



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr. A. Akram

**Respondent**

Ranstad Solutions Limited

v

**Heard at:** Watford

**On:** 27 January 2020

**Before:** Employment Judge Heal  
Ms C. Brodie  
Mr W. Dykes

**Appearances**

**For the Claimant:** in person  
**For the Respondent:** Mr Searle, counsel

## RESERVED JUDGMENT

1. The complaints of discrimination because of religion or belief are well founded.
2. The complaints of discrimination because of religion or belief were presented within such period as the tribunal thinks just and equitable.
3. The complaints of discrimination because of race are not well founded and are dismissed.
4. There will be a hearing listed for one day to determine issues relating to remedy at Watford Employment Tribunal on **8 July 2020** starting at 10.00am or so soon thereafter as the tribunal may hear it.
5. Of our own initiative, the name of the claimant's manager shall not be disclosed to the public and is anonymised under rule 50(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) regulations 2013.
6. We have made the following case management orders by consent.

## ORDERS

1. On or before **31 March 2020** the claimant shall disclose to the respondent any documents in his possession relevant and necessary to resolve the

issue of remedy. [The tribunal does not now anticipate that these will need to include documents showing the claimant's loss of earnings or attempts to mitigate his loss.]

2. If the claimant claims that he has suffered any psychiatric injury from the discrimination proved, then his disclosure shall include any medical evidence relied on in support of his claim.
3. If the respondent wishes to instruct a medical expert (who the tribunal expects would be a single joint expert) then on or before **30 April 2020** the respondent shall tell the tribunal and the claimant that a short telephone preliminary hearing will be needed to consider the need for expert evidence give any directions for the instruction of the expert.
4. The respondent will have primary responsibility for producing the bundle for the remedy hearing.
5. On or before **29 May 2020** the respondent shall send to the claimant the full final paginated remedies bundle which shall contain all of the respondent's relevant disclosure necessary to resolve the remedy issue.
6. Witness statements relevant to remedy shall be exchanged on or before **10 June 2020**.

## REASONS

1. By a claim form presented on 25 May 2018 the claimant made complaints of unfair dismissal and race discrimination and discrimination on grounds of religion or belief.
2. The complaint of unfair dismissal was dismissed by Regional Employment Judge Byrne on 26 March 2019 because the claimant did not have two years' service and therefore the tribunal did not have jurisdiction to deal with it.

### *Evidence*

3. We have had the benefit of an agreed bundle initially running to 117 pages. The following additional documents were added to the bundle by consent during the hearing:

Pages 118 to 134, being the respondent's equal opportunities policy and some Employment Relations FAQ's.

4. We have heard oral evidence from the following witnesses in this order:  
Mr Arslan Akram the claimant and  
Mr Chris Williams, senior HR Adviser.

5. We have not heard evidence from the claimant's immediate manager. We have been told that she left in March 2018 and has not given a witness statement. We have been told why she left: Mr Williams said he did not know. It seems very likely that she does not know that she has been named in these proceedings. Given the serious criticisms that have been made of her, and because she has not had an opportunity to defend herself, of our own initiative we anonymise her identity under rule 50. We call her A. In doing so we have balanced the principle of open justice against A's right to a fair trial of her civil obligations.

### **Issues**

6. The issues were identified at the outset of the hearing from an agreed list of issues as follows:

#### *Discrimination on the grounds of religious belief*

- 6.1 Did the respondent subject the claimant to less favourable treatment because of his religious belief? The claimant asserts that the respondent treated him less favourably by the following acts; on 8/9 February 2018:
  - 6.1.1 Ms A requesting that the claimant remove his baseball cap due to security reasons and insinuating that he was a 'Muslim terrorist'; and
  - 6.1.2 Ms A enquiring as to the reasons why the claimant travelled the distance to work and insinuating that he was a 'Muslim terrorist'.
- 6.2 The respondent will say that the above does not constitute less favourable treatment in that:
  - 6.2.1 it was a reasonable management instruction for the claimant to remove his cap, unconnected with the claimant's religious belief; and
  - 6.2.2 claimant was not asked why he travelled to work for reasons related to his religious belief.

