



EMPLOYMENT TRIBUNALS

Claimant: Mr P Thambu

Respondent: The Co-operative Group

Heard at: London South Croydon initially as a hybrid hearing and subsequently solely by CVP

On: 1-5 August, 8-9 August (the afternoon in chambers) and on 10 August 2022 (giving judgment and reasons)

Before: Employment Judge Tsamados
Members: Miss N Murphy
Ms S Evans

Representation

Claimant: Ms S Polkowski, Paralegal

Interpreter: Ms J Selvarajah
(Tribunal appointed interpreter for the Claimant)

Respondent: Mr P Gorasia, Counsel

RESERVED JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

- 1) The Claimant's complaints of direct race discrimination, race related harassment, unfair dismissal, damages for breach of contract and unauthorised deductions from wages are unfounded and the Claim is dismissed;
- 2) In any event his complaints of unfair dismissal, damages for breach of contract and unauthorised deductions from wages were presented outside the relevant time limits and the Employment Tribunal has no jurisdiction to deal with them.

REASONS

After our Judgment and Reasons were given orally the Claimant requested written reasons. These are provided below and do not materially differ to what was given orally save for the introductory paragraphs 1 to 26 which reflect the history of the Claim and certain matters that occurred during the hearing.

The Claim

1. The Claimant presented his Claim to the Employment Tribunal on 23 January 2020 following a period of Early Conciliation that started and ended on 7 January 2020. This contained complaints of unfair dismissal, race discrimination and entitlement to notice pay, holiday pay, arrears of pay and other payments.
2. The Claim was initially rejected by the Tribunal because the Claimant had not provided any Particulars of Claim beyond ticking the various boxes at paragraph 8.1 and indicating at box 8.2 that “particulars of claim will be provided in due course”. In a letter dated 18 February 2020, the Claimant cited various reasons for having not provided the particulars and among other things enclosed his Particulars of Claim and evidence of sickness and medication. The Claim was subsequently accepted by the Tribunal in a letter dated 25 February 2020.
3. In its Response received on 20 March 2020, the Respondent denied the Claim in its entirety.
4. A telephone Preliminary Hearing on Case Management was held on 21 July 2020. The Claimant attended in person and the Respondent was represented by Mr Gorasia. The hearing was conducted by Employment Judge (“EJ”) Khalil. The hearing was postponed at the Claimant’s request because he said he had only received notice of the hearing the day before, had been suffering with ill-health and was in the process of instructing solicitors. However before postponing the hearing, EJ Khalil took the opportunity to identify issues for discussion at the next preliminary hearing and to make a case management order for the Claimant to provide further particulars of paragraphs 8-11 of his Particulars of Claim on or before that date. The Claimant duly provided this on 12 November 2020.
5. A further telephone Preliminary Hearing on Case Management was held on 12 November 2020 by which time the Claimant had provided the further particulars. The hearing was conducted by EJ Mason. The Claimant was represented by Ms Polkowski and the Respondent was unrepresented (due to apparent technical problems). EJ Mason identified the issues, set dates for a 5 day full hearing in October 2021 and made case management orders to prepare for that hearing. On the basis that there was a potential transfer of undertaking of the Claimant’s employment, EJ Mason also added Rontec Roadside Retail Ltd (“Rontec”) as the Second Respondent.
6. The Respondent (by which term we make reference to the Co-operative Group Ltd) subsequently presented Amended Grounds of Resistance on 3 December 2020.

7. A further Preliminary Hearing on Case Management took place on 17 May 2021 in front of EJ Sage. Ms Polkowski represented the Claimant, the Respondent was represented by Ms Anand of Counsel and no one attended for the Second Respondent. EJ Sage rescheduled the full hearing for 10 days from 1 August 2022, made case management orders, including further amendment by the Respondent of its Grounds of Resistance and added a Third Respondent to the proceedings, STS SAI UK Ltd, who it was asserted was the correct Second Respondent, with dismissal of the Second Respondent to be determined after receipt of written representations from all of the parties. The Respondent had provided a draft list of issues to be finalised after clarification by the Claimant of a number of questions contained within it.
8. The Respondent provided further Amended Grounds of Resistance – Part Two on 28 May 2021.
9. A further Preliminary Hearing on Case Management was held on 21 March 2022 in front of EJ Smith. Ms Polkowski appeared for the Claimant, Mr Gorasia for the Respondent and Ms Anderson of Counsel for the Second and Third Respondents. It was agreed that the Claimant's employment terminated prior to the transfer of undertaking and so the Second and Third Respondents were removed from the proceedings. EJ Smith identified and agreed the issues to be determined at the full hearing, set further case management orders and granted the Respondent leave to re-amend its Response.
10. The Respondent presented Amended Grounds of Resistance – Part Three on 25 April 2022.

The Issues

11. After an initial dispute on the first day, it was agreed by the parties that the list of issues to be determined at this hearing are those set out at pages 113 to 120 of the bundle augmented by a document from the Claimant entitled "Allegations" at pages 125-132.
12. The list of issues at pages 113-120 identify time limit issues, the allegations relied upon and the complaints of unfair constructive dismissal, direct race discrimination, harassment related to race, unauthorised deductions from wages in respect of outstanding holiday entitlement and arrears of pay, and damages for breach of contract in respect of entitlement to notice pay. The Allegations document is said by the Claimant to "fill in" information missing from the list of issues.
13. We made it clear that these were the issues that would be determined by this Tribunal and we would not depart from them unless there were exceptional circumstances. The parties agreed that we would deal with liability first and then remedy if appropriate to do so.

The CCTV footage

14. At the start of the first day, Mr Gorasia advised us that the Respondent wished

to rely on CCTV footage lasting approximately 10 minutes taken between 4.20 and 4.30 pm on 24 October 2019, the day that the Claimant walked out of work. Ms Polkowski objected on the basis that it had not been previously disclosed. Mr Gorasia stated that it had been sent to her in June and July 2022 by way of an emailed link. During our reading adjournment it was re-sent. We then received an email from Ms Polkowski stating that the Claimant objected on the basis that it was now 2 years since the events in question, they were unable to open the file to view the footage, the Claimant is “stressed out” by the admission of new documentation and he believes the footage has been manufactured.

15. We had difficulties opening the link to the CCTV footage but ultimately were able to do so. I drafted a set of opening instructions to send to the Claimant’s solicitors and my clerk sent this to them. I asked the Respondent to send the link again, so that Ms Polkowski can watch it and then indicate whether she still objects to its admission or not.
16. On the second day of the hearing, Ms Polkowski told us that they had managed to view the CCTV footage and the Claimant’s position was that it had been manufactured from a previous shift, the colleague shown, Mr Rehab was not employed in 2019 and there were numerous gaps and omissions in the various camera angles. Ms Polkowski added that it was disclosed late and that begged the question why and that she needed to obtain expert evidence on the authenticity of the footage. Further, she said that additional documents had been added to the bundle without agreement (although this was not subsequently pursued).
17. Mr Gorasia responded: the CCTV footage is date stamped 24 October 2019; the audio of the conversation between the Claimant and a colleague refers to Mr Selva, who was a representative of the company taking over the petrol station where the Claimant was employed, and who was coming there that day, which places it in 2019; the colleague shown is Mr Flissi not Mr Rehab; the footage was disclosed over 6 weeks ago, a pen drive sent with the footage on it and then a link to a drop box; it goes to the reason for the Claimant’s resignation; Mr Mohottalalage, the Claimant’s Manager, produced the footage and is here to give evidence; he retained this part of the footage because it was when the Claimant walked out of work.
18. We then adjourned to watch and listen to the CCTV footage and to consider our decision as to its admission.
19. On return we gave our decision to admit the CCTV footage for the following reasons:
 - a. The footage is clearly relevant to what happened on the final day of the Claimant’s employment;
 - b. We accept that it was disclosed 6 weeks ago by way of a pen-drive and a link. It is referred to in Mr Mohottalalage’s witness statement. Lateness in itself does not give grounds for excluding evidence;
 - c. We accept there were difficulties in opening the link but these have been overcome and the Claimant has viewed the footage. It is only 10 minutes

long and, whilst it contains a number of different camera angles, even viewing each camera angle individually is not an onerous task;

