unprofessionally and why he was concerned about way in which Mr Odish had approached the discussion regarding reduction in hours in store. The Claimant was asked to respond to the questions by 18 June.

85. The Claimant's solicitor wrote to Mr Brown on 18 June 2019. In that letter, she made many allegations, including that Mr Odish had asked the Claimant how many Asians worked at the store in a conversation on 3 March. The letter also alleged that Mr Odish had approved a junior member of staff's leave over Christmas but when the Claimant asked for Christmas Day off so he could travel to Sri Lanka with family on holiday, Mr Odish had refused, which caused him to have to incur additional travel fees. Mr Odish was asked about this in the hearing and he confirmed that the member of staff was not the store manager, she was getting married and had applied 6 months in advance for 4 weeks' holiday around her wedding. The Respondent's handbook makes an exception for once in a lifetime situation such as this. A copy of the handbook at 55.c of the bundle shows the following *"you will not be permitted to take annual holidays in excess of two consecutive working weeks except for 'once in a lifetime opportunities'".* Mr Brown investigated this and was satisfied that this was why her leave had been authorised. Also, there had been previous occasions when the Claimant had been authorised to take leave around Christmas time to travel abroad.

86. Mr Brown asked Ms Lawrence to write a statement about the meeting that she had with the Claimant and Mr Odish, as the Claimant had complained about it. We have already referred above to the note she prepared. He also asked Mr Odish to write a statement on what had happened between them. Mr Odish did so. In his statement he explained the rationale behind his instruction to the Claimant to reduce the core hours in the store and the discussion they had about the member of staff who was on maternity leave. He stated that the Claimant was opposed to the idea of cutting hours and had accused him of being racist when he insisted. His statement said that this was during a discussion at the store on 1 March. Mr Odish spoke to Ms Waterman after that and was

advised that he should ask Ms Lawrence to sit in future meetings with the Claimant.

87. Mr Brown was also given a copy of Ms Lawrence's notes of the meeting on 6 March. We had those copies of those notes in the bundle but they were illegible. Mr Brown also spoke to Mr Odish to make sure that he understood his statement.

88. Mr Brown asked Ms Waterman to write a statement about her recent interactions with the Claimant. In her statement she referred to her visit to the store on 2 April and her telephone conversation with the Claimant on the following day.

89. After he considered all that evidence, Mr Brown wrote to the Claimant with a decision on his grievance. The letter was dated 1 July 2019 and covered all the points raised in his solicitor's letters. He told the Claimant that the ongoing disciplinary matter would address the points in relation to the falsification of company records and he would not deal with it as part of the grievance.

90. He stated that it was unlikely that the Claimant had a meeting with Mr Odish on 3 March as that was a Sunday and Mr Odish did not work on Sundays. In addition, Mr Odish denied asking the question about how many Asians worked in the store. Mr Brown noted that Mr Odish would have had access to all employee data on the CMS system and would therefore have been able to see who was employed at the store - if that was of interest to him but because his main concern was to get the Claimant to reduce hours to make the store profitable; he did not believe that the question had been asked. Lastly in relation to this point, Mr Brown remarked that even though the Claimant had an opportunity in the 6 March meeting with Ms Lawrence and Mr Odish to raise any examples of racist behaviour, he had failed to raise this allegation.

91. Mr Brown confirmed that the Claimant was not under investigation for allegations of gross misconduct so that the Respondent could avoid having to pay him redundancy pay, as had been alleged in the solicitor's first letter.

92. Mr Brown was solely responsible for the decision on the Claimant's grievance. He concluded that there was no evidence to support the Claimant's allegations that Mr Odish acted in a racist, threatening and unprofessional manner towards him or that the Claimant had been treated differently in relation to granting annual leave or any other matter. The Claimant's grievance was not upheld.

93. The Claimant appealed the grievance outcome. The appeal letter was from his solicitor and was dated 5 July. Mr Brown spoke to and passed that letter and the file of papers from this grievance to another Area Manager, Mr Gary Hill, who had been asked by Ms Waterman to deal with the grievance appeal.

94. In the appeal letter the Claimant asked whether the Respondent had obtained the CCTV footage of the incident as then Mr Odish's confrontational and patronising stance to the Claimant would be 'obvious' from the footage as would his sarcastic laughter as their conversation had not been humorous. This was the first time that the Claimant had alleged that Mr Odish's behaviour towards him would have been caught on a CCTV camera. By the time this was raised in the appeal letter in July, the CCTV footage from March was no longer available. Also, the Respondent's CCTV cameras only captured images but no sound.

95. In the appeal letter the Claimant's solicitor stated that the date on which Mr Odish asked the question about how many Asians work at the store was 4 March. He confirmed that he got the date wrong in the earlier letter. As already stated above, at the hearing, the Claimant reverted to saying that it had occurred on 3 March.