#### *Discrimination on the grounds of race*

- 6.3 Did the respondent subject the claimant to less favourable treatment on the grounds of race? The claimant will say he was less favourably treated by way of the following acts:
  - 6.3.1 Mr. Lukasz Dobordiez requiring the claimant to change roles from a 'picker' to a 'runner' on 9 January 2017;
  - 6.3.2 terminating the claimant's engagement with Johnson and Johnson.
- 6.4 The respondent will say that changing the claimant's role was not discrimination on the ground of race occasioned by the respondent by way of the following:

The requirement to change roles was occasioned because of business needs as opposed to being due to the claimant's race.

6.5 The respondent will say that the termination of the claimant's engagement was not due to his race, but rather for the following reasons:

6.5.1 the claimant failing to meet his targets;

6.5.2 the claimant absenting himself on numerous occasions; and

6.5.3 claimant's unprofessional attitude whilst at work.

6.6 Further, the respondent will say that the tribunal does not have jurisdiction to deal with the act set out paragraph [6.3.1] about it being 'out of time'.

6.7 We elicited some further information about comparators before we started:

6.8 The claimant told us that 5 or 6 people were wearing baseball caps. They were all 'British' and one was Italian. He said that they were 'not obviously Muslim'.

6.9 The claimant said 'Keiran' told the claimant that no-one else had been asked about their travelling.

6.10 The claimant said that 'Stephen' and his older brother were not asked to be pickers.

6.11 The claimant said he did not know of anyone else who was not dismissed in his circumstances.

7. As we heard the evidence, it became plain that that list of issues was inaccurate in certain particulars. The claimant gave different dates for the acts set out in paragraph 6.1 and his new dates, probably 3 and probably 9 January 2018 placed those claims out of time. We have therefore dealt with that jurisdictional matter below.

8. The date at 6.3.1 is obviously wrong and we have dealt with this hearing on the basis that this took place in 2018 not 2017. At 6.3.1 the claimant in fact changed roles from a runner to picker, not the other way around. We think these are typographical errors.

9. The above list of issues elides the full set of questions which we are required to ask in order to apply the burden of proof under section 136 of the Equality Act 2010. We have set out our analysis under what we understand to be the correct questions.

10. In his closing submissions, Mr Searle for the respondent said for the first time that he relied upon the defence in section 109 of the 2010 Act. That is, it is a defence for an employer to show that it took all reasonable steps to prevent an employee from doing the discrimination alleged or from doing anything of that description. This defence was not pleaded in the response, as Mr Searle agreed. It was not identified as an issue by Regional Employment Judge Byrne at the preliminary hearing on 26 March 2019. It was not set out in the list of issues prepared by the respondent for this hearing. It was not raised by Mr Searle at the outset of the hearing while we worked through the issues to check that we all understood them. Mr Searle did ask questions

in examination in chief of Mr Williams about the equalities training that A had received. However, he did so without saying why he was asking these questions. Mr Williams' answers were not backed by any disclosure of documents.

11. We consider that the issue of section 109 is not properly before us as an issue in these circumstances. The claimant was given no warning at all that it was to be raised. The tribunal was not told at any stage that it was to be raised and so we could not carry out a fair hearing asking the appropriate questions and giving orders for the appropriate disclosure in order to elicit whether a section 109 defence had been made out.

### **Facts**

12. We have found the following facts on the balance of probability. That means that because we do not possess a perfect method of discovering absolute truth, we listen to and read the evidence placed before us by the parties and on the basis of that evidence we decide what is more likely to have happened than not.

13. The respondent is a limited company in the business of supplying staffing solutions to commercial clients.

14. In this case the client was Johnson and Johnson. Ms A, Mr. Lukasz Dobordiez, Mr. Michael Wojtjiewicz, and Mr. Chris Williams are all employees of the respondent. Ms Magdalena Wlodek, Mr. Justin Jaskowski and Ms Dorota Rocur were employees of Johnson and Johnson.

