



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. Amir Idrees

**Respondent:** Tesco Stores Limited

**Heard at:** London South, Croydon

**On:** 12-13 June and 1 September 2017 (in chambers)

**Before:** Employment Judge Sage

**Members:** Ms R. Hawley  
Ms V. Stansfield

## Representation

**Claimant:** Mr. J Davies of Counsel

**Respondent:** Mr. Singer of Counsel

# RESERVED JUDGMENT

1. The Claimant's claim for constructive unfair dismissal is not well founded and is dismissed.
2. The Claimant's claim for breach of contract is not well founded and is dismissed.
3. The Claimant's claim for discrimination because of race and religion and belief is not well founded and is dismissed.
4. The Claimant's claim for unauthorised deduction from wages is dismissed upon withdrawal.

# REASONS

1. By a claim form presented on the 19 December 2016, the Claimant claimed constructive unfair dismissal and direct discrimination (race, religion and belief). The Claimant relied upon two specific incidents, one on the 20 July 2016 in relation to a claim for expenses and on the 7 August 2016 when the Claimant resigned in response to what he claimed

amounted to a fundamental breach. The Claimant's dates of employment were the 4 July 2009 to the 7 August 2016; he was employed as a Sales Assistant.

2. By a response form the Respondent denied all claims against them. They stated that the Claimant admitted to stealing in the meeting on the 7 August and resigned to avoid a more serious sanction. The Respondent denied placing the Claimant under duress in the meeting.

### **The Issues**

These were agreed as follows (see pages 32-34 of the bundle):

3. The Claimant brings complaints of direct discrimination because of race and religion and belief contrary to Sections 9, 10, 13(1) and 39(2)(d) Equality Act 2010, constructive unfair dismissal and breach of contract. The Claimant withdrew his claim for unauthorised deduction from wages at the start of the hearing. The Claimant also withdrew all claims of discrimination against Mr Gafre.
4. Preliminary issues: is the claim for discrimination in time in respect of the factual scenario on the 20 July 2016? If not is it a continuing act of discrimination?
5. Substantive issues: Discrimination
  - a. As compared to a hypothetical comparator [an employee not of the Muslim Faith and/ or not Pakistani], but otherwise there being no material difference between their circumstances and those of the Claimant,
    - i. was the Claimant treated less favourably by Mr Sthapit on the 20 July 2016 when he criticized the Claimant, questioning his expenses claim in an angry or aggressive fashion or speaking to him in an otherwise derogatory manner?
    - ii. Was the Claimant treated less favourably by Mr Sthapit coercing the Claimant into resigning by threatening him with criminal proceedings and being dismissed?
  - b. Can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his Pakistani origin or because he is a Muslim?
  - c. If so can the Respondent provide a non-discriminatory reason?
6. Constructive Dismissal
  - a. Was the Claimant subject to the following treatment:
    - i. Did Mr Sthapit criticise the Claimant on the 20 July 2016 questioning his expenses in an angry or aggressive fashion or speaking to him in an otherwise derogatory manner?
    - ii. Did Mr Gafre on the 7 August 2016 commence an investigation into the Claimant's purchase of glue?
    - iii. Did Mr. Gafre and Mr Sthapit threaten the Claimant with criminal proceedings and being dismissed?
    - iv. Was the Claimant presented with a piece of paper and instructed or coerced or encouraged to write a resignation letter?

- b. Did the acts above at (i) to (iv) above singularly or cumulatively amount to a breach of the implied term of trust and confidence by the Respondent?
  - c. Did the Respondent commit a repudiatory breach of contract going to the root of the employment contract?
  - d. Did the Claimant resign in response to any such breach?
  - e. Was the real reason for the Claimant's resignation that he was trying to avoid a disciplinary sanction?
  - f. Did the Claimant affirm the breaches of contract?
  - g. If the Claimant was constructively dismissed, was any such constructive dismissal unfair pursuant to section 94(1) ERA and in consideration of the ACAS Code?
  - h. Did the Claimant fail to mitigate any loss suffered by failing to raise a grievance regarding his concerns with the Respondent prior to resignation, should any compensatory award be reduced accordingly?
7. Breach of Contract – was the Claimant entitled to be paid a period of notice, following receipt of his resignation on the 7 August 2016? If so what was his entitlement to notice pay?