- d. The reasons for its late disclosure can be tested in evidence and raised in submissions. As can the reasons why Mr Mohottalalage only retained this evidence after the Claimant left his employment;
 - e. The stress that this has caused the Claimant does not give rise to grounds for excluding evidence. We acknowledge that the Claimant may be stressed but that is in the nature of bringing contested litigation. He is professionally represented in any event so he is not dealing with prosecution of the matter first hand;
 - f. The allegation that the CCTV footage has been tampered with. On multiple viewing of each camera angle what the footage appears to show is a chronological series of events caught by different cameras inside and outside the petrol station kiosk and premises between 4.20 and 4.30 pm on 24 October 2019. There is nothing that obviously indicates any disparity in the sequence of events or that the timeline or date has been altered. But in any event these are matters to be tested in evidence and cross examination;
 - g. The prejudice to the Claimant in admitting the CCTV footage is less than would be caused to the Respondent in refusing. The Claimant can test the credibility of its late disclosure and its content in cross examination and can raise as appropriate in submissions. The Respondent would be faced with a reduced ability in being able to challenge the Claimant's allegations of what happened on his last day of employment;
 - h. As to the request to in effect adjourn to seek expert evidence, this would cause prejudice to both parties particularly the Respondent in that this hearing would not go ahead and the likelihood is that a further 10 day fixture would be for dates towards the end of 2024. The events in question took place in 2019, the witnesses may not be available or may have left the Respondent's employment and of course even with witness statements memories fade.
20. We then discussed the practical arrangements for showing the footage to witnesses during the proceedings.

The interpreter

21. We were concerned because whilst the Claimant was able to speak and to read English, he had no one with him who spoke Tamil. The Tribunal provided him with the use of an interpreter and with agreement this was extended to include interpreting outside of his witness evidence and the translation of documents within reason so as to not unnecessarily slow the proceedings down. I did make it clear that it was really a matter for the Claimant and his solicitors as to the arrangement of appropriate communication facilities. Nevertheless, we did provide a private CVP room for the Claimant and the interpreter to meet in to discuss matters other than his evidence (that is not until after the end of his evidence). However, notwithstanding our constant reminders about the availability of this facility, it

appeared that the Claimant never used it.

The evidence

22. We were provided with the following documents by the parties: chronologies from each party; an agreed cast list; a bundle of documents from the Respondent containing 605 pages, which we will refer to as "RB" followed by the relevant page number where necessary; CCTV footage from the Respondent; a bundle of documents from the Claimant containing 77 pages, which we will refer to as "CRB" followed by the relevant page number where necessary (although this bundle appeared primarily relevant to remedy).
23. We heard evidence from the Claimant and from his witnesses Mr Gowri-Shankaran Rajaratnam and Mr Kirishanthan Pathmanathan by way of written statements and in oral testimony. The Claimant also provided a witness statement for Mr Janagan Sutharalingam, who initially intended to attend and give evidence but in the end did not (as set out below). As we indicate later on, having taken account of his lack of attendance, explanation for not attending and also that his statement is neither signed nor dated, we have attached no weight to its contents.
24. We heard evidence on behalf of the Respondent from Mr Mark Blyth, Mr Anuj Christi, Mr Tashika Mohottalalage, Mr Thulasithasan Sivasubramiam and Mr Ratnasamy Radakrishnan, again by way of written statements and in oral testimony.
25. Both parties provided us with reading lists.

The conduct of the hearing

26. We spent the first day reading the documents and witness statements. We heard evidence from the Claimant and his witnesses on days 2, 3 and 4 of the hearing and then from the Respondent's witnesses on days 4, 5 and 6. The parties provided us with written submissions and we heard from them orally by way of reply on day 7. We spent the afternoon of day 7 and the morning of day 8 deliberating and gave oral judgment and reasons on the afternoon of day 8. The Claimant then requested written reasons.

Our findings of fact

Introduction

27. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.
28. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
29. The Claimant is Sri Lankan Tamil. He was employed by the Respondent as

a Customer Sales Assistant at its petrol station and store in Leatherhead (“the Leatherhead petrol station”) until his resignation which he asserts amounts to a constructive dismissal on 24 October 2019.

30. The Respondent is a well-known national food retailer.

Start date of employment

31. The Claimant states that he commenced employment with the Respondent’s predecessors in title on 3 July 2008. He further states that he was initially employed at a petrol station in Wallington by a company called Total. His employment then transferred to a company called Somerfield and he was then employed at the Leatherhead petrol station. In addition he states that his employment was subsequently transferred to the Respondent. We assume in the absence of nothing else that these references are to alleged transfers of undertaking under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”).
32. We were not provided with any contractual documents relating to the Claimant’s employment. On a subsequent transfer of the Leatherhead petrol station to Rontec in November 2019, his personnel file was lost either by the Respondent or by that company. Further, whilst one would reasonably expect documentation and letters to also be in the possession of the Claimant, he has not provided them. For this reason, the bundle does not contain basic contractual or other documentation or much of the contemporaneous correspondence between the parties.
33. The Respondent’s position is that the Claimant commenced employment on 23 March 2015. This is the date that was notified to Rontec as part of the provision of employee information in relation to the TUPE transfer (at RB357).
34. In oral evidence, the Claimant said that he took a career break at the end of December 2014 to approximately March 2015 to go to Sri Lanka to get married. The Respondent’s witnesses acknowledged that there was a career break policy although they were unaware of the Claimant’s alleged career break.
35. We were provided with printouts of the Respondent’s ER Service records which set out enquiries made by managers as to HR matters and the advice provided. Part of these records refer to disciplinary action taken against the Claimant from 5 May 2015 onwards (at RB155-157) which indicate that at that time he was on probation and as a result of the disciplinary findings his probation was extended.
36. In particular, we note at RB155, “SM (the Store Manager) is concerned that (the Claimant) used to work for the Co-op and people are saying he didn’t leave on good terms previously. SM wants a reference.” The Claimant denied that this disciplinary action took place or that he was on probation and inferred that the document had been manufactured for the purposes of this hearing. Indeed, as we shall see, this was a common theme of his case.
37. Whilst there is a presumption of continuity under section 210(5) of the Employment Rights Act 1996 between the day that the employee started

work and the end date of employment, which operates in favour of claimants, we find that this has been rebutted by the evidence presented by the Respondent and the Claimant has not satisfied us that his employment was continuous on return from what he alleges was a career break.

38. On balance of probability we find that the Claimant started work with the Respondent on 23 March 2015 and that whilst he may have gone away for what he calls a career break, his employment was not treated as continuous on his return.