96. Mr Hill invited the Claimant to the grievance appeal hearing on 10 July 2019. The Claimant declined the invitation for that meeting as it was too short notice and he wished to have the opportunity to deal with it in writing. Mr Hill invited him to a grievance appeal meeting to be held on 17 July. The Claimant attended that meeting. Having been advised of the right to be accompanied, the Claimant attended the meeting alone. The Claimant was happy to proceed. The meeting lasted over 2.5 hours during which there were breaks for refreshment. During the meeting Mr Hill allowed the Claimant the opportunity to put his points and only asked him for clarification. They went through the solicitor's letter, paragraph by paragraph.

97. In addition to reading all the documents he had been given by Mr Brown, Mr Hill decided that he needed to conduct further investigations before coming to a decision on the appeal. Also on 17 July, he wrote to Mr Brown to ask whether he had looked at the CCTV footage when he considered the grievance. Mr Brown confirmed that this had not been raised during his part of the process and that it would have been too late to do so as the grievance meeting had occurred approximately 80 days after the alleged incident. Mr Hill also emailed Ms Lawrence to ask her whether she advised the Claimant to raise a grievance against Mr Odish because of the manner of the meeting and whether Mr Odish had threatened to suspend the Claimant in the meeting that she attended. Ms Lawrence replied to strongly refute that either had occurred. She stated that she had given her card as a support and not because she believed that he had a genuine complaint against Mr Odish, as the Claimant suggested. She confirmed that at no point in the meeting on 6 March had Mr Odish threatened to suspend the Claimant.

98. At the end of those investigations, Mr Hill considered all the evidence and decided that the matters raised in the grievance had been dealt with properly and thoroughly by Mr Brown and that the correct decision had been made. He detailed his findings in his letter dated 29 July 2019. The Claimant's grievance was not upheld. The grievance appeal marked the end of the Respondent's internal procedures.

99. The Claimant began the ACAS conciliation process on 18 October 2019 and the certificate was issued 18 November 2019. The ET1 complaint form was issued on 16 December 2019.

<u>Law</u>

100. The Tribunal considered the following law in coming to its judgment in this case.

Unfair Dismissal

101. The Respondent has the burden of proving the reason for dismissal and that it is a potentially fair one. The Respondent submitted that the Claimant was dismissed because of gross misconduct. Misconduct is potentially a fair reason for dismissal.

102. The Claimant appeared to dispute the reasons for his dismissal as in his submissions he stated that it was not clear that it was his car in the loading bay and that

the Respondent had not showed him all the CCTV. He also submitted that real reason the Respondent wanted to dismiss him was because he earned more than some of the Respondent's Area Managers. He submitted that the decision to dismiss him fell outside of the range of reasonable responses open to the Respondent because he had not received adequate training on the CMS system, there had been difficulty in communication between the Claimant and his managers, the investigation was inadequate and because he often worked over 39 hours. His case was that the Respondent should have considered his clean employment record since he started working in 2006 and should have given him a written warning. The Claimant believed that he should have had a lesser sanction than dismissal.

103. The law considered by the Tribunal started with the seminal case of *BHS v Burchell* [1980] ICR 303, where a three-stage test was outlined for tribunals in assessing complaints of unfair dismissal where the allegation is of misconduct. The employer must show that: -

(a) he believed the employee was guilty of misconduct;
(b) he had in his mind reasonable grounds which could sustain that belief, and
(c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

104. The means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it, which has been reasonably tested through an investigation.

105. In establishing whether the Respondent had a potentially fair reason to dismiss, the Tribunal must base its decision on the facts known to the employer at the time *(Abernethy v Mott, Hay & Anderson [1974] ICR 323).*

106. There is a neutral burden when deciding whether the dismissal was reasonable in the circumstances *(Boys and Girls Welfare Society v McDonald [1966] IRLR 129).* The Respondent submitted that gross misconduct involves deliberate wrongdoing or gross negligence. Consideration should be given to the character of the conduct and whether on the facts it was reasonable for the employer to regard the conduct as gross misconduct.

107. If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including equity, the size of the employer's undertaking and the substantial merits of the case, the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal should be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again and the Tribunal must ask itself whether what occurred fell within "the range of reasonable responses" of a reasonable employer.

108. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law by pointing to the words of section 98(4) ERA (Employment Rights Act 1996) themselves and then stated that the tribunal must consider the reasonableness of the employer's conduct, not simply whether

they (the members of the tribunal) consider the dismissal to be fair as the tribunal must not substitute its decision as to what was the right course to adopt for that employer. He stated that in many (though not all) cases there is likely to be a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonable take another and the function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

109. The ACAS Code of Practice on Disciplinary and Grievance Procedures recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct.

110. *Harvey* points out that the nature of the industry may dictate that some misconduct, not apparently serious, may justify dismissal for a first offence. In the case of *Siraj-Eldin v Campbell Middleton Burness & Dickson* [1989] IRLR 208, Ct Sess, the question arose of whether the dismissal of an employee for taking alcohol on board an off-shore oil rig could constitute a fair dismissal in circumstances where it was a first offence and the alcohol had been kept in a locked suitcase. The Inner House of the Court of Session held that a reasonable employer could fairly dismiss in these circumstances. This was because there was evidence that possession of alcohol on an oil rig is considered so serious that no mitigating circumstances are accepted.