### **Witnesses**

For the Respondent, the Tribunal heard from:  
Mr S. Gafre Lead Ambient Trade Manager  
Mr V. Sthapit Fresh Food Lead Manager  
Mr. C. Ferreira Compliance Manager  
Ms W. Armstrong People Manager and  
The Claimant.

### **Findings of Fact**

8. The Claimant was employed by the Respondent as a Customer Assistant from 4 July 2009, he first worked at the Lewisham store and then in 2010 transferred to the Surrey Quays store which is where he worked until the date of termination of his employment.
9. Although Mr Gafre stated at paragraph 8 of his statement that he had never had a complaint or grievance against him personally; he accepted that his statement was inaccurate as the Claimant had made a complaint against him. Mr Gafre told the Tribunal that the complaint was discussed and after that, there were no problems between them.
10. The Claimant alleged at paragraphs 2 and 3 of his witness statement that he had on occasion been asked to work at other stores; he told the Tribunal that when this happened he was paid cash in hand for his travel expenses. He stated that the first time this happened was in 2012 when he was offered money to top up his oyster card and in 2012 Mr Sthapit asked the Claimant to work in the Kennington store for a couple of days and he was paid in cash for his travel expenses.
11. The evidence given by Mr Gafre was that the Respondent's travel policy was clear and was at pages 69-79 of the bundle; the policy allowed staff to claim 35 pence per mile and this would be paid by BACS, they were not

paid cash for travel expenses. Mr Sthapit's evidence to the Tribunal was that their travel and expenses policy required managers authorising such payments to challenge any claim which is considered to be "inappropriate, extravagant or excessive" and a failure to do so could result in the manager facing dismissal. The Claimant in cross examination told the Tribunal that he had not seen the travel expenses policy before and had not claimed expenses using any procedure, he stated when he had previously asked for expenses he was paid in cash.

### **The Incident on the 20 July 2016**

12. The first incident occurred on 20 July 2016 when he was asked by Mr Gafre to work at the Southwark store because they were short staffed, the Claimant was also asked to take his colleague with him. It was the Claimant's evidence at paragraph 4 of his witness statement that he was requested by Mr Gafre to take his own car and the Claimant informed Mr Gafre that he would have to get petrol first. It was the Claimant's evidence that he was told by Mr Gafre that he would "sort it out when we got back later that day". Mr Gafre's evidence was that he told the Claimant to make a note of the distance travelled and he could "claim his mileage expenses when he got back to the shop". He denied telling the Claimant that he could claim his petrol costs as this was not in line with the Travel Policy. Mr Gafre confirmed that he did not explain the process for claiming back expenses to the Claimant and accepted that the ET3 at page 23 was inaccurate where it stated that the process for claiming expenses was explained to the Claimant. The Southwark store was 1.9 miles away from the Claimant's normal place of work and would result in a mileage claim of £1.33. The Claimant filled up with £12 worth of petrol and obtained a receipt. The Claimant felt that he should be paid a reasonable amount given that he was taking another colleague with him and he had saved the company cab fares.
13. When the Claimant returned to the branch he told the Tribunal at paragraph 6 of his witness statement that he looked for Mr Gafre but was unable to find him and then went to the Customer Service Desk and asked the person on duty, Manu, to put out a call for him. Mr Gafre's evidence however was that he had been informed that the Claimant had gone to the Customer Services desk and asked to be reimbursed for the £12 worth of petrol he had put in his car and stated that this had been "authorised by a Duty Manager".
14. Mr Sthapit's recollection of this event was that he received a call from the Customer Service Desk (from Manu) and he was told that the Claimant was "requesting to be reimbursed for £12 of petrol expenses and that the Duty Manager had already authorised this". The Claimant could not recall what he overheard of the telephone conversation. Mr Sthapit told Manu that he was with Mr Gafre (doing a handover at the end of his shift); he told Manu not to process the claim and if the Claimant was unhappy about this he should come and see him in the Systems room with Mr Gafre. The Claimant accepted that this message was relayed to him by Manu.
15. The parties then met in the produce warehouse, the Claimant still had the petrol receipt with him. It was Mr Sthapit's evidence that the Claimant was trying to argue that he should be reimbursed for £12 petrol money. Mr