Mr Mohottalalage start date at Leatherhead and WhatsApp messages

39. Mr Tashika Mohottalalage, also known as Tash, was one of the Respondent's Store Managers and he was based at the Respondent's Teddington store. He was appointed by Mr Anju Christi, the Area Manager, to the position of Acting Store Manager at the Leatherhead petrol station at the end of February 2019. He was the Claimant's line manager at the relevant times.
40. Mr Mohottalalage stated in his witness statement (as did Mr Christi in his) that he started at Leatherhead in April 2019. However, at the start of his oral evidence before he adopted his witness statement, he corrected his start date to the end of February 2019. Mr Christi also accepted in oral evidence that this was the case; that Mr Mohottalalage started earlier and that he was paying him additional responsibility allowances in February and March 2019.
41. The Claimant denied that Mr Mohottalalage started in the Leatherhead petrol station at the end of February 2019 and asserted that he had started in April 2019.
42. We were referred to a series of WhatsApp messages at RB267-286 showing text messages between Tash and the Claimant. These messages start on 25 February and end on 29 October 2019. On face value the messages reveal a friendly and amicable relationship between the two parties. Indeed, on one occasion Tash wishes the Claimant a happy birthday and rearranges his shift so that he can take his birthday off (at RB271-272).
43. The Claimant said in evidence that he did not have a record of these messages anymore. Mr Mohottalalage said in evidence that he had printed them off from his WhatsApp history.
44. The Claimant asserted that the WhatsApp messages started in February 2019 at which time Mr Mohottalalage was not working at the Leatherhead petrol station. He further alleged that they were received and sent using the Leatherhead work phone which is a mobile phone. He also alleged that these messages were between him and a Team Leader also called Tash and not with Mr Mohottalalage. As far as we were made aware, and we have seen supporting evidence of, the Team Leader at the relevant times was Mr Flissi.
45. Mr Mohottalalage denied that there was another employee called Tash at Leatherhead. Mr Mohottalalage further stated that the messages were sent and received on his personal mobile phone and were between him and the Claimant. In addition he denied that the work phone was a mobile and said that it was a landline phone.

46. We note the briefing register, which Mr Mohottalalage said he took in November 2019 at RB525, only lists the Store Manager as Mr Tashika Delgasthenne, which we understand to be Mr Mohottalalage's middle name (RB521 letter from Mr Gurusamy confirms). We were not taken to any evidence by the Claimant as to the identity of another employee called Tash, as he claimed.
47. We further note that the Claimant refers to the "store number" in his text message dated 14 April 2019 at RB272:
- "Hi Tash I can't come to work today same problem again. I called store number no one answer. I'm really sorry."*
48. This would on balance of probability indicate that there was a separate store telephone. If it received texts then that begs the question why the Claimant simply did not send a text to that number if he could not get an answer.
49. In addition, we note the reference in the ER Service records at RB175 to the Claimant sending a text message to Mr Mohottalalage on 14 April 2019 reporting his absence because his wife had been hospitalised. This appears to be the circumstance reflected in his text message at RB272. It would further indicate on balance of probability that the WhatsApp messages were between the Claimant and Mr Mohottalalage.
50. We also note that the times of the messages (many being outside work hours and in the evenings) are indicative of it being a personal mobile phone rather than a work phone. Moreover, it seems unlikely that there would be this volume of text messages and of this content and nature to anyone other than the Store Manager, Mr Mohottalalage. Indeed the final text message of 29 October 2019 is from the Claimant and it raises the allegations of bullying and disrespectful behaviour to Mr Mohottalalage and is clearly addressing him directly (at RB286).
51. On balance of probability we find that these WhatsApp messages were from Mr Mohottalalage's mobile phone and were between him and the Claimant.
52. The tone of the messages is conciliatory and friendly, on both sides, indicative of a good working relationship. As we have said, this includes Mr Mohottalalage wishing the Claimant a happy birthday and rearranging his shifts so that he could have time off for his birthday (at RB270 & 272).
53. On balance of probability we also find that Mr Mohottalalage started working at the Leatherhead petrol station at the end of February 2019 onwards.

Lottery ticket warning

54. We heard evidence regarding disciplinary action taken by the Respondent against the Claimant. The Claimant alleges that one of the acts of discrimination was that around the beginning of August 2019, Mr Mohottalalage falsely accused him of stealing a lottery ticket which resulted in him being suspended from work for 6 weeks without pay. This is at paragraph 15 t. of the agreed list of issues (at RB115).

55. The ER Service records of this matter are set out at RB177-183 and the first entry is dated 17 August 2019. In essence, upon reviewing CCTV footage taken inside the Leatherhead petrol station kiosk, it was apparent to Mr Mohottalalage that the Claimant printed two lottery tickets out, gave one to a customer which was paid for, put the other one on top of the lottery machine and had not pay for it by the end of the day. When challenged by his manager the next day he said he intended to pay for it but forgot.
56. The matter was referred for disciplinary action by Mr Blyth, the Respondent's Store Manager at Surbiton. Mr Blyth investigated the matter, viewed the CCTV footage and spoke to the Claimant. At the end of the disciplinary process, the Claimant was given a first written warning and returned to work. His period of suspension was from 6 September to 17 October 2019 and was prolonged to some extent by his non-availability to attend the original date set for the disciplinary hearing. The Respondent asserts that the Claimant was paid during his suspension.
57. The Claimant denies this and his position is that he had done nothing wrong and in fact he was exonerated and allowed to return to work.
58. Whilst correspondence relating to the suspension is in the bundle, it does not contain the usual invite and outcome letters.
59. On balance of probability we do not find it probable that in these circumstances the Claimant would have been exonerated. We accept Mr Blyth's evidence that he was initially very suspicious of the Claimant's actions in the CCTV footage but gave him the benefit of the doubt that he intended to pay for the ticket later on in his shift but forgot. Mr Blyth explained to us and we accept that he was aware that this had happened in his own store where staff print out lottery tickets for themselves before the lottery machine closed down in the evening and then paid for them later on. Mr Blyth gave the Claimant a first written warning because he did not pay for the ticket. This is recorded in the ER Service records at RB183.
60. In any event, of course the Claimant's allegation is against Mr Mohottalalage and not Mr Blyth. There is nothing to support his contention that the accusation leading to his suspension was falsely made by Mr Mohottalalage. Beyond reporting the matter and investigating, Mr Mohottalalage was not involved in the disciplinary proceedings or the decision taken. This was dealt with by Mr Blyth. We heard no evidence as to who had taken the decision to suspend the Claimant. But in these circumstances we can find nothing untoward in such a decision being made.

Allegations of discriminatory treatment and constructive dismissal

61. The bulk of the Claimant's claim is one of direct race discrimination and race related harassment as set out in the allegations identified in the agreed list of issues and the further particulars provided at RB112-120 and RB125-132 (appended to this Judgment).
62. In essence, the Claimant alleges that on various dates during April and October 2019, Mr Mohottalalage racially abused and harassed him and

subjected him to racially discriminatory conduct, much of the time in the public area of the Leatherhead store and in front of sometimes colleagues and sometimes customers and sometimes both. This culminated with the alleged conduct by Mr Mohottalalage on the last day of the Claimant's employment on 25 October 2019 which he further alleges caused him to walk out and which forms the basis of his constructive dismissal.

63. Mr Mohottalalage denies all of the allegations.
64. What we have therefore is a situation (polemic) where we have to decide on the evidence of the Claimant and Mr Mohottalalage and the parties' other witnesses and where possible from the documentary evidence, what more probably than not happened and by applying the burden of proof under section 136 of the Equality Act 2010 and relevant case law.
65. Not only are the central allegations in dispute but also the veracity of the supporting witnesses' testimony and certain documentation. And notably the CCTV footage said to be taken on the last day of the Claimant's employment is also in dispute.

The Claimant's witnesses

Mr Suntharalingam

66. Mr Suntharalingam provided a witness statement in which he alleged that as a customer of the Leatherhead petrol station he had witnessed certain elements of the alleged discriminatory words used and behaviour by Mr Mohottalalage towards the Claimant between June and August 2019. He was due to give evidence and was present in the CVP room but ultimately did not do so. The explanation given by Ms Polkowski was that he had second thoughts having spoken to his wife over lunch and her concerns that it would bring trouble to the family because of the number of Tamil customers at his place of work. The difficulty for the Tribunal is that Mr Suntharalingam was not here to be questioned, his evidence was highly contentious, his statement was not signed or dated and whilst we might acknowledge his reasons for not attending, we decided it was appropriate to attach no weight to his statement.