Time points

111. The Respondent submitted that any acts that occurred before 19 July 2019 should be deemed to be out of time and that the Tribunal had no jurisdiction to consider them. Section 123 of the Equality Act states that proceedings on these complaints may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3)(a) states that for the purposes of this section, conduct extending over a period is to be treated as done at the end of the period.

112. The Respondent submitted that there was no continuing act here as the Claimant describes various unrelated acts rather than a continuing state of affairs. Secondly, the Respondent submitted that the Claimant failed to provide any evidence to support his allegations of discrimination, harassment or victimisation which meant that the Tribunal did not have any evidence to support his claim of there being ongoing acts.

113. Even if there had been a continuing act, it was the Respondent submission that it ended on 6 March 2019 as nothing happened between that date and the investigation meeting on 2 May 2019.

114. The leading case on when conduct could be considered to be extending over a period is *Commissioner of Police of the Metropolis v Hendricks* [2003] IRLR 96. In that case, Mummery LJ held that the claimant *"was entitled to pursue her claim …on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'"*. The judgment stated that the focus of the

tribunal's enquiry must be not on whether there is something that can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against was treated less favourably.

115. We also considered the more recent case of *South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168 in which Choudhury P stated that *"Hendricks demonstrates that there are several ways in which conduct might be said to be conduct extending over a period….. One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in [Hendricks] is where separate acts of discrimination are linked to one another and are evidence of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both of these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination."*

116. *Harvey* advises that in deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to (a) the nature and conduct of the discriminatory conduct of which complaint is made, and (b) the status or position of the person responsible for it.

117. If some part of the Claimant's claim is out of time and it is the Tribunal's judgment that there was no continuing act then the next consideration is whether the tribunal will use its discretion to extend time on a just and equitable basis.

118. The Tribunal has a broad discretion to extend the time limit where it considers it 'just and equitable' to do so. When considering whether to use it discretion in this way, the tribunal was aware of section 33 of the Limitation Act 1980 which stated that in considering whether to allow a late claim to proceed the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for delay; (b) the extent to which the cogency of evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking legal action. These factors are a useful checklist but there is no legal requirement on a tribunal to go through such a list in every case as long as no significant factor has been left out of its consideration. (*London Borough of Southwark v Afolabi* [2003] IRLR 220).

119. If it is the Tribunal's judgment that it has jurisdiction to consider the discrimination complaints, the relevant law applied in deciding those complaints is as follows: -

Race Discrimination

Direct race discrimination

120. The Claimant complained of less favourable treatment on the grounds of race, harassment and victimisation.

121. The Claimant's complaint was of discrimination because of the protected

characteristic of race. He alleged that the Respondent treated him less favourably than others because of his racial/ethnic origins. The Claimant is of Asian (Sri Lankan) ethnic origin.

122. Section 13 Equality Act 2010 confirms that direct discrimination occurs when, because of a protected characteristic (in this case race/ethnicity), a person (A) treats another (B) less favourably than A treats or would treat others. The burden of proving the discrimination complaint rests on the employee bringing the complaint. Section 136 of the Equality Act deals with burden of proof in discrimination cases and states *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…. If A is able to show that it did not contravene the provision then this would not apply".*

123. In the case of *Laing v Manchester City Council [2006]* ICR 1519 tribunals were cautioned against taking a mechanistic approach to the proof of discrimination. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc [2007] IRLR 246)*.

124. In every case the tribunal has to determine the reason why the claimant was treated as s/he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more

Harassment

125. The law on harassment is contained in section 27 Equality Act 2010 (EA):

(1) "A person (A) harasses another (B) if –

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

(b) the conduct has the purposes or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

126. Section 27(4) states that in deciding whether conduct has the effect referred to in subsection (1)(b) set out above, each of the following must be taken into account:

- The perception of B
- The other circumstances of the case
- Whether it is reasonable for the conduct to have that effect.

127. The Tribunal was aware of the case of *Land Registry v Grant* [2011] EWCA Civ. 769 in which Elias LJ focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caused by the concept of harassment".*

128. In the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the EAT stated that the conduct that is treated as violating a complainant's dignity is not so merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. The Tribunal is obliged to take the complainant's perspective into account in making that assessment but must also consider the relevance of the intention of the alleged harasser in determining whether the conduct could reasonably be considered to violate a complainant's dignity.

129. It is also important where the language used by the alleged harasser is relied upon, to assess the words used in the context in which the use occurred.

130. The Respondent disputed that it had harassed the Claimant at all.

Victimisation

131. Section 27 EA states that

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith.

132. The first question for the Tribunal was whether the Claimant did protected acts. The Respondent submitted that the Tribunal should consider whether the employee acted honestly in giving the evidence or information, or in making the allegation, that is relied on as the protected act. In the case of *Saad v Southampton University Hospitals NHS Trust* [2008] IRLR 1007 the EAT held that when determining whether an employee has acted in bad faith for the purposes of s 27(3) Equality Act, the primary question is whether they have acted honestly in giving the evidence or information or in making the allegation.

133. If he had done a protected act, the Tribunal then has to decide whether the Claimant was subjected to any detriment because of it.