Sthapit asked the Claimant why he had gone to Customer Service Desk to ask for “the money”, the Claimant told the Tribunal he had explained he had not asked Manu for the money but just to make an announcement.

16. It was the Claimant’s evidence that Mr. Sthapit then called for Mr Gafre and the Claimant was asked to go to the upstairs training room to discuss the matter. The Claimant in cross examination stated that during the meeting he felt that Mr Sthapit “would attack me and I was afraid if I did something he would do something in future” and he was “walking up and down, he was tense and his eyes were coming out and his nose was getting bigger”. There was no evidence before the Tribunal that Mr Sthapit’s conduct bore any resemblance to the description given by the Claimant. He said he did not complain about Mr Sthapit’s aggressive behaviour because he was scared that worse things might happen and Mr Gafre would not be a witness. The description of Mr Sthapit exhibiting aggressive and potentially violent behaviour was not reflected in his ET1 which only referred to questioning the Claimant in an angry and aggressive manner (page 15 of the bundle) and in his statement he only referred to Mr Sthapit being rude to him and his “body language being aggressive” and being abusive (paragraph 7 and paragraph 9). The Tribunal conclude on the balance of probabilities that although Mr Sthapit was frustrated with the Claimant, there was no consistent evidence that he was physically aggressive or intimidating towards the Claimant.
17. The evidence of Mr Gafre who was present in the room when Mr Sthapit spoke to the Customer Services Desk and when the meeting took place, accepted that Mr Sthapit was “frustrated” with the Claimant and this was evident from the fact he kept asking the Claimant the same question and getting the same answer but denied he was aggressive.
18. It was put to Mr Sthapit accepted in cross examination that the ET3 at paragraph 8 was incorrect where it stated that the Claimant was aware of the correct process for claiming expenses, he accepted that there was no evidence that the Claimant was aware of the correct procedure and or that he chose not to follow it. He told the Tribunal that the process was to go and see Mr Gafre on his return to the store. He stated that during this conversation he and the Claimant were talking over each other. Mr Sthapit also accepted in cross examination that he had assumed wrongly that the Claimant was aware that he could only claim 35p per mile and accepted that the ET3 was inaccurate at paragraph 4 on page 23 where it stated that the Claimant was told this by Mr Gafre before he left the store.
19. The Tribunal find as a fact that the Claimant was not aware of the details of the expenses policy and they were not explained to him at the time. The reference in the ET3 to the Claimant being aware of the process for claiming expenses and Mr Gafre explaining this to the Claimant was wrong. However, we find as a fact that the consistent evidence before the Tribunal was that the Claimant was instructed to seek out Mr Gafre on his return, which he did not do.
20. Mr Gafre stated that he told Mr Sthapit that he had asked the Claimant to go to work at another store and that he could claim his mileage but did not tell him he could claim £12 (and he did not state that the Claimant had also taken his colleague to the store). Mr Gafre asked the Claimant why

he had not come to see him as he had asked and he stated that the Claimant replied that he had “forgotten” but the Claimant denied that he said this.