15. The respondent supplied workers, supervisors and managers to manage the contract.

### Chronology

16. The claimant started work on 8 November 2017 on an assignment as a warehouse assistant. Specifically, he was engaged by the respondent to work on an assignment at the Johnson and Johnson premises at the European Vision Centre at Sunbury on Thames where vision related goods, including contact lenses, were picked and packed and then distributed.

17. The Johnson and Johnson picking process had an area that involved picking for 'air side' for goods to be air freighted. Therefore, security was particularly important. There were CCTV cameras in the warehouse. The claimant never actually worked in the air freight area.

### The travel to work question

18. The claimant started work as a 'runner'. On or about 3 January 2018 Ms A said to him that 'we' have checked the travel to work distance for all employees and had noticed that the claimant travelled from Croydon (a distance of about 30 or 40 miles). She mentioned people travelling from Slough (a distance of about 20 miles) and asked him why he came to Sunbury. The claimant replied that he could not find a job in Croydon. A replied,

*'You know there are concerns around here.'*

19. The claimant told us that the way she said it meant that she was worried about why he was travelling so far to work.

20. He said that she came to him on three different days asking the same question about travelling.

21. The claimant was off sick of 17, 23 January and 7 February 2018. There is no evidence from the respondent of any absences before that. The claimant says that he had no absences before these three absences, and we accept his evidence. Therefore, whatever reason A had for asking him about his travelling on 3 January it was not because of his sick absences as suggested by the respondent. No complaint has been made to us about the claimant's timekeeping.

22. After the claimant had been asked this question by A he asked a few other members of staff whether they had been asked the same question: Keiran, who appeared to be a person of British origin and not Muslim, Olra/Aura from Romania who was catholic or orthodox, and Callum, also apparently not a Muslim, who was angry with A because she asked the claimant the question about travelling. The claimant was therefore treated differently in this respect, we find, from Keiran, Olra and Callum who we find were not Muslim.

23. We think it highly likely that when the claimant was recruited in November 2017 those recruiting him knew his address. His journey to work was not a concern then it seems. Something therefore made the claimant's journey to work a concern for A. It was not his absences, and we have not been told about a time keeping problem, both of which would have given rise to natural concerns about his journey. We have not been given any other explanation.

#### The baseball cap

24. After new year in 2018 but before the claimant was told by Mr Lukasz Dobordiez to become a picker on 9 January, Ms A told the claimant that he should not wear a baseball cap at work. This was probably on 9 January 2018.

25. The claimant had worn a baseball cap to work believing that it was acceptable because he had seen others including an engineer - or perhaps mechanic - wearing caps and therefore assumed that it was allowed. Moreover, the engineer's photograph was on a hierarchy photograph board and showed him wearing his cap. This reinforced for the claimant the message that caps were acceptable.

26. The claimant's evidence was that there were 5 or 6 others who wore caps at work. He said that they appeared not to be Muslim. He could tell by their names: a name such as 'Abdullah' for example would tell him that a person was Muslim. He could tell too by what they ate in the canteen, where halal food was available.

27. He said that one of the cap wearers seemed Italian and had an Italian name. the claimant spoke to him and concluded that he was probably east European, perhaps Hungarian.

28. Another cap wearer wore a 'Burger King' cap. He sat next to the claimant on one occasion in the canteen and asked if the claimant minded him eating pork next to him.

29. On this evidence the claimant concluded that none of the other cap wearers were Muslim. The evidence does not make us feel *sure* that he is right, however it is the best evidence we have and on the balance of probability we conclude that he is right. All those who wore caps apart from him, were not Muslim.

30. We accept that A told the claimant to remove his cap. When A told him to remove his cap, she said to him that the CCTV camera could not see his face if he wore a cap and so he must take it off. The claimant did so.

31. The claimant told us, and we accept that after this the claimant spoke to two people about their hats. They said that they had not been asked to take off their hats. The others wore hats over a period of time (and the engineer indeed appeared in an official photograph with his hat). On balance of probability, and only on balance we find as a fact that the claimant was the only person who wore a cap who was asked to take it off. Had the others been asked to take their caps off at work, we find it highly likely that they would have done so.