Applying law to the facts set out above

<u>Unfair Dismissal</u>

Reason for Dismissal

134. At the time of the Claimant's dismissal, there were other managers who had transferred from the Co-Op who continued to work in the Detroit stores, within the Respondent. We did not have evidence of a policy to make them redundant or a practice of doing so.

135. The Respondent had discussed closing the Claimant's store but then decided that it would keep the store open and reduce overheads instead. In their discussions about cost-saving measures, Mr Odish did not bring up with the Claimant the idea of reducing his hours. That was never suggested. The Claimant was never at risk of redundancy. There was no redundancy situation at the store.

136. No disciplinary action was taken against the Claimant until the Respondent received the letter of complaint from the supervisor within the Claimant's store. It was only then that the investigation was conducted. It was Alison Waterman's decision to ask Mr Odish to conduct the investigation into the allegations contained in the whistle-blowing. As he was the Area Manager for the Claimant's store, it made practical sense that he should be the person to conduct the investigation.

137. There was also no evidence that the investigation had any connection to the Claimant's race or his ethnicity. This was not put to the Respondent's witnesses and the Claimant did not give that evidence in his witness statement or in the hearing.

138. Mr Gibbs and Mr North were both satisfied that the investigation arose from the supervisor's complaint. In this Tribunal's judgment, both Mr Gibbs and Mr North made their decisions on the evidence of the falsification of the records on the CMS system and the fact that this resulted in the Claimant being paid for time that he had not worked.

139. The Respondent has proved that the reason for the Claimant's dismissal was his misconduct. Although the Claimant alleged that the reason was the level of the Claimant's wages or the fact that it wanted to make him redundant as a cost-saving measure, we had

no evidence in the hearing to support those positions.

140. It is therefore the Tribunal's judgment that the reason for the Claimant's dismissal was his misconduct.

141. The answer to point 1, on page 38 of the list of issues is that the reason for the Claimant's dismissal was conduct.

Was it fair and reasonable for the Respondent to summarily dismiss him for gross misconduct?

142. The Tribunal has to answer that question from the facts found above.

143. It is this Tribunal's judgment that Mr Odish conducted an investigation into the allegations in the complaint. The Claimant's case was that the Respondent should also have investigated the allegation of theft and the fact that it did not, made the investigation unfair and incomplete. In our judgment, the Respondent was entitled to limit the scope of the investigation. Mr Odish adopted a fair and measured approach to the allegations. The Respondent was not seeking to unnecessarily punish the Claimant but to look into some of the allegations made by the whistleblower. Mr Odish narrowed the investigation further by only focussing on dates in April. He did not include in the investigation any days on which the discrepancy between the times on the CMS system was different to the Claimant's actual work time by only minutes. When, at the disciplinary hearing the Claimant stated that he did not want to discuss these matters further after discussing the 4th and 5th April, Mr Gibbs agreed and stopped there even though he had evidence for all the other dates in April where the Claimant had altered the time records to show him working more hours than he actually had.

144. In our judgment, these facts show that the decision not to investigate the allegation of theft was a decision the Respondent was entitled to make and does not indicate a lack of fairness or thoroughness of the investigation. The Claimant was not charged or dismissed for theft of stock. That allegation played no part in his disciplinary or his dismissal.

145. The Respondent conducted a thorough investigation into the time recording issue. We accepted Mr Odish's evidence that he looked at the footage from all 14 cameras at the store for the dates in April, which included the 4th and 5th and found no evidence that the Claimant had returned to the store on those dates. The Respondent proved that the Claimant was trained on the CMS system and on the touch in/touch out - fingerprint recording part which had been introduced in November 2018. He had accurately recorded his time on it on many occasions. The Claimant was the store manager and had to address any queries that his staff had about the system. He was expected to know how it operated and it was the Respondent's judgment that he did. It was reasonable for the Respondent to come to that conclusion. The Claimant contacted HR once with a query on the system for one of his staff. If he had any queries about how to use the system, he clearly knew where to get assistance in dealing with it. Lastly, he admitted in the disciplinary process that he had to send a member of staff home as the Respondent owed him time because he had worked over the time he was due to be paid. That again showed the Claimant's clear understanding of the system and how it related to pay.

146. The Respondent gave the Claimant the information from the investigation, in good

time for him to be able to comment on it and respond. He participated in the investigation. We are satisfied that he was shown the CCTV of the relevant evidence at the investigation meeting. He signed the notes of the investigation meeting to confirm that had fully participated and been given the opportunity to state his side of the case. He declined the offer of seeing that footage again at the disciplinary hearing and again when offered the opportunity by Matthew Brown. He was given copies of the relevant CCTV stills. It made practical sense and was reasonable for the Respondent not to have downloaded footage from 14 cameras to show his absence. That would have necessitated the disciplinary and appeal and potentially the Tribunal having to look at days of footage with other individuals shown but without the Claimant appearing. It was not reasonable to expect the Respondent to produce evidence to show that the Claimant was absent. It would have been easier for the Claimant to produce evidence that he had come back to work or had been at work but he was unable to do so.