21. The Claimant alleged that he was told in this meeting that he was stupid to charge the Respondent £12 and he was accused of being “a cheater” and of defrauding the Respondent. Mr Sthapit in his evidence in chief stated that he had challenged the way in which he had approached a Customer Services Desk employee “falsely stating that [the claim] had been approved” and he commented that he felt that the Claimant had been underhanded. Mr Sthapit denied referring to the Claimant as a cheater or stupid. Mr Gafre recalled that Mr Sthapit said that the Claimant had tried to defraud the Company. The Tribunal on the balance of probabilities conclude that Mr Sthapit accused the Claimant of defrauding the Respondent but there was no consistent evidence to suggest that he called the Claimant a “cheater”.
22. Mr Sthapit accepted in cross examination that he made assumptions that the Claimant was aware of the policy on expenses and knew how to fill out the form. It was also conceded by Ms Armstrong that the policy did not cover the procedure to adopt when travelling to another store. The Claimant stated that he was told by Mr Sthapit that the company only pays travel on the usual mileage basis and by a bank transfer, this was corroborated by Mr Sthapit who told the Tribunal he explained how the travel expenses policy worked.
23. It was the Claimant’s evidence that he felt that Mr Sthapit was making “a fuss” because he felt that he had done the company a favour. Even though Mr Sthapit said he would give the receipt to Ms Armstrong, the People Manager, the Claimant felt it was simpler to forget it and did not wish to take matters further (see paragraph 8 of his statement). It was the Claimant’s evidence that it was “ridiculous” that he would use his own car and only charge 35p mile. The Claimant raised no complaint at the time about the conduct of Mr Sthapit and decided not to pursue his expenses claim. The Claimant said he did not pursue it because he was worried that Mr Sthapit would further harass and threaten him. No notes were taken of this meeting because it was not an investigation only a conversation.
24. Mr Sthapit said that race or religion had no part to play in his frustration and denied speaking to the Claimant inappropriately. The Tribunal find as a fact that there was no evidence to suggest that Mr Sthapit’s conduct during this conversation was less favourable treatment because of race or religion and belief, the Claimant’s contemporaneous grievance at pages 121 of the bundle made no reference to this amounting to less favourable treatment because of race or religion and at the time this was written the Claimant was no longer working for the Respondent therefore he would have no fear of further harassment.
25. The Claimant accepted that his ET1 was incorrect (page 15 paragraph 11(v)) that the meeting did not take place on the shop floor it was in private and it was not witnessed by his colleague Jenny. He accepted that this was an error and he had made a mistake. The Tribunal did not find that this error undermined the credibility of the rest of his evidence.

26. The Tribunal find as a fact that this was a one-off incident and not a continuing act. Although the Claimant referred to Mr Sthapit “picking on him” around 2015 (paragraphs 41-42 and 46) and calling him offensive names the Tribunal found that this evidence lacked any credibility. The Claimant could give no times and dates when this alleged harassment occurred and it was not mentioned in his grievance letter or his ET1, the Tribunal therefore find as a fact that the allegations made against Mr Sthapit of harassment because of race and religion and belief are not well founded. The incident on the 20 July 2015 was a one off incident and therefore not part of a continuing act, it is therefore out of time.

### **The Second Incident**

27. The background to the second incident was in respect of products which were called “zero to clear”; this initiative involved seasonal goods or discontinued items which were given away free to customers or staff in return for a small contribution to charity. The Claimant stated at paragraph 13 that he took some candles and glue as part of this promotion; he accepted however that he forgot to pay the donation. It was also the Claimant’s evidence that Emergency Product Withdrawal “EPW” are also dealt with in this manner but this was disputed by the Respondent, who told the Tribunal that products dealt with under EPW procedure are withdrawn because they are faulty are either sent back to the supplier or destroyed but they must be removed from stock. The Tribunal prefer the evidence of the Respondent on this point.

28. On 7 August 2016 the Claimant was working in the stationary aisle and was approached by a colleague who was working at the Customer Services Desk who asked him where the glue could be found. They then had a conversation about the glue and the Claimant told her that he had had a problem with this product as it had dried up. After this conversation, the Claimant decided to exchange the glue with some deep heat cream, he therefore went to his locker to collect the glue, selected the heat cream from the shelves and took both products Customer Services Desk to exchange them. The Claimant accepted in cross examination that staff were not allowed to do shopping during their shifts and provided no explanation as to why he chose to exchange the product at this time.