Mr Sivasubramiam

67. Mr Sivasubramiam is Sri Lankan Tamil. His testimony was of limited assistance. Whilst he claims to have witnessed much of the abuse that the Claimant alleges he suffered at the hands of Mr Mohottalalage and to have come to the Leatherhead petrol station as a customer 3 times a week, his evidence as to the allegations is vague, he did not report these matters to the Respondent, even though the Claimant asked him to. In cross examination he initially said that he did not do so because he could not find any email addresses or phone numbers for the Respondent despite checking on line (which sounded improbable) and when this was challenged on this basis he then said that he did not have time to make a complaint. This again seemed improbable given that he is also Sri Lankan Tamil and the alleged abuse was against the Claimant on the basis of his ethnicity and also against all Tamil people. We were concerned as to his credibility and found his evidence

lacking and of limited assistance.

Mr Pathmanathan

68. Mr Pathmanathan is Sri Lankan Tamil. He is a taxi driver and he claims to have been at the Leatherhead petrol station on the day that the Claimant walked out on 24 October 2019. He said that he had only visited the petrol station on this one occasion.
69. His evidence is as follows. He drove the Claimant to work at the Leatherhead petrol station at about 2.30 pm. Whilst he was in the store paying for his petrol he witnessed Mr Mohottalalage abusing the Claimant. He left the store after paying for his petrol about 30-40 minutes later and when he was leaving the petrol station he saw the Claimant standing by the side of the main road crying. The Claimant told him what had happened and he drove home.
70. This is at odds with the CCTV footage provided by the Respondent and said to be taken on that day (which we will come to in due course). This shows the Claimant leaving work at 4.30 pm that day and neither Mr Pathmanathan nor his taxi can be seen in any of the camera angles.
71. When he was asked in cross examination about the CCTV footage his answers sounded rehearsed (in that they reflected the Claimant's position already given in cross examination as to the veracity of the CCTV footage) and so it appeared more probable than not that he had been briefed by the Claimant as to what to say.
72. Mr Pathmanathan said in answer to cross examination that he did not believe the footage, that the Claimant did not wear that uniform on the day he was there, that the Claimant was at Till 1 and he also mentioned Till 2, and he denied that the Claimant said in the footage "I don't want to meet Selva".
73. He was asked how, if he had only visited the store once, he would be aware of what uniform the Claimant would ordinarily wear. At this point, Mr Pathmanathan suddenly contended that he could not understand English and would need an interpreter (although I had offered him the use of the Tribunal interpreter at the start of his testimony and he had declined and during his evidence his English appeared fine). I also noted that he did appear very nervous by this stage of his testimony. Mr Pathmanathan did not have a credible answer to the question and we find it more probable than not in these circumstances and because of the other things he said that he would only have known about the Claimant's uniform had the Claimant told him of this prior to his evidence.
74. Further, Mr Pathmanathan accepted that he did not raise any complaint with the Respondent about what he witnessed as to Mr Mohottalalage's behaviour towards the Claimant. His explanation being that "you got no response from them in any event and so what was the point". We were not sure how he would know you got no response. And given the nature of the abuse he said he witnessed, which was also against all Sri Lankan Tamils, it did seem strange that he did not raise a complaint.
75. We had grave cause for concern about his evidence particularly given our

findings as to the CCTV footage (which are dealt with below). In addition, even on his own account, his timings did not make sense. He dropped the Claimant off in his role as a taxi driver, he bought some petrol, paid for it, and then left. But why would it take him 30-40 minutes to pay for his petrol and leave?

76. On balance of probability we did not accept that his evidence was truthful and we further believe that he has colluded with the Claimant in presenting false evidence.

Other inconsistencies arising from the allegations and the evidence

77. The Claimant's account of what purportedly occurred on 16 June 2019 at allegation 15d (at RB114]), 15n in so far as it related to 17 June (at RB115), 15p-q (at RB115) and 15u (at RB116) could not have taken place as alleged because the Claimant was not in work at those times, as can be seen from the Time Sheets (at RB600-603) which we accept are accurate (as dealt with below).
78. The Claimant's answers to questions concerning allegation 15i (at RB114) were also nonsensical and lacked any credibility. The Claimant sought to explain that he was placed on Till 2 away from the window so that Mr Mohottalalage could monitor his till but when it was pointed out that both tills could be seen from the CCTV footage, the Claimant maintained that they could not.
79. The Claimant maintained that he could not take holiday between 1-23 June 2019. However, it is clear that the Claimant did not work from 4-19 June 2019 from the Time Sheets (at RB600), had been granted holiday during that period (at RB518-520) and appears to have been at London Gatwick Airport on 5 June 2019 (his bank account records at RB504). On balance of probability, we did not accept his evidence or his assertion that his wife possibly used Apple Pay on his debit card whilst he (on his case) was at work.
80. The Claimant was taken to paragraph 43 of his witness statement and it was put to him that Mr Mohottalalage was not actually in the store that day (17 October 2019) from the Time Sheets at RB603. At this point the Claimant for the first time alleged that Mr Mohottalalage came into the store on days he was not working and/or after his shift had ended, wearing plain clothes and just to abuse him.
81. The Claimant was also cross-examined on paragraph 44 of his witness statement and again it was put to him that he did not actually work on 22 October 2019 according to the Time Sheets at RB603 and neither did Mr Mohottalalage. At this point the Claimant merely alleged that the clock in/out times were fabricated without explaining how this could have taken place. We did not accept without supporting evidence that this was the case.

The Respondent's witnesses

82. None of the Respondent's witnesses witnessed any of the alleged abuse and behaviour by Mr Mohottalalage. All of them stated that the Claimant did not raise any such allegations with them.

The Claimant's "grievance"

83. The Claimant was absent from work mid-shift on 24 October 2019. Mr Mohottalalage sent a letter to the Claimant dated 25 October 2019 (at RB266) stating the following:

"I'm writing to you because you've left the work (sic) in the middle of your shift on 24/10/2019 and you haven't contacted me since 24/10/2019. I've tried calling the number we've got for you (redacted).

I'm worried about you and want to make sure you're okay. Please can you call me as soon as possible and by 29/10/2019 at the latest to let me know you're okay and talk about why you're not at work. My phone number is (redacted).

Just so you know, as you've not followed the absence reporting procedure, your absence is being recorded as unpaid unauthorised absence.

Remember we have an Employee Assistance Programme (EAP) who can provide colleagues with support. You can contact the EAP on (redacted). It's independent and totally confidential. And there's no charge for Co-op colleagues."

84. On 29 October 2019, the Claimant sent a text to Mr Mohottalalage stating the following:

"Thank you for your letter dated 25 October 2019. I was surprised to read in your letter that you did not know the reason for me leaving my job in the middle of the shift. As I mentioned to you before leaving my job by telling you that I no longer able to tolerate your bullying and disrespectful behaviour specifically in front of my colleagues and customers. I will not be coming back.

Regards Thambu"

85. Mr Ratnasamy Radakrishna is the Respondent's Store Manager in the Claygate store. He is Sri Lankan Tamil. He was approached by Mr Mohottalalage and dealt with the matter in Mr Christi's absence. He spoke to Mr Mohottalalage regarding the Claimant's absence from work on 24 October onwards and the Claimant's text of 29 October 2019. He directed Mr Mohottalalage to ER Services. ER Services told Mr Mohottalalage to send a standard template "AWOL letter" adapted to deal with the text raising a grievance (at RB287). This is the letter dated 30 October 2019 which states as follows:

"I'm writing to you because you've not come to work since 24 October 2019. We wrote to you on 25 October 2019 asking you to make contact which you did yesterday, 29 October 2019 via text message.

Your text message refers to the alleged bullying of your store manager. If you wish to raise these issues further please set out the grievance in writing, giving details of the basis of the complaint and send it to: Anuj Christi , Coop Tattenham Corner,43-49 Tattenham Crescent, Epsom, KT185NY."

86. The Claimant asserts that he sent a letter in response to HR dated 31 October 2019. This is at RB288. He said in evidence that he was given help in writing the letter. The letter says as follows:

"My name is Prapatheepan Thambu, I am working in your company in the Sales Assistant past 11 years I walk out of my job because the manager Mr Mohottalalage was saying rude things to me again. The subject of my letter is actually a complaint against the manager of the store. I want to bring this to your kind notice that our manager who has been not behaving well with the staff specially myself.