147. The Claimant had an opportunity to present his case at the disciplinary and appeal hearings. He was able to ask questions and to challenge the case against him. In our judgment, the Claimant had no difficulty in understanding English or in expressing himself in English, even though it is not his first language. There was no issue with the Claimant's understanding or of him having difficulty in participating in the internal hearings or in the Tribunal hearing.

148. The decision letters from Mr Gibbs and Mr North were clear and consistent. The allegations did not change. They were that the Claimant had falsified the company records related to the CMS and payroll systems to show that he had been working on 4 and 5 April, when he had not been. He had declared himself as working on the Respondent's payroll system when he had not physically worked those hours.

149. The Respondent did not dispute that the Claimant had gone to the school to collect his son on 4th April as there had been an accident. The misconduct was the Claimant's act later on of going into the system and changing the time that he finished work that day, to over an hour later than he had. There was no evidence that he had returned to work and if he had, the correct procedure would have been to have touched in again rather than to manually adjust the clock some time later.

150. It was Mr Gibbs' decision that the Claimant had deliberately falsified the Respondent's records. It is our judgment that this was a reasonable conclusion for him to draw from the evidence. The Claimant did not put forward a different explanation. This was deliberate wrongdoing from a store manager. The Claimant's actions resulted in him being paid for time that he had not worked for the Respondent. The Claimant's only answer to that was to say that he had frequently worked over 39 hours. The Respondent did not agree that he had but even if had, that would be mitigation rather than him disputing the misconduct allegation. It would not explain why he altered the times on the system without permission from his Area Manager. He was unable to say how many hours he had worked over 39 hours and he had no record of when he had done so. In the Tribunal hearing he made vague statements about coming in to work on a Sunday or of coming to work early but there was no sense that he had any idea of how many times that occurred or how much time it came up to. The Claimant was aware that the Respondent wanted time to be recorded. That was the purpose of the CMS system and the touch in/touch out system. If he wanted credit for extra time worked then it would have been incumbent on him to record this time and to speak to Mr Odish as his manager, about it. The Claimant failed to do so. It was dishonest to manually adjust the time on the system

to show him having worked more hours than he had.

151. It is this Tribunal's judgment that there were reasonable grounds for the Respondent's belief that the Claimant had committed gross misconduct and that at the time the belief was formed, the Respondent had carried out a reasonable investigation.

152. It is our judgment that as the Claimant's actions were deliberate and resulted in him being paid for more hours than he actually worked on 4 and 5 April, it was within the band of reasonable responses for the Respondent to describe it as gross misconduct.

(2.1 and 2.2 of page 39) If the reason for dismissal was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

153. We are satisfied that Mr Gibbs and Mr Hill considered the Claimant's mitigating factors in coming to their decision as to what would be the appropriate sanction for this gross misconduct. They had considered the Claimant's length of service and that this was his first disciplinary matter. The Claimant was the manager of the store. He was familiar with the system and was responsible for making sure that those who reported to him used the system honestly and properly. This was deliberate falsification of time records and resulted in him being paid for hours he had not worked. The Claimant had no satisfactory explanation for this. The Respondent did not accept his explanation that he did not understand how the system worked since he had successfully used it and had used it with his junior staff.

154. In those circumstances, it was within the band of reasonable responses for Mr Gibbs to decide that the appropriate sanction was summary dismissal. The Claimant could offer no explanation for his misconduct. Other managers had been dismissed for similar conduct. We were not told that this was the Respondent's policy but it did demonstrate the seriousness with which the Respondent considered the deliberate tampering by managers of the time recording system which was connected to the payroll.

155. In all the circumstances, it is this Tribunal's judgment that the decision to summarily dismiss the Claimant was within the band of reasonable responses to his gross misconduct. The Respondent acted reasonably in treating it as a sufficient reason to dismiss him.

Race Discrimination

156. The allegations of race discrimination are contained on pages 31 and 38 of the bundle of documents.

157. The first issue for the Tribunal was the Claimant's reluctance to put his allegations of discrimination to Mr Odish during the Tribunal hearing. Most of these allegations were against Mr Odish and so it was necessary that he be given an opportunity to give evidence on them. The Claimant had to be prompted on more than one occasion during the hearing by the Judge to ensure that the case was put.

158. All the allegations contained on page 31 were considered as part of the Claimant's grievance.

Taking the allegations in number order
Direct Discrimination

4.2.2.1 – the imposition of unreasonable targets

159. It is our judgment that Mr Odish did not impose unreasonable targets on the Claimant. He spent time at the store with the Claimant working out the details of the changes he wanted the Claimant to make. He did just impose targets and leave. The Claimant was asked not to recruit maternity cover for the supervisor and not to replace the security guard. There were no impossible or unreasonable targets recorded on Ms Lawrence's note of 6 March. The Claimant did not refer us to any unreasonable targets.

160. Mr Odish offered to get another store manager in the business to come and assist the Claimant in doing the rota after the above changes were made. The Claimant refused that help. Mr Odish made many visits to the store to try to assist the Claimant.

161. In our judgment, impossible targets were not imposed. In addition, there was no evidence that any targets that were imposed were related to his race.