29. Mr Gafre was at the Customer Services Desk and he saw the Claimant queueing up and asked him what he wanted. He commented in his statement that he felt the Claimant was acting nervously and out of character. This was denied by the Claimant. It was the Claimant’s evidence that he informed Mr Gafre that he was intending to exchange the two products; the Claimant denied that he told Mr Gafre that someone at the desk was processing the refund as he had not spoken to anyone else before he spoke to Mr Gafre.

30. Mr Gafre then took over the transaction and he told the Tribunal that the Claimant informed him that he was attempting to claim a refund of £7 and that he had purchased the product using his Privilege (discount) Card. Although the Claimant denied that he said he used his discount card, he was taken in cross examination to his grievance letter at page 124 which confirmed that Mr Gafre asked him to bring his discount card to the

computer desk. The Tribunal therefore find as a fact that this corroborated Mr Gafre's version of the events. Mr Gafre asked the Claimant for the receipt and the Claimant informed him that he had lost it. He accepted in cross examination that this was untrue and told the Tribunal he lied "because of the last incident" however the Tribunal note that the Claimant made no complaint about Mr Gafre's conduct on the 20 July and at that stage he was only dealing with him (not with Mr Sthapit). Mr Gafre stated that the Claimant then asked if he could exchange the glue for the deep heat and he indicated that he could provide proof of purchase.

31. In the meantime, Mr Gafre searched for the receipt on the system and found no proof of purchase on the Claimant's privilege card. He then asked Mr Sthapit to help with the search and again no trace was found of the transaction. It was put to Mr Gafre in cross examination that the Respondent's ET3 contained an embellishment when it referred to five possible dates being investigated. Mr Gafre said "it could have been five times; I went backwards and forwards". The Tribunal did not raise an adverse inference from any inaccuracy recorded in the number of times Mr Gafre searched the system, we accept that he searched a number of times for the transaction.
32. The Claimant was then taken upstairs by Mr Gafre and Mr Sthapit (which was confirmed by the Claimant in cross examination) to the training room and he was asked by Mr Sthapit when he had purchased the glue and the Claimant stated that it had been "a while ago", the Tribunal note that again this was untrue. Mr Gafre told the Tribunal that he again searched the computer but could find no trace of the transaction. The Claimant alleged that Mr Sthapit was shouting and intimidating him and he felt harassed and scared. It was then the Claimant accepted he had not paid for the glue and he got it as a "zero to clear" product. The Claimant told the Tribunal the reason he did not inform them earlier was because he was scared and harassed by their previous behaviour as well as what he referred to as "ongoing intimidation". The Claimant was asked to leave the room and wait outside until called.
33. Although the Tribunal noted that the Claimant referred to what he described as 'ongoing intimidation' we saw no evidence that this was the case. We have concluded that the incident on the 20 July was a one off act and there was no suggestion that Mr Gafre had committed any act that could be described as intimidatory at any time, the Claimant having withdrawn all allegations of discrimination at the commencement of the hearing. The Claimant provided no evidence that Mr Sthapit had committed any acts that could be described as intimidation, the Tribunal having found as a fact that the behaviour exhibited by Mr Sthapit on the 20 July was frustration not intimidation.
34. Mr Gafre told the Tribunal that the Claimant informed him that he had "taken the item without paying for it as part of the zero to clear initiative". Mr Gafre told the Tribunal that an item such as glue would not be part of this initiative as it continued to be sold in store at full price and if he had got it for free, he would have used his Privilege Card. Mr Gafre told the Tribunal that he again checked whether this product had been reduced or discontinued but there was no evidence it had.