I am facing a number of problems and also his behaviour, He is very rude and sometimes he uses very harsh language about my culture and this behaviour is not tolerable as we people work really hard and in return, we do not want to hear such abusive language. I can't concentrate on our work with his presence around us. He treats like his slave and we have no self-respect in his opinion. It is getting

very difficult to work in such an environment and it is reason affecting my performance.

I can't no more work in abuse from manager. I feel uncomfortable when he use bad language in front of customers who I no for years. I make application to transfer to Epson High Street August because it have the open vacancy, but Mr Mohottalalage did not support me application for transfer in August, instead he say I theif and I get suspended from the work without money.

I love working here, and I know that this is a company that holds true to employee wellbeing. As such, I trust that you will handle this matter amicably.

I am looking forward to a positive response. Many Thanks"

87. In evidence, Mr Christi denied ever speaking to the Claimant on the phone or face to face let alone receiving or seeing this letter at the time of the events in question. He only saw it in the course of these proceedings.
88. The Respondent alleges that the letter was never sent but has been manufactured by the Claimant to bolster his claim.
89. We note the following. The letter is addressed to the Respondent's HR Department at its head office address whereas the Claimant was directed to write to Mr Christi at a different address. It does not refer to the Claimant's evidence that he had by this time already raised the allegations against Mr Mohottalalage with both Mr Christi and Mr Blyth.
90. On balance of probability we do not accept that this letter was sent and that the Claimant has presented it as evidence that he raised a grievance when he did not.
91. At RB296 there is a letter purportedly sent by Mr Christi to the Claimant dated 8 November 2019 which states as follows:

"I'm writing to confirm that your grievance was received, in order to further deal with the issues raised including discrimination and bullying, I need you to send me the details of all the incidents you are complaining against Tashika Mohottalalage your line manager. I understand you made previous complaints and Mark Blyth was dealing with it.

Send this information as soon as possible and we will look into transferring you to one of our other branches."
92. Mr Christi denied that he had responded to the Claimant at all. Again the Respondent alleges that the Claimant has manufactured this letter to bolster his claim.
93. We note the following. The Claimant disclosed this letter and so his case is clearly that he received it from the Respondent. Why would the Claimant have an unsigned copy of the letter surely he would have the signed copy? Why is it from HR Services at the head office in Manchester and not from Mr Christi's address?
94. On balance of probability we do not accept that this is a genuine letter and so we have to conclude that the Claimant has fabricated it given that he disclosed it.
95. The Claimant's letter to Mr Christi dated 2 December 2019 in response is at RB310. This refers to a telephone conversation that the Claimant states that he had with Mr Christi on 15 November 2019, in which he told him in detail

what had happened. The letter complains that the Claimant had already told Mr Christi about what had happened but asked again and the Claimant told him everything. The letter further complained that it was almost three weeks and Mr Christi had not contacted him. The letter then set out details of the alleged treatment that the Claimant received from Mr Mohottalalage.

96. In evidence, Mr Christi denied receiving this letter and speaking to the Claimant on the telephone on 15 November 2019 or about these matters.
97. We note the following. Again the letter is sent to HR at the Respondent's head office. In his letter he refers to emails sent. The Respondent denies receiving any emails. The Claimant has not disclosed any such emails. The Claimant was evasive in cross examination when questioned about the emails and then attempted to resile from this assertion.
98. In addition, Mr Blyth denied that the Claimant told him about his manager's behaviour.
99. On balance of probability, we do not accept that the letter was sent or that the Claimant had spoken to Mr Christi on the telephone or sent emails or other communications raising allegations about his manager.
100. We therefore find that beyond his text message of 29 October 2019, the Claimant did not raise any concerns about his manager's behaviour as he has alleged and in particular he did not raise a grievance or receive any response to the alleged grievance.

Other members of staff

101. We were not presented with any evidence that any complaints were made to the Respondent by the members of staff at the Leatherhead petrol station named in the Claimant's allegations, alleged to have witnessed the alleged abuse and behaviour by Mr Mohottalalage against the Claimant.
102. We find this very surprising given the nature of the alleged abuse and behaviour, that the majority of those witnessing the abuse were of Tamil ethnicity and that much of the abuse was directed at Tamils generally, that the manager is alleged to have shouted offensive things to the Claimant in front of them and the small size of the workplace (which we can see from the CCTV footage).
103. The Claimant's explanation in cross examination for the lack of complaints was that his colleagues, Mr Manoj (South Indian Tamil), Mr Gurusamy (South Indian Tamil) and Mr Jayathikumar (Sri Lankan Tamil) did not complain because they thought that Mr Mohottalalage was not being serious and took it as fun (ie in jest). He subsequently said in cross examination that he approached them to come to the Tribunal but they said that they did not have time and Mr Jayathikumar is 65 years old (the implication being he was too old to attend). However, in his witness statement at paragraph 43.3, the Claimant stated that his work colleagues were unhappy with how Mr Mohottalalage treated him but were afraid to speak up because no one wanted to lose their jobs. This is to an extent contradictory evidence.

The Claimant's medical records

104. The Claimant was also taken to his medical records (at RB 471 and 484-485) and was asked in cross examination why there was no reference to any discriminatory treatment in the notes of his consultations with his GP and instead a reference to his being made redundant. The Claimant maintained that he told his GP and the Psychological Wellbeing Practitioner all about the discriminatory treatment he had suffered although this is not recorded.

The Time Sheet Records

105. These are at RB600-605. The Respondent used a system called Kronos for pay-roll purposes which allowed staff to clock in and out of work using their fingerprint or a code. The working week ran from Monday and the entries could be manually entered and amended by the Store Manager but only up to midday of the Monday of the following week.

106. These records show the dates and times that Mr Mohottalalage and the Claimant were at the Leatherhead petrol station between 1 May to 24 October 2019.

107. The Respondent relies upon the Time Sheet Records because there are certain dates on which Mr Mohottalalage is alleged to have abused the Claimant in person at work and was not at work and on which the Claimant was not at work. They are also relied upon as showing work times on the Claimant's last day of work, 24 October 2019.

108. We note that some of the text messages we were referred to were sent on Mr Mohottalalage's non-working days but a) no one raised the point with us and b) we accept that a manager would have to deal with staff non-attendance and cover and that this can arise outside his work hours.

109. The Claimant's position when the Time Sheet Records were put to him in cross examination was that these records have been fabricated. He pointed to the fact that the start and end times shown for Mr Mohottalalage are all precise and rounded figures whereas his are not.

110. Mr Mohottalalage said in evidence that he was based for pay purposes at Teddington and was acting up as Store Manager at Leatherhead. He said that he could not clock in and out at Leatherhead (Mr Christi confirmed that was the case at that time) and so his figures were entered manually and reflected his scheduled hours which he worked.

111. On balance of probability we accept that the attendance dates and times are accurate.

The CCTV footage

112. Mr Mohottalalage burned a copy of the CCTV footage taken by the multiple cameras inside and outside the Leatherhead petrol station between 4.19 pm and 4.29 pm on 24 October 2019. He did this before the CCTV equipment was removed from the Leatherhead petrol station, which was shortly before the date of closure in early November 2019 (when the Leatherhead petrol station was to be transferred to Rontec) . He did so because he wanted to

retain it as evidence of the Claimant walking off site that day. At that time, the Claimant had gone AWOL and faced disciplinary proceedings. He placed a copy of it on the Claimant's personnel file and retained a copy for himself. He gave a copy to the Respondent's solicitors during the course of these proceedings and he has referred to it in his witness statement (at paragraph 30).