4.2.2.2 – Mr Odish speaking to the Claimant in an aggressive tone and threatening disciplinary action. It is likely that this relates to a conversation they had on 4 March.

162. It is our judgment that the Claimant was not in agreement with the changes that the Respondent wished to make to the running of the store as he did not agree that there was any problem with its profitability.

163. He was resistant to Mr Odish's management. Mr Odish had been instructed to do this by Ms Waterman. He had reviewed the store and it had been decided that these changes needed to be made.

164. It is likely that the Claimant did not accept what Mr Odish instructed him to do. It is also likely that Mr Odish informed him that if he continued to refuse to do as instructed, the Respondent's final sanction would be disciplinary proceedings. In our judgment, this is not threatening the Claimant but letting him know that this was not negotiable and that he had to carry out the instructions.

165. It is our judgment that Mr Odish was firm with the Claimant but that he did not speak to him in an aggressive tone and did not threaten him with disciplinary action.

166. The Claimant presented no evidence that the way Mr Odish spoke to him on 4 March was related to his race.

4.2.2.3 – it is likely that this refers to a conversation on 4 March. Mr Odish asking the Claimant how many Asians work in the store

167. The Claimant was unclear on the date on when the conversation in which Mr Odish allegedly asked him how many Asians work in the store, took place. Even though Mr Brown told him that it could not have happened on 3 March 2019 as Mr Odish did not work on Sundays, the Claimant repeated that date at the preliminary hearing on 26 June 2020 to EJ Burgher which is why the allegations on page 31 are recorded as having happened on that date.

168. The Tribunal's judgment is that the Claimant knew that he could raise a grievance about Mr Odish's conduct, if it was of concern to him. He did not do so until he was invited to a disciplinary hearing, over 2 months later.

169. It is also our judgment that Mr Odish did not ask the Claimant how many Asians worked at the store on 3 or 4 March 2019. There would have been no need for him to do so and that question bore no relation to the discussions they were having at that time about reducing the stores hours. Mr Odish was trying to get the Claimant to agree to reduce staff hours by moving the hours for the person on maternity leave to a different budget so that the overheads for that store would be reduced. The question of how many Asians worked at the store would not be relevant to that conversation.

170. The Claimant failed to address the allegation in his witness statement, which was served after he had the benefit of seeing the Respondent's witness statements. He also failed to address it in his written submissions which were prepared well after the hearing finished.

171. It is our judgment that he failed to address it in his documents and in the hearing because it did not happen.

172. It is our judgment that Mr Odish did not ask the Claimant how many Asians work in the sore and why he employed so many Asians.

4.2.2.4 – Mr Odish placed a ban on the Claimant carrying out any additional recruitment in the store.

173. In our judgment, Mr Odish asked the Claimant not to recruit maternity cover or to recruit another security guard. There was no blanket ban on recruitment but even if there were, it is our judgment that this was not personal to the Claimant. This was to make the store profitable. This was business related and was not a judgment on the Claimant. If the store was overstaffed as Mr Hill suggested that it might have been then that is a matter left over from the way in which the Co-Op organised the store and was not a reflection on the Claimant.

174. The Claimant took it personally but in our judgment, Mr Odish was simply discussing a variety of measures with him that would mean that the store would stay open and everyone would keep their jobs but certain changes had to be made.

175. We find it unlikely that he was told that he could never recruit again or that he was banned from carrying out recruitment. Even if he had, the Claimant presented no evidence to the Tribunal that any strictures that Mr Odish placed on his carrying out recruitment was related to his race.

4.2.2.5 Mr Odish's unannounced visit with Ms Lawrence. This is likely to be the meeting on 6 March

176. In our judgment, Mr Odish visited the store regularly at this time to assist the Claimant in making the changes necessary to turn the store around. There was a genuine business reason for this meeting. There was a need to discuss the number of hours in relation to the store and how these could be reduced while covering the shifts. This was a normal management matter. Ms Lawrence was asked to accompany him because of the

way in which the Claimant had reacted to the last conversation that he had with Mr Odish on the telephone. The Claimant had reacted unprofessionally and had accused Mr Odish of cutting hours because he was racist. In those circumstances, it was appropriate and reasonable for Mr Odish to ask HR to accompany him to the next meeting with the Claimant.

177. Ms Lawrence's attendance at the store was not detrimental to the Claimant. She gave him her card and they had a discussion about his concerns about the way Mr Odish spoke to him. He was able to ask her any questions he wanted about what Mr Odish was doing. Her presence was meant to be supportive to both he and Mr Odish.

178. We had no evidence that Mr Odish's invitation to Ms Lawrence to attend this meeting with the Claimant was connected to his race.

4.2.2.6 – Mr Odish assessing the Claimant at 77% and failing the Claimant for a minor error in mid-late March 2019

179. We did not hear any evidence about the Claimant being assessed at 77%. We did hear evidence on the temperature check that the Claimant had falsified. This was a serious offence and the Claimant could have been disciplined for it.