35. The Claimant was called back into the meeting by Mr Gafre and Mr Sthapit was asked to attend as notetaker; he did this with a view to commencing an investigation into theft. He also stated that he asked the Claimant if he wished to have a representative present and it was his recollection that he declined the offer; the Claimant denied he was offered a representative. Mr Gafre stated that Mr Sthapit left the room at this stage to get some paper to take notes (as he did not have any paper with him when he entered the room). Mr Sthapit stated that when he left the room, the investigation had not officially started and his evidence on this point was accepted. It was put to Mr Gafre that the ET3 at page 26 (paragraph 20) was wrong when it stated that he had explained to the Claimant that he would be suspended and he replied that they did not get this far and accepted that this was wrong. The Tribunal therefore conclude that the ET3 was inaccurate and this was conceded by the Respondent's witnesses, however although this was incorrect the tribunal did not conclude that it undermined the evidence of Mr Gafre on other matters.
36. It was Mr Gafre's evidence that the Claimant admitted on Mr Sthapit's return to the room that he had stolen the glue and he "expressed remorse for his actions, stating that he had made a big mistake". Mr Gafre stated that as the Claimant had admitted to stealing he had no choice but to take it further. Mr Sthapit's recollection was that the Claimant stated he "stole it" and he regretted what he had done and he was "willing to be honest in the hope that we would agree not to take the matter any further" (paragraph 21 of his statement). It was Mr Gafre's evidence (at paragraph 34) that he felt that the Claimant had committed a double act of dishonesty by taking the item and then trying to claim a refund on it. Mr Gafre stated that he would have to commence an investigation if any member of staff had made these admissions.
37. The Claimant denied saying he had stolen the item and denied he expressed remorse or apologised. The Tribunal find as a fact that we prefer the evidence of the Respondent's witnesses to that of the Claimant. Although the Respondent's evidence was at times inconsistent, the Tribunal took into account the contents of the Claimant's post termination grievance where he accepted that he had lied during this meeting and the truth was that he had not paid for the product (see page 124 of the bundle). Even if the Claimant's evidence was correct and he did not state that he had stolen the item, he accepted that he had lied to both managers and he was trying to exchange a product he had got free for a full price item. This was an offence of dishonesty and was serious and we accept the evidence of the Respondent that once theft was suspected and the tribunal conclude that the Respondent had reasonable suspicion that an item had been stolen and dishonesty had been admitted, it had to be investigated.
38. The Claimant's version of events was that Mr Sthapit told him that he should resign or "get ready to be arrested by the police for theft" and he would be handcuffed and walked through the store in front of his colleagues; he would be imprisoned starting from six months to 2 years and get a permanent criminal record as well as a bad job reference. Mr Sthapit denied saying this in the meeting. The Claimant also alleged that Mr Gafre told him that if he resigned, he could get holiday pay and a good reference and reapply for his job in any different store in a couple of

weeks' time. Mr Sthapit's evidence was that the Claimant asked if he could resign "in order to avoid disciplinary action", he stated that this was at the Claimant's suggestion and was not raised by Mr Gafre or himself.

39. The Claimant stated that during this conversation Mr Sthapit was aggressive and threatening towards him and shouted at him for 10 minutes. The Claimant stated that "I felt like he was going to put a gun to my head and shoot me". The Claimant said he could not leave the room because he was scared and didn't know he could leave. These allegations were denied by Mr Gafre and Mr Sthapit; they denied that they mentioned the police in this meeting. As the Tribunal have already found as a fact that the Claimant had embellished his evidence about the behaviour of Mr Sthapit on the 20 July we also conclude that his description of the meeting on the 7 August was similarly embellished. There was no evidence that Mr Sthapit intimidated the Claimant in this meeting and the allegations made in the course of the Tribunal Hearing were considered to be fanciful as they were not consistent with the description provided in his grievance, where no reference was made to intimidation or aggressive conduct. We prefer the evidence of the Respondent as to the conduct of this meeting.
40. The Claimant alleged that no process was followed and that there was no investigation and he alleged that the Respondent had no intention of carrying out any real investigation or any disciplinary process. There was no evidence that this was the case; the Claimant had offered his resignation at the start of the meeting before any investigation could commence. The Tribunal also found as a fact that the Claimant resigned to avoid facing a disciplinary investigation.
41. The Claimant also alleged at paragraph 26 of his statement that he suggested a formal investigation should be commenced if there was an allegation of theft or doubts about his honesty and on suggesting this, Mr Sthapit and Mr Gafre answered back at him "**enough is enough**" and stated that they were about to call the police. The Claimant stated that he was being harassed, blackmailed, threatened scared and intimidated and felt trapped. He accepted in cross examination that this was another complaint that had not been referred to in his grievance letter, although he denied that it was a further embellishment the Tribunal conclude that there was no consistent evidence before the Tribunal to support this version of the events. There was simply no evidence that he asked for the matter to be investigated; the consistent evidence before us was that he had, at the very least, admitted to lying and to taking a product without paying for it. He accepted he had tried to exchange it for a full price item, there was no evidence that he asked for a full investigation. The Tribunal also noted that this factual element of his claim was not referred to in his ET1 or in any contemporaneous documents. We conclude therefore that this complaint has no factual validity and amounts to a further embellishment.
42. The Claimant was then provided with a piece of blank paper by Mr Sthapit and he stated at paragraph 27 of his statement that Mr Sthapit "suggested what I should write" and he wrote down what he was told. It was Mr Sthapit's evidence that the Claimant wrote his resignation letter and he did not encourage or pressure the Claimant into resigning. Mr Gafre's evidence was that it was the Claimant who asked for a piece of paper and

stated that it was his intention to resign to avoid disciplinary action. Mr Gafre denied that he coerced the Claimant into resigning and denied that it was suggested he should resign.

43. The Claimant denied that Mr Sthapit left the room at any time and denied that he left to speak to Ms Armstrong of HR. However both Mr Gafre and Mr Sthapit confirmed that Mr Sthapit spoke to Ms Armstrong to seek advice as to whether they could accept his resignation; she advised that the resignation letter should be witnessed by an independent manager (see paragraph 36 of Mr Gafre's statement). The Tribunal note that Ms Armstrong corroborated the evidence of Mr Sthapit and Mr Gafre and on the balance of probabilities the Tribunal conclude that Mr Sthapit left the room and sought advice as to how to proceed.
44. As a result of the advice given, Mr Ferreira, another manager who worked in Mr Sthapit's department, witnessed the Claimant's signature. When he arrived in the room the letter had already been written. It was his evidence to the Tribunal that the Claimant signed it in front of him "pretty willingly" (paragraph 4) and he then signed to witness it.
45. The resignation letter was at page 118 of the bundle and it stated as follows "**Dear Simon, I hereby wish to resign the Company, do accept my resignation please**". It was signed by all who were present in the room. The Tribunal find as a fact that the resignation letter was written by the Claimant; there was no credible evidence to suggest that either of the Respondent's witnesses dictated the terms of resignation letter or that they applied undue pressure in the meeting to coerce the Claimant to resign. The grievance document gave no indication that the terms were dictated as he stated that "Vic gave me piece of paper to write the resignation then I wrote that I will resign the Company". The Tribunal conclude after taking into account all the facts that the letter was not dictated by the Respondent, it was written by the Claimant in order to avoid facing disciplinary action. We also conclude that the meeting was conducted fairly and reasonably and did not amount to undue pressure or discrimination because of the Claimant's race and religion or belief.
46. It was the Claimant's evidence that Mr Sthapit had decided to get rid of him because he didn't like him and he was a problem. He told the Tribunal that he felt that Mr Gafre had agreed to Mr Sthapit's "plan" because in 2014 he had complained about Mr Gafre's rude and aggressive approach towards him and the Claimant concluded that he wasn't happy with him.
47. The Claimant made no accusation against Mr Gafre of discrimination, this allegation being withdrawn at the commencement of the hearing. The Claimant's case