32. From what A said about the need for CCTV cameras to see the claimant's face, we conclude that A had a suspicion about the claimant that amounted to more than a fear of, say, theft of contact lenses. Had it been a problem with theft of stock, the fear would have applied to everyone.

33. A must therefore have had a fear that related to the claimant but not to other cap wearers.

#### Runner to picker

34. It is not disputed that the claimant moved from being a runner to a picker on 9 January. He did not want to make this change. There were about 5 runners of whom two who were not moved were of white British origin (Stephen and his brother) and two were moved to be pickers. The claimant and one other - who appeared to the claimant to be of white British origin and not South Asian - were both moved from being runners to pickers. We accept that the impetus for this was because there was a need for more pickers.

35. We have no evidence and have not had it explained to us why the respondent chose these two to move from running to picking.

36. The claimant moved to join a team of pickers who were all of Polish origin apart from him. He found that they tended to speak together in Polish so that he felt uncomfortable and excluded. He felt that they did not accept him because he was not Polish.

37. After a couple of days, the claimant asked his manager Lukasz Dobordiez if he could move back to be a runner. Mr Dobordiez said no. Three days later however a Polish woman was appointed to be a runner.

Performance and attitude

38. The claimant admits that his picking rate was not meeting the respondent's targets (even those targets adjusted for the fact that he was a trainee). He says that this was because he was demoralised because he was left out and because he had to work in a team but could not do so because he could not communicate with the others in his team.

39. On 25 January 2018 Justin Jaskowski of Johnson and Johnson sent an email to Magdalena Wlodek of Johnson and Johnson saying that he had come across the claimant, '*having fun*' while working on line 2. Mr Jaskowski asked the claimant to focus on work instead of having fun. The claimant replied that Mr Jaskowski should not speak to him like this because he was not the claimant's manager. Mr Jaskowski found the claimant's attitude derisive.

40. On 5 February 2018, in response to a concern about the claimant's performance in relation to targets raised by Dorota Roncur of Johnson and Johnson, Ms A sent an email to Ms Roncur. A said that she had spoken to the claimant the previous week about his target. She had asked if he had anything on his mind and he replied that he was tired, but everything was fine. A told the claimant that his scans had dropped to the low to mid 60s when they should be up in the high 180s. She told him that he needed to improve and to ensure that he met his weekly and monthly targets.

The decision to terminate

41. On 7 February 2018 Mr Dobordiez wrote by what appears to be a routine email to a number of different recipients at Johnson and Johnson reporting that there had been three absences that afternoon. Records show that the claimant had been one of those absent.

42. In response, on 8 February at 13:57 Ms Wlodek replied to the respondent as well as the recipients within Johnson and Johnson, saying,

*'I just want to bring to your attention that Arslan [that is the claimant] working here may be 2 months and yesterday was his 3<sup>d</sup> occasion of absent. On top of that we have issue with his attitude and performance. Could you please let me know what will be next step as I have feeling that we are wasting time for his training as there is not much improvement.'*

43. Ms A responded to Ms Wlodek,

*'Thank you for your email, Michael and I have discussed this situation with Arslan and we have come to the conclusion that we agree with your opinion on this situation; after 2 months of being here at J&J he should be a more productive member of the team. In light of his multiple instances of sickness we have decided to end his assignment effective from the end of today's shift therefore he will not be returning tomorrow.'*

44. 'Michael' is Mr Wojtjiewicz, (from whom we have not heard evidence), the respondent's account manager. We accept from the email evidence that he and A decided that the claimant's assignment would be terminated because of his 3



absences and against the background of the client's and the respondent's perception of his performance and attitude. Johnson and Johnson had not expressly asked for the contract to be terminated. Although Mr Williams did not read the email of 8 February at 13:57 as a request for termination, we do. We think it highly likely that once Johnson and Johnson had given a hint as strong as this about a member of the respondent's staff who had absences and about whom there were concerns about attitude and performance, the respondent would have reacted by dismissing the relevant worker, whatever the worker's race.