180. Mr Odish exercised his discretion and decided that since the Claimant had just had a difficult meeting about reduction in staffing hours in the store, he would talk to him about the temperature check but not take it any further. The Claimant's characterisation of his failure to record the temperature of food served in the store correctly and at the right time shows that he did not take this task seriously as he should have done. This was not a trivial or minor matter. This was a direct breach of company procedure.

181. It is our judgment that Mr Odish took appropriate action against the Claimant in relation to the temperature check. The Claimant has failed to show that this was detrimental to him as no further action was taken. There was no evidence that it was
182. related to his race.

4.2.2.7 – Mr Odish overruled the Claimant and permitted another member of staff's holiday request in December 2019 while the Claimant was refused December holiday in December 2018.

183. It is not clear whether the dates are correct in this issue.

184. There was no evidence that either of these holiday requests were related to race. The employee's holiday request was a unique situation as she was getting married and she gave the Respondent 6 months' notice of her desire to take 4 weeks holiday over the Christmas period. The policy allowed for these types of situation as getting married is a unique occasion. The Claimant's situation was different. Mr Odish used his discretion on both occasions. There was also evidence that the Claimant had previously had holidays over Christmas while working for the Respondent.

185. There was no evidence that any refusal of Christmas leave on any occasion was related to the Claimant's race.

4.2.2.8 – On 29 May 2019, Mr Odish taking the Claimant's store key and threatening him with dismissal

186. The Claimant produced no evidence that Mr Odish's act of taking his store keys away from him on suspension was due to his race.

187. The Respondent needed someone else to cover the Claimant's duties while he was suspended. The removal of keys was to make sure that the store could be secured and accessed in the Claimant's absence. This was standard practice.

188. There was no evidence that Mr Odish threatened the Claimant with dismissal on 29 May. Mr Odish took the Claimant's keys from him when he suspended him on 2 May.

189. 29 May was the day on which the disciplinary meeting should have happened but the Claimant attended with the letter from his solicitors which he handed to Mr Gibbs. The meeting ended shortly after. Mr Odish was not at that meeting. There was no evidence that they spoke on that day.

190. Mr Odish did not threaten to dismiss the Claimant when he suspended him on 2 May. It is likely that Mr Odish advised him about the disciplinary process that would follow his suspension. This was unrelated to the Claimant's race.

4.2.2.9 – Dismissing the Claimant on 26 July 2019.

191. It is this Tribunal's judgment that the Claimant's dismissal was unrelated to race. The Claimant was dismissed because he committed gross misconduct. He deliberately falsified entries on the Respondent's time recording system which meant that he was paid for time that he had not worked. This was not an accident and did not only happen once.

192. Mr Gibbs was responsible for the decision to dismiss. It was not Mr Odish's decision.

193. The Claimant provided no evidence at the Tribunal hearing that could lead the Tribunal to infer that his dismissal was related to his race.

194. Overall, in relation to all these allegations, the Claimant has failed to prove facts from which the Tribunal could infer that the treatment was related to the Claimant's race or that it was the reason for the treatment. The burden of proof does not shift to the Respondent.

195. The Respondent has proved that it had a non-discriminatory reason for its treatment of the Claimant. The Respondent was seeking to manage the Claimant and manage its East Ham store. Once serious allegations were made about the Claimant by a colleague, the Respondent properly investigated those, took disciplinary action which the Claimant participated in and made decisions that were within the band of reasonable responses and unrelated to his race.

Judgment on Time

196. The Claimant's ET1 complaint form was issued on 16 December 2019. The Claimant submitted to the ACAS Early conciliation process on 18 October and the

Certificate was issued on 18 November 2019. Matters that occurred before 19 July may be out of time.

197. The allegations referred to at 4.2.2 1 – 4.2.2.8 above all occurred before that date, although there is some confusion on some of the dates.

198. It is this Tribunal's judgment that they were all out of time. The complaint about the Claimant's dismissal (4.2.2.9) was in time and we have judged that there were no facts from which we could infer that the Claimant's dismissal was related to his race. That complaint fails.

199. Was there a continuing act in relation to the other complaints? It is this Tribunal's judgment that the allegations that concern Mr Odish could be seen as part of a continuing act as they all relate to the same manager and to the same period of time, March 2019. However, after 2 May, Mr Odish had very little to do with the Claimant. If there was a continuing act, it ended on 2 May when Mr Odish suspended the Claimant and passed the paperwork from the investigation to Mr Gibbs. 4.2.2.7 appears to have occurred well before – at the end of 2018 - and is unlikely to be connected to the other allegations as nothing happens again until March 2019. It is not part of the continuing act as it is on its own.

200. It is this Tribunal's judgment that the complaints above at 4.2.2.1 - 4.2.2.6 and 4.2.2.8 were part of a continuing act which ended on 2 May 2019. They were brought to the Tribunal out of time as they were issued outside of the period of 3 months from 2 May 2019. To be in time, those complaints should have been brought to the Tribunal by 1 August 2019. The ET1 claim was issued on 16 December 2019. It was issued 4 months out of time.

201. The Tribunal considered whether to extend time to allow them to be considered. The first consideration is that it is our judgment that these allegations either did not occur or that there was no evidence before us to show that they were in any way related to the Claimant's race.