113. We find nothing untoward in Mr Mohottalalage retaining the CCTV footage as evidence of the Claimant walking off site.
114. The Respondent's position is that it disclosed the footage to the Claimant's solicitors at exchange of witness statements, initially by sending them a memory stick with it on and later by way of a link to a drop box.
115. The Claimant's solicitors deny this and state that initially they were given a blank memory stick and then subsequently sent a link which they were unable to open. In addition they say that they were unaware of the footage until 31 July 2022 when a link was sent by email (to them and to the Employment Tribunal) and they could not open it.
116. We can attest to the difficulties in opening the link and in the end had to call upon IT support within our office to view it and then we sent simplified opening instructions to the Claimant's solicitors who were then able to view it. We do not understand why it took so long for the Claimant's solicitors to raise this matter.
117. We accept that it was disclosed as the Respondent's solicitors state and that whilst there may have been difficulties opening and viewing the footage everyone had seen it by the second day of the proceedings or before the start of particular witnesses' evidence. In any event, the footage only lasts ten minutes and even if you watched each camera angle individually it would not have taken even half an hour to an hour to view once.
118. The footage consists of 9 camera angles showing the elapse of time between 4.19 pm and 4.29 pm on 24 October 2019. The footage starts with the camera angle within the store kiosk which also recorded the sound. The Claimant is working with the Team Leader, Mr Flissi. At 16.20.40 – 16.20.51 of the CCTV footage Mr Flissi says "Selva is coming today" with the Claimant responding "I don't want to see him". At 16.25.28 – 16.25.33 the Claimant says "I know this guy, very bad person, I don't want to see him". Finally at 16.29.10 the Claimant says "I want to go home man, I don't want to see this man, call Tash, he's already taken over, I don't want to see this person, this man is stupid, last time he came I go toilet, call Tash, I go home, this man is stupid". At this point the Claimant clocks out, leaves the kiosk, walks across the store and out of the building and across the petrol station forecourt. The last we see of him he is standing by the side of the main road. The various camera angles show the Claimant's progress through the premises and outside in real time.
119. Having listened to the audio on the footage several times against Mr Gorasia's transcript within his written submissions (as set out above) we accept that this is what was said by Mr Flissi and the Claimant.
120. The footage is entirely inconsistent with the Claimant's account that he

arrived at 2.30 pm, Mr Mohottalalage abused him and he walked off site about an hour later because he could not take it anymore.

121. The Claimant's position is that the footage has been forged and that what is shown is taken from a different day when he had worked a double shift from 5 am onwards and left in the afternoon at 3.30 pm when a work colleague had not appeared to take over for him. The Claimant points to the fact that he is holding a coffee cup and that he only drinks coffee in the mornings. Mr Pathmanathan stated in his evidence that the Claimant was wearing his uniform in the footage and he was not wearing it on 24 October 2019. He also mentioned the issue with the coffee cup. As we have already said we concluded that this level of detail had arisen through collusion with the Claimant.
122. In addition, the Claimant stated that he was referring to Silva not Selva, Silva being the work colleague and that the reference to call Tash was another member of staff called Tash. Mr Pathmanathan said in evidence that the Claimant had not said Selva although he then said that he did not hear what was said. We would add that Mr Pathmanathan is not seen on the CCTV footage and neither is his taxi.
123. The Claimant denies ever meeting Selva. Mr Blyth said in evidence that the Claimant had asked about transferring to another of the Respondent's stores because he did not fancy working for Rontec having worked for them before and having had an issue with them.
124. At one point the Claimant alleged in cross examination that the footage shown was taken from 2017. However, at least two of the camera angles of the store show a sign on the entrance/exit doors saying "Grocer of the Year 2019". The Claimant did not dispute that this was an award received by the Respondent in 2019 and which had been announced in June 2019.
125. This would mean that if the Claimant is right, the footage purportedly dated 24 October 2019 would have to have been recorded on an occasion between that date and say June 2019 on which he had worked a double shift, been relieved by some called Silva and left at about 3.30 pm.
126. The Time Sheet Records do not record such an occasion on which the Claimant worked such hours.
127. On balance of probability we accept that the CCTV footage was taken on the day and at the times shown and reflects what happened between those times and that the Claimant walked off site because he did not wish to meet Selva.

The Claimant's last day 24 October 2019

128. We find that what happened that day is essentially recorded in the CCTV footage. There is nothing to support the evidence that the Claimant had an altercation with Mr Mohottalalage witnessed by Mr Pathmanathan and left work as a result an hour later. Indeed we have grave concerns about this testimony.
129. The Claimant left work because he did not wish to be there when Selva

arrived. The further implication is that he did not wish to be transferred to Rontec by way of the TUPE transfer.

TUPE transfer

130. In or about July 2019, Mr Christi notified Mr Mohottalalage that the Respondent was proposing to sell the Leatherhead petrol station (along with other petrol stations owned by the Respondent) to Rontec by way of a TUPE transfer. We were referred to documentation at RB 526-599 and 315-357 relating to the transfer. In particular, we were referred to the transferring employee information at RB 358-373 and at 524. We were also referred to documentation provided by the Respondent in the form of a TUPE Transfer Communication Pack (at RB 233-241). The process set out in this document was followed at all the affected petrol stations.
131. The proposed transfer was raised with all of the staff at the Leatherhead petrol station by way of collective and individual consultation. The store closed to customers around 7 November 2019 and the transfer of staff took place around 11 November 2019. Staff were invited to identify and apply for vacancies within the Respondent's organisation as an alternative to their employment transferring with the petrol station to Rontec.
132. The Claimant alleges that he sought to transfer to other Co-op stores but this was not authorised by, and so effectively blocked, by Mr Mohottalalage. Mr Mohottalalage denied this. The Claimant further alleges that Mr Mohottalalage blocked any internal transfer requests made by Tamil members of staff. However, we are satisfied that four staff members transferred to positions in different stores, having identified those vacancies themselves, two of whom were Tamils. We were referred to letters from two members of staff (Mr Manoj and Mr Gurusamy) confirming the closure of the Leatherhead petrol station and their internal transfer at RB521-522.
133. It had been thought by the Respondent that the Claimant's employment had transferred to Rontec as envisaged. However, the Claimant was on unauthorised absence from 24 October 2019 onwards and did not return to work. His employment therefore did not transfer to Rontec and as at the time of his leaving he was employed by the Respondent.
134. Mr Mohottalalage left the transferring staffs' personnel files in the Leatherhead petrol station office prior to the transfer. This included the Claimant's personnel file. However, it subsequently became apparent that Rontec did not have them and neither did the Respondent. Whilst this is of course unfortunate, we do not find anything untoward arising from it.
135. Mr Blyth said in evidence that whilst there was no discussion with him and the Claimant about the Claimant's allegations of discriminatory conduct and behaviour by Mr Mohottalalage, he recalls very clearly that at the end of the disciplinary meeting (regarding the lottery ticket), the Claimant asked him about the TUPE transfer and whether he could transfer to another of the Respondent's stores. However, he denied that the Claimant had told him that Mr Mohottalalage was blocking his attempts to transfer internally. Mr Blyth's further evidence is that the Claimant had asked who the new company would be and said that he did not fancy working for them because he had worked

for them before and had an issue with them. Mr Blyth explained in evidence that whilst the TUPE transfer was outside of his remit, he responded to the Claimant and attempted to get him to look at the positive side of things and to “sell” the new company to him.

136. On balance of probability, particularly given our grave concerns about the Claimant’s evidence we accept that Mr Mohottalalage did not attempt to block or fail to authorise the Claimant’s attempts at a transfer, of which the Claimant provided no real detail. We further accept Mr Blyth’s evidence of the discussion which took place at the disciplinary hearing.

Suspension pay

137. The Claimant was entitled to be paid during a period of suspension.
138. During the process which considered the allegation that he had not paid for a lottery ticket, he was suspended on basic pay from 6 September 2019 pending a disciplinary meeting. This was confirmed in writing in a letter to him from Mr Mohottalalage dated 12 September 2019 (at RB249 which is unsigned and RB251 which is signed). Basic pay represents 32 hours of work per week.

139. The Respondent’s disciplinary policy at RB379 states:

“Sometimes we may decide to suspend you on full pay while we investigate allegations.”

140. The Claimant’s position is that he was not paid in full or he was not paid at all. Not paid in full appeared to be on the basis that if he had attended work he would have worked basic hours and also worked additional overtime hours. The Respondent’s position is that he did not work and so was only paid his basic contractual hours.
141. Even if the Claimant is right, he has not set out when he would have worked overtime and Ms Polkowski provided an average figure of earnings of £1200 based on the Claimant’s bank statements showing earnings received from the Respondent over 6 months.
142. As to not being paid at all, we can see from his bank statements at RB508 & 509 that he was paid at the end of September and October 2019 and these figures are those shown as his net pay in his pay slips for those months at RB459 & 458.

143. We were unconvinced either way by the Claimant’s contentions.

Holiday pay

144. The Claimant originally claimed 64 hours of holiday which he believed was outstanding at the time of his leaving. In cross examination he accepted that this was his entitlement for an entire holiday year but said he was not sure if it was the correct amount or not.
145. The Respondent took him to his final pay slips and explained the following. He had taken all of his pro rata entitlement and in fact more at the time of

leaving (24 October 2019). In his September 2019 pay slip, his holiday balance is shown as £71.67 (at RB459). In his October 2019 pay slip, his holiday balance is shown as £63.67 (at RB458). In his final pay slip for November 2019, his holiday balance is shown as nil (at RB457). The reason for this was that these balances were for the entire holiday year. The Claimant did not accept this explanation.

146. Mr Mohottalalage's written evidence was as follows. That by 11 November 2019, when the Claimant was processed by the Respondent as a leaver, he had taken 152 hours holiday (at RB518-520). The Respondent's holiday year runs from 1 April each year. Based on the Claimant's working hours, he had accrued 134.14 hours of holiday as at 11 November 2019 and so he had actually taken 17.86 hours over his actual accrued entitlement. In cross examination the Claimant did not accept this explanation. Mr Mohottalalage's evidence was not challenged by Ms Polkowski.
147. To further confuse the Claimant's case, in her written submissions, Ms Polkowski asserted that the Claimant was seeking 123 hours (at paragraph 4 on page 7). This was not evidence given by the Claimant.
148. Ultimately, we were unclear what the Claimant was claiming or how it was calculated.

Notice pay

149. The Claimant's case is that he is entitled to 11 weeks' notice of termination of employment based on his start date in 2008. This appears to rely on the statutory minimum notice entitlements within the Employment Rights Act 1996. However, as we have found the Claimant started continuous employment in 2015 and so on this basis it could only be 4 weeks.

Essential relevant law

150. Section 13 Equality Act 2010:

"Direct discrimination

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

151. Section 26 Equality Act 2010:

- "(1) A person (A) harasses another (B) if—*
- a. A engages in unwanted conduct related to a relevant protected characteristic, and*
 - b. the conduct has the purpose or effect of—*
 - (i) violating B's dignity, or*
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (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).*
- (3) A also harasses B if—*
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
 - c. the conduct has the purpose or effect referred to in subsection (1)(b), and*
 - d. because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

- (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
- (a) *the perception of RB;*
 - (b) *the other circumstances of the case;*
 - (c) *whether it is reasonable for the conduct to have that effect.”*

152. Sections 95 & 98 Employment Rights Act 1996:

Section 95

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

- a. the contract under which he is employed is terminated by the employer (whether with or without notice),*
- [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.*

Section 98

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- b. the reason (or, if more than one, the principal reason) for the dismissal, and*
- c. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) relates to the conduct of the employee,*
- (c) is that the employee was redundant, or*
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment...*

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- a. depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- b. shall be determined in accordance with equity and the substantial merits of the case.”*

Conclusions

Burden of Proof

153. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

154. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be “*something more*”. There has to be enough evidence from which a reasonable tribunal could conclude, if

unexplained, that discrimination has (not could) occurred.

155. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.
156. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Time Limits

157. Complaints of unfair dismissal and damages for breach of contract must be received by the Employment Tribunal within 3 months of the date of dismissal (the effective date of termination) subject to an extension of time provided by an application to ACAS for Early Conciliation within that initial time limit. With an unauthorised deduction from wages claim the unauthorised deduction must fall within the same time limits running from the date of the deduction or if there are a series of deductions, the last of them must form within the same time limits. Late claims can be allowed to proceed if the claimant can persuade the Tribunal of two things.
158. Section 111(2) of the Employment Rights Act 1996 states that:
- "... [Subject to the following provisions of this section] an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –*
- a. before the end of the period of three months beginning with the effective date of termination, or*
- b. within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
- [(2A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207RB (extension of time-limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).]"*
159. Section 111 is replicated in the statutory provisions in respect of damages for breach of contract and unauthorised deductions from wages.
160. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his/her claim in time. The burden of proving this rests firmly on the claimant (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if s/he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.
161. Whether it was reasonably practicable for the claimant to submit his claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the claimant's reasons.

162. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to respondents and does not mean 'physically possible', which would be too favourable to claimants, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?'
163. May LJ in Palmer stated that the factors affecting a claimant's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the respondent's conciliation machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the respondent had misrepresented any relevant matter to the claimant; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
164. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA)#
165. Where the claimant satisfies the Tribunal that it was not reasonably practicable to present his/her claim in time, the Tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.
166. Turning to this case. The Claimant initially presented his Claim on 23 January 2020 following a period of Early Conciliation starting and ending on 7 January 2020. His employment ended on 24 October 2019 (the effective date of termination or "EDT") and the last deduction from wages would be the last pay date which was also 24 October 2019 (his pay slip and bank statement at RB 458 and 509 respectively) (although after giving oral judgment I noted that the Claimant's last payment of wages from the Respondent was on 23 November 2019 (at RB457 and 510). His claim was referred to ACAS and then presented to the Employment Tribunal in time. The Claimant did not provide an email address at this time and so all correspondence was by post.
167. His Claim was rejected by the Tribunal, as notified in a letter to him dated 3 February 2020, because it contained no Particulars of Claim and could not sensibly be responded to. The Claimant replied by letter dated 18 February 2020 (RB18) in which he referred to being on medication for stress and depression, suffering from lack of sleep, and that he had indicated in the Claim form that the Particulars of Claim would be provided in due course.
168. The letter attached medical evidence which is at RB461. This refers to

numbness in his feet, type II Diabetes and low mood. From the Employment Tribunal file we found that he also provided two prescriptions both dated 19 February 2020, which would indicate that he did not post his letter on 18 February as it is dated. One prescription is for Metformin and the other is for Sitagliptin. We were not told and have no idea what these medications are for.

169. The Claim was then accepted by letter from the Employment Tribunal dated 25 February 2020. We do not know when the letter of 18 February was received, but if we accept that it was posted on 19 February 2020 and assume it was sent first class post, then deemed receipt would be two clear working days later, so on Monday 24 February 2020. This would mean that the Claim was on a generous interpretation 17 days out of time.
170. We considered the doctor's notes at RB471 which refers to the presenting problem as struggling with his mental health since losing his job in 2019.
171. We also considered the Claimant's GP notes at RB485 onwards. The entry for 23 October 2019 indicates that he was unable to sleep and prescribed Promethazine Hydrochloride, which we assume was to help him sleep.
172. Other references to low mood, depression and anxiety are contained in entries dated 17 February 2020, 19 February 2020 and 24 February 2020 (at RB484-485).
173. Having considered the above, we reached the following conclusions. The Claimant was able to notify ACAS under the Early Conciliation process in time and to complete the Claim form and present it to the Employment Tribunal in time initially. The medical evidence does not support an inability to deal with his affairs to the point that it became not reasonably practicable to present the Claim in time. We were not presented with any evidence other than what we have referred to in support and Ms Polkowski's submissions were lacking.
174. On this basis we find that the complaints of unfair dismissal, damages for breach of contract and unauthorised deductions from wages were presented out of time and so we have no jurisdiction to deal with them. However, for sake of completeness we have set out our finding and conclusions on each complaint.
175. Section 123 Equality Act 2010 governs time limits for the purposes of discrimination complaints. It states:

"(1) [Subject to sections 140A and 140RB,] proceedings on a complaint within section 120 may not be brought after the end of—

- a. the period of 3 months starting with the date of the act to which the complaint relates, or*
- b. such other period as the employment tribunal thinks just and equitable...*

(3) For the purposes of this section—

- a. conduct extending over a period is to be treated as done at the end of the period;*
- b. failure to do something is to be treated as occurring when the person in question decided on it.*

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

- a. when P does an act inconsistent with doing it, or*
- b. if P does no inconsistent act, on the expiry of the period in which P might reasonably have been*

expected to do it."

176. An act of discrimination which "*extends over a period*" shall be treated as done at the end of that period under section 123(3) of Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.
177. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a "*continuing discriminatory state of affairs*".
178. We were not presented with any evidence or submissions as to whether the acts of discrimination extended over a period of time. However given the nature of the allegations and the extent, taking them on face value we are willing to accept that they were capable of forming part of a continuing discriminatory state of affairs on the date that the Claimant left his employment on 24 October 2020.
179. Moving on to whether the Claim was presented in time. This Claim was presented 17 days out of time for the reasons we have set out above.
180. An Employment Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.
181. The factors to take into account (as modified) are these:
- a. the length of, and reasons for, the worker's delay;
 - b. the extent to which the strength of the evidence of either party might be affected by the delay;
 - c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
 - d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
 - e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.
182. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.
183. Whilst we were not convinced by the evidence as to why the Claimant

delayed in submitting his Claim in time, we take account of the fact that the delay is relatively short, would not have affected the strength of the evidence and that it is a claim of discrimination and so the prejudice to the Claimant in not having it heard would be greater than the prejudice to the Respondent. We would stress that we were not assisted in reaching this decision by the Claimant because of the lack of evidence or submissions beyond asking us to accept the claim.

184. Nevertheless taking a generous view and given the wider discretion under section 123 of the Equality Act 2010 we decided extend time to allow us jurisdiction to deal with it.

The Claimant's credibility

185. We struggled to avoid the inevitable conclusion that the Claimant has presented false allegations and evidence to this Tribunal. We attempted to give the Claimant the benefit of the doubt and to seek out any evidence that supported his case, we also took into account that he speaks English not as his first language and was using the services of an interpreter. However, the Claimant has an understanding of and ability to speak English and certainly on a number of occasions he answered questions in English before they had even been interpreted. We therefore do not accept this to be an excuse.
186. Frankly, there is nothing to support the Claimant's allegations against Mr Mohottalalage or indeed most other aspects of his case. He has denied the accuracy of any document that does not support his case including the CCTV footage. At times, his explanations have bordered on bizarre to nonsensical but nevertheless unsustainable. For example, his denial that he got a first written warning. Another example is that Mr Mohottalalage came back to work outside his work hours in plain clothes to harass him. A key example is his attempt to suggest that the CCTV footage was forged. This simply did not make any sense and his evidence changed as it went on and shortcomings in his account were put to him and which revealed his assertions to be no more than that. And another example is when it was put to him that certain of his allegations did not occur because either he or Mr Mohottalalage were simply not at work on those occasions, he then alleged that the clocking in and clocking out records had been falsified.
187. However, the most damning of matters was his attempted reliance on false documents and his collusion with his witness Mr Pathmanathan as to what had happened on the last day of his work which he relied upon both as an act of discrimination by Mr Mohottalalage and giving rise to his resignation being a constructive dismissal.
188. I would add that rarely does an Employment Tribunal have to take such a strident view of the evidence. However, we found the Claimant to be an unreliable and non-credible witness. We do not say this lightly but we have no way of avoiding it in this case.
189. These are very serious allegations against Mr Mohottalalage in particular and they are matters that not only can cause distress but can be career threatening. To bring false allegations based on false documents and supported by false testimony and false assertions simply adds to the distress

caused.

Direct race discrimination

190. Under section 13 of the Equality Act 2010, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case race, by reference to an actual or hypothetical comparator in the same or similar circumstances.
191. The Claimant has named actual comparators, one of whom is a Sri Lankan Tamil and the other two are South Indian Tamils. The difficulty with these comparators is that they are of the same ethnicity as the Claimant and even if they are not, we have no evidence that they were treated any differently to the Claimant beyond what the Claimant asserts, which as we have already indicated we have grave concerns about.
192. If we consider the allegations of less favourable treatment made by the Claimant we have to conclude on the evidence that we have heard that on balance of probability they did not occur. We are concerned that the Claimant has not given truthful evidence and has attempted to obfuscate the evidence when it does not support what he claims.
193. We therefore find that the complaint of direct race discrimination is unfounded and it is dismissed.

Harassment

194. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
195. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).
196. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

197. The same difficulty arises with this complaint as with the direct race discrimination complaint. The evidence we heard does not support the allegations that the Claimant has made and so on balance of probability we find that they did not happen.

198. We therefore conclude that the complaint is unfounded and it is dismissed.

Unfair dismissal

199. For the purposes of a claim of unfair dismissal there of course has to be a dismissal. This has to fall within section 95 of the Employment Rights Act 1996. A termination of the contract of employment between the parties by the employee will constitute a dismissal within section 95(1)(c) if s/he is entitled to so terminate it because of the employer's conduct. This is colloquially and widely known as a 'constructive dismissal'.

200. If a dismissal occurs, section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

201. In Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 the Court of Appeal held that an employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

202. Thus in order for an employee to be able to claim constructive dismissal, four conditions must be met:

- a. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
- b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his/her leaving.
- c. S/he must leave in response to the breach and not for some other, unconnected reason. S/he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

203. If an employee leaves in circumstances where these conditions are not met, s/he will simply have resigned and there will be no dismissal within the meaning of the Employment Rights Act 1996 and so there can be no claim of unfair dismissal.

204. Turning to this case. The Claimant's case is that he was subjected to bullying and offensive behaviour over a period of months (which amounts to a breach of mutual trust and confidence between the parties) and that final straw was the way in which Mr Mohottalalage behaved towards him on 24 October 2019.

205. However, we have found on balance of probability that none of the alleged events happened and so his constructive dismissal complaint must fail and he simply resigned because for whatever reason he did not want to be in the store when the new owner arrived and more probably than not because he did not want to be transferred.

206. We therefore conclude that the complaint is unfounded and is dismissed.

Holiday pay

207. We were unclear what the Claimant was claiming or how it was calculated. However, the complaint is out of time and so we have no jurisdiction to deal with it.

208. The complaint is therefore unfounded and is dismissed.

Suspension pay

209. We were unconvinced by the Claimant's submissions either way. However, the complaint is out of time and so we have no jurisdiction to deal with it.

210. The complaint is therefore unfounded and is dismissed.

Notice pay

211. This complaint arises under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. It is essentially a complaint of wrongful dismissal on the basis that by being constructively dismissed he left without being able to work his period of notice.

212. As we have said the Claimant was not constructively dismissed but resigned

without notice and so had no entitlement to notice. However, the complaint is out of time and so we have no jurisdiction to deal with it.

Final conclusion

213. The Claimant's complaints of direct race discrimination, race related harassment, unfair dismissal, damages for breach of contract and unauthorised deductions from wages are unfounded and the Claim is dismissed.

214. In any event his complaints of unfair dismissal, damages for breach of contract and unauthorised deductions from wages were presented outside the relevant time limits and the Employment Tribunal has no jurisdiction to deal with them.

Employment Judge Tsamados
Date: 3 November 2022

Sent to the parties on
Date: 14 November 2022

Appended:
List of issues
Allegations

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