45. Ms A and Mr Wojtjiewicz decided to terminate the claimant's contract and did so at the end of the shift on 8 February 2018.

The claimant's complaint

46. The claimant submitted a complaint about his treatment to the respondent on 5 March 2018. This included the complaints about A telling him to remove his cap and asking him why he travelled so far to work with the respondent. He said that he was the only one from all the employees wearing a hat to take it off. He described himself as Asian/Pakistani and said that he was currently thinking about taking the matter to ACAS.

47. Mr Tim Mennell interviewed the claimant by telephone about his complaint on 8 March 2018. The claimant gave Mr Mennell details of his complaints about A, the baseball cap and the question about travelling. Mr Mennell did not ask about who else was wearing a cap who was not asked to take it off. The claimant complained about the move from running to picking and about Polish workers speaking Polish so that he felt they were talking about him and laughing at him.

48. The respondent investigated the allegations about relationships between Polish workers and others, as well as the issue of workers excluding others by not speaking English. The question of others not being asked to take off their caps was not pursued. A was not interviewed: she had left the respondent in early March 2018. The respondent did not attempt to contact her.

49. On 23 April 2018 Sati Nandra wrote to the claimant with the outcome of the investigation. This said:

*'We have investigated your complaint as far as we are able to do so.*

*[A] is no longer with Randstad, such we could not question her about the allegations you referred to regarding the hat and asking about your distance to work. On the latter point, it would seem likely that this question would have been asked either in conversation or in relation to staff retention. We cannot find anything that suggests that discrimination was the motivation behind this.*

*In relation to the termination of your assignment, the evidence suggests that, as you stated in your meeting with Tim, this was due to performance issues.*

*We have looked into allegations that the different nationalities at this site treat one another (or are treated) differently. We have not found any evidence that you yourself have been treated unfairly in this respect. We have spoken to the witnesses you*

*suggested. Some evidence suggests that the different nationalities do tend to sit in their groups-particularly at lunch. We will bear this point in mind, and will be passing our findings to EVC.*

*Regarding your point about a Romanian lady and her treatment by a manager, we have investigated this separately as it is mostly in relation to her, and taken witness statements. We will be passing our findings on this to EVC so that they can investigate further if necessary or provide guidance to the manager involved they feel appropriate.*

*Thank you for bringing these matters to our attention.'*

50. The claimant replied by email on 25 April 2018. He said that he was thinking of taking the matter to ACAS first and after that to the employment tribunal as he thinks that the respondent did not do enough to investigate the matter.

### **Statement of the Law**

51. We have reminded ourselves of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258. On this occasion we think it valuable to set those principles out in our judgment:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts

before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

52. Expanding on that, it is the claimant who must establish his case to an initial level. Once he does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof

facing a claimant which it would be very difficult to overcome if he had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race or religion or belief. What then, is that initial level that the claimant must prove?

53. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases, the discrimination will not be ill-intentioned but merely based on an assumption such as that "he or she would not have fitted in".
54. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer race discrimination.
55. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the '*same, or not materially different*' as those of the claimant.
56. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the claimant's case is based on particular words or conduct by the respondent employer, he must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.
57. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.
58. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding '*the reason why*'. This is particularly likely to be so where, as in parts of this case, a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as he was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

59. Some cases arise (See Martin v Devonshire's Solicitors [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

## **Analysis**

### The baseball cap

*Did A request the claimant to remove his baseball cap?*

60. We have found that she did. It is not necessary for the purposes of the burden of proof to ask whether she insinuated that the claimant was a terrorist.

*Was the claimant in that respect treated less favourably than his actual comparators or than a hypothetical comparator?*

61. There were 5 or 6 actual comparators who were of a different religion to the claimant.

62. The respondent has not suggested that these people were not valid comparators (i.e. the same or not materially different) to the claimant. Indeed, it has not produced lists of staff or attempted to identify them. On the limited information we have we find that they were valid comparators. They are likely to have been of the respondent's workforce. They wore caps at work. They were in the same premises as the claimant.

63. If we were wrong about that we find that they shed light on how a hypothetical comparator of a different religion to the claimant would have been treated. Taking the evidence about the other cap wearers together with A's unexplained security-based suspicion of the claimant, we find that someone not a Muslim would not have been asked to remove his cap.

*Was it to the claimant's detriment to be told to take off his cap?*

64. We consider that it was to the claimant's detriment: to be singled out for different treatment about an article of clothing that others were allowed to wear would give a justifiable sense of grievance. The claimant obviously wanted to wear a cap. Others were allowed to do so, but he was told to take his cap off so that CCTV cameras could see his face. A reasonable employee would find the treatment demeaning. So it is to the claimant's detriment in the 'Shamoon' sense that a reasonable worker would or might take the view that it was to his disadvantage in the circumstances in which he had thereafter to work. It would give the claimant a justifiable sense of grievance.

*Are there primary facts from which we **could** properly conclude that the reason A told the claimant to remove his cap was because of his religion?*

65. We find that there are. We find this because A had some fear about the claimant wearing a cap which is not explainable by a concern about, say, theft: if that

was her concern, she would have applied it to everyone, yet she did not. This is in the context of an operation with an air freight arm – even though the claimant was not involved in air freight. There was reason for the respondent to think it should take precautions about the security of its airfreight. This is in the current social environment in which there is a general alarm about access by possible Muslim terrorists to air traffic. We consider this would be enough for a tribunal properly to conclude that the difference in treatment was because of the claimant's religion.

66. We add – though it is now academic - that Mr Williams thought (see his email of 26 March 2018) that the allegations about the hat and travel were quite trivial. Conduct by a manager which singles out a particular religious or other group for suspicion is not trivial, even if the way it manifests itself appears unimportant on its face. A person who receives such treatment is likely quickly to feel targeted. We note that while the respondent did investigate the claimant's allegations, there were areas in which Mr Williams showed a lack of curiosity and was satisfied with the explanations provided by speculation. A had left and he does not seem to have tried to find out why, or to interview her. He was very willing to accept explanations at face value and to conclude that there was no evidence of discrimination. The respondent did not investigate the claimant's statement that he was the only one of all the employees who had to take off his cap. Yet the respondent concluded that there was no evidence of discrimination. This could show a tribunal that this is an employer which creates an environment in which the risk of discrimination is not taken very seriously so that discrimination is able to take root.

67. So, we find that a tribunal *could* – in the absence of an explanation from the respondent – conclude that the reason A asked the claimant to remove his cap was because he is a Muslim.

*Has the respondent provided an explanation which on the balance of probabilities we accept, and which discloses no discrimination whatsoever?*

68. No. We have not heard from A who is the only person who could explain why she gave this instruction: not even indirectly through a statement in a grievance investigation. All the respondent said was that she gave a 'reasonable management instruction' in relation to the CCTV's ability to identify individuals if they were allowed to wear caps.

69. This explanation – even if it came from A - does not give any explanation for the difference in treatment between the claimant and the others who wore hats and were not told to remove them. The respondent has not shown that it did not 'contravene the provision' (section 136(3) of the 2010 Act).

70. Therefore, this complaint of religion and belief discrimination succeeds.

The travel to work question

*Did A ask the claimant why he travelled so far to work with the respondent?*

71. Yes, the claimant has proved that A did ask him this on three occasions in early January 2018.

*Was he in this respect treated less favourably than the respondent actually treated comparators or would have treated a hypothetical comparator of a different religion to the claimant?*

72. Our findings show that the claimant was treated less favourably than others who were not Muslims in that he was asked why he was travelling so far to work but other employees were not. We do not know what the journeys of the comparators were, although there was some mention of workers travelling from Slough, which would be about 20 miles. Those comparators however are some evidence of how a hypothetical comparator would have been treated. The three named people were not Muslim and indeed one was angry that the claimant had been asked this question. We have also the evidence that A was suspicious of the claimant for some unexplained reason and only asked him - a Muslim - to take off his cap. So, we conclude on the balance of probabilities that a hypothetical comparator of a different religion would have been treated less favourably in this respect than the claimant.

*Was the claimant subjected to a detriment?*

73. We do think that the travel to work question is also a detriment. This is in the context that A has shown herself to be suspicious of the claimant, as he discovered later. We note for what it is worth that 'Keiran' was angry that only the claimant was asked that question, although we do not know the precise details of why he was angry. We do not consider the detriment to be very great, but it is a detriment (in the 'Shamoon' sense that a reasonable worker would or might take the view that it was to his disadvantage in the circumstances in which he had thereafter to work: it would give the claimant a justifiable sense of grievance) to be the only member of staff asked a question, without good reason and with an element of suspicion.

*Are there primary facts from which a tribunal **could** conclude that the difference in treatment was because of the claimant's religion?*

74. Yes: we have reminded ourselves of the reasons set out above in relation to the cap. A had an unexplained suspicion of the claimant which related only to the claimant. This work environment involved airfreight even though the claimant did not work with airfreight. There was an awareness of security and the need for CCTV. In a social context in which there is a general alarm about the risk of Muslim terrorism involving aircraft, we think there are primary facts from which a tribunal could conclude that the difference of treatment was because of the claimant's religion in that the question could have been asked

because the respondent was suspicious of why the claimant would travel so far to work.

75. This is reinforced by the approach to an investigation of discrimination which we have already set out above.

*Has the respondent provided an explanation which on the balance of probabilities we accept, and which discloses no discrimination whatsoever?*

76. We have been given no explanation by A for asking this question. Therefore, we find that A discriminated against the claimant in this respect because of his religion.

***Race discrimination.***

***Runner to picker***

*Has the claimant proved that he was moved from runner to picker on 9 January 2018?*

77. Yes.

*Was he in this respect treated less favourably than the respondent actually treated comparators or would have treated a hypothetical comparator of a different race to the claimant?*

78. We know that there was a group of runners of about 5. Of those we know that one was white British who was also transferred to picking at the same time as the claimant. We know that two did not become pickers: Stephen and his brother who were or appeared to the claimant to be white British.

79. We do not know the origin of the other runner or runners. We do know that a white Polish female was made a runner shortly after the claimant was moved to be a picker.

80. We have no evidence about how the runners to be moved were selected. Mr Williams made no enquiries about this and accepted the explanation that the move was made because more pickers were needed, without more. We have not heard from Mr Dobordiez, assuming that he made the selection.

81. On that evidence we have two actual comparators of a different race treated more favourably than the claimant. We know nothing about them apart from the bare facts that they were white British and were not moved. Nor do we have evidence - beyond any evidence put forward by the respondent of a white person who was also moved - that tells us how a hypothetical comparator of a different race would have been treated. The respondent's explanation of the 'reason why' cannot help us because we have not been given the 'reason why' the claimant was selected.



*Is there evidence from which a tribunal **could** properly conclude that the difference in treatment was because of race?*

82. Although we have real concerns about the respondent's incurious approach to investigating some aspects of the alleged discrimination, we do not, in this area of the case have the additional evidence of unexplained suspicion directed to the claimant that we had with the first two allegations. Given that the evidence is also that a worker of white British origin was also moved to be a picker at the same time we do not consider that - taking the evidence altogether - a tribunal could properly conclude that there had been discrimination on grounds of race.

83. In a fluid work environment, the fact that a Polish person became a runner days later tells us little: the need for workers even two or three days later may have been materially different. We have heard evidence also of workers of Polish origin in both roles – runner and picker – as well as in management.

84. Therefore, the burden of proof does not pass to the respondent. If we are wrong about that however we note that we have been given no explanation as to why the claimant was selected to move.

*Termination of assignment*

85. It is not in dispute that the claimant's assignment was terminated.

*Was he in this respect treated less favourably than the respondent actually treated comparators or would have treated a hypothetical comparator of a different race to the claimant?*

86. The claimant has put forward no actual comparator for this aspect of his case.

*Would a hypothetical comparator of a different race but otherwise the same as or not materially different from the claimant have had his assignment terminated?*

87. We have considered all the evidence before us. Johnson and Johnson did not expressly say that they wanted the claimant's assignment terminated. However, we think the email of 8 February at 13:57 was a subtle but heavy hint that led directly to the termination of the claimant's contract later that day. Had it not been for that email we do not consider that his assignment would have been terminated when it was. Even though we have not heard from A or Mr Wojtjiewicz, we have found on the balance of probability that that client email of 8 February directly caused the claimant's dismissal. Both client and respondent shared the opinion that the claimant's absences, his performance and his attitude meant that his assignment should be terminated. That was the 'reason why' his assignment was terminated. Any worker of any race would have had his contract terminated in those circumstances.

88. For that reason, we find that this aspect of race discrimination is not well founded.

***Time.***

89. Both the allegations we have found proved are out of time. They are not part of a continuing act with the later termination of assignment (which would have been in time) because we have found that was not discriminatory.

***Law: time***

90. We have a wide discretion whether or not to extend time, but that discretion is not unlimited. There is no presumption in favour of extending time and time limits are to be exercised strictly in employment cases. It is for the claimant to persuade us that time should be extended. We find it helpful to apply the principles in *British Coal Corporation v Keeble* [1997] IRLR 336. We consider the prejudice which each party would suffer as a result of granting or refusing an extension, and we have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the 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 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 knew of the possibility of taking action.

***Analysis: time***

91. The acts of discrimination took place between about 3 and 9 of January 2018. Working back three months from day A, (the date the claimant approached ACAS for early conciliation) the cut-off point before which any act was out of time, was 2 February 2018.

***Length of and reasons for the delay.***

92. The delay is between one month and about three weeks.

93. The claimant always knew that the discrimination was unlawful.

94. He did not have the money to take legal advice. Once he was dismissed, he had time to research online. He did so on his iPhone. That helped him to discover ACAS and how to claim in the employment tribunal.

95. He made a complaint to the respondent on 5 March 2018 and said then that he was thinking about taking the matter to ACAS. He was continuing with his grievance during March and he was not given his final outcome until 23 April 2018.

96. On 23 April 2018 the claimant wrote to the respondent saying that he was considering taking the matter to the employment tribunal.

97. The claimant discovered about the three-month time limit but believed it ran from the date of dismissal, so he approached ACAS on 1 May 2018 and presented his claim on 25 May 2018. This was in time in relation to the termination of his assignment. However, the claimant did not discover the subtlety that time runs from the individual act complained of. We think this was a reasonable failure: the claimant is not an employment lawyer and without any skilled legal help his assumption about time running from dismissal was reasonable.

98. So, the claimant delayed because he had no legal advice, could not afford such advice and without that advice, did not know that time could run from a date earlier than his 'dismissal'.

*The cogency of the evidence.*

99. The evidence before us from the respondent has been lacking in cogency but not because of failures of memory or the claimant's delay: Ms A left the respondent in March 2018. She was never interviewed during the investigation by Mr Williams which was carried out while the claim would still have been in time. Had the claimant brought his claim in time A would still have left and she would still not have been interviewed or called as a witness. We do not consider that the respondent would have made any greater attempt to communicate with her had the claim been made in time.

*The claimant's promptness*

100. The claimant himself has acted with promptness. He knew that what A did was unlawful, but he is not a lawyer and had no advice in finding his way around what is – especially to a lay person - a complex system of law. He thought that time ran from his dismissal. He has acted with decisiveness within the limits of his understanding: bringing a grievance to the respondent, discovering about employment tribunals and ACAS via his iPhone and bringing a claim as he thought, in time.

101. If we do not grant an extension of time the claimant loses the remaining part of his claim. If we extend time the respondent's ability to defend itself is not compromised: its inability to defend itself is due to its failure to call A and her departure which would have happened in any event.

102. So, weighing all of that up, we 'extend time' on the basis that the claim was presented within such period as was just and equitable.

**Conclusion**

103. There will therefore be a remedy hearing to deal with compensation arising out of the two matters we have found proved (which we would expect to be compensation for injury to feelings) on 8 July 2020.

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Employment Judge Heal

Date: 30/01/2020

Sent to the parties on: 06/02/2020

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For the Tribunal Office