202. Secondly, the Claimant gave no evidence about why he did not raise these claims at the time they occurred or why he delayed bringing them to Tribunal. The Claimant did not raise a grievance on what he says Mr Odish asked him in March until he was invited to a disciplinary hearing in May. It is likely that if he had been asked that question in March he would have complained at the time.

203. In the circumstances, it is this Tribunal's judgment that we will not use our discretion to extend time to consider the complaints of race discrimination that are out of time. The Tribunal does not have jurisdiction to consider allegations 4.2.2.1 – 4.2.2.8.

204. In addition, it is our judgment that we had no evidence from which we could infer that allegations 4.2.2.1 – 4.2.2.9 on page 31 and 32.2 on page 38 had occurred or were related to the Claimant's ethnicity/race. They fail and are dismissed.

Harassment

205. The harassment complaints on page 38 (allegation 32.2) are

(i) that Mr Odish placed a ban on the Claimant carrying out any additional recruitment in the store

(ii) that Mr Odish questioned why the Claimant had employed so many members of staff who were Asian.

206. It is our judgment that these allegations are out of time as they relate to conversations the Claimant had with Mr Odish in March and the claim was not issued in the Tribunal until December 2019.

207. In addition, in relation to (i), it is our judgment that there was no total ban on recruitment but simply on not recruiting the maternity leave cover and the security guard. Even if that meant that no recruitment could take place, there was no evidence that this created a hostile, intimidating or offensive environment for the Claimant. He was still able to do his work. When he was given the revised budget after the meeting on 6 March, he was able to do the rotas and manage the store within the new parameters.

208. Mr Odish did not intend for the decision that the Claimant could not recruit maternity leave cover or a security guard cause to cause him to feel intimidated or create a hostile environment for him. It is our judgment that it did not have that effect.

209. In relation to (ii), it is our judgment that Mr Odish did not ask the Claimant this question. The Claimant's evidence on this was inconsistent and unclear. He did not know on what day this happened. He did not refer to it in his witness statement or in his submission at the of the case. We did not have evidence from which would could infer that this happened.

210. The complaint of harassment fails and is dismissed.

Allegation 32.3. 1 (page 38) - The allegation of victimisation – that after he submitted a grievance in May 2019, Mr Odish, threatened to reduce his hours of work after he submitted a grievance alleging race discrimination.

211. It is our judgment that the letter of 29 May (if that is the letter the Claimant was referring to) contained an allegation that Mr Odish's actions towards the Claimant may be racially motivated because he treats him differently to other members of staff. The letter did not describe itself as a grievance but the Respondent treated it as such.

212. However, at the meeting of 6 March, the Claimant told Ms Lawrence that he only alleged that Mr Odish racially discriminated against him because he was angry. He denied that there had been any discriminatory treatment.

213. Also, it is unlikely that the allegation contained in the solicitors' letter was made in good faith. It is unlikely that the Claimant actually believed that he was being treated less favourably by Mr Odish on the grounds of his race. If he had a genuine belief that this was the case, he would not have waited until he was invited to a disciplinary hearing before he raised a grievance and he would not have told Ms Lawrence on 6 March that he had only referred to race discrimination because he was angry. But if he honestly believed that Mr Odish's management instructions were racially motivated then the letter from the solicitors on 28 May would be a protected act.

214. In our judgment, the complaint of victimisation is out of time as there were no conversations between the Claimant and Mr Odish after 19 June 2019. The dates on when this is alleged to have happened is unclear. Mr Odish had nothing to do with the Claimant after the letter of 29 May.

215. In order for it to be an act of victimisation under the Equality Act 2010, the alleged act of victimisation must take place after the date of the protected act. If the date of the protected act was 29 May and the Claimant last interacted with Odish on 2 May, then the protected act cannot have caused the alleged act of victimisation.

216. There was no evidence that after that letter was sent that the Claimant had any interactions with Mr Odish. Their last contact was on 2 May and well before the Claimant's solicitor's letter was sent to the Respondent.

217. The Claimant saw Mr Odish briefly when Mr Odish attended the disciplinary hearing to sort out the CCTV for Mr Gibbs. There was no evidence that they spoke to each other or that Mr Odish made any threat to the Claimant. The Claimant was on suspension at the time. It would not have made sense to threaten to reduce his hours then.

218. There was no allegation that he was threatened on 6 March with a reduction in his hours. Ms Lawrence was at the meeting and she would have noted that down in the bullet points that the Claimant agreed that she could make.

219. There are no facts from which the Tribunal can conclude that the Claimant was victimised by Mr Odish or anyone else at the Respondent.

220. The complaint of victimisation fails and is dismissed.

Judgment

221. The Claimant was fairly dismissed. His complaint of unfair dismissal fails and is dismissed.

222. The Claimant's complaints of direct race discrimination, harassment and victimisation are out of time. The Tribunal has no jurisdiction to consider them.

223. The complaints of direct race discrimination, harassment and victimisation are unfounded. Those complaints fail and are dismissed.

224. The Claimant's case fails.

Employment Judge Jones
Date: 4 January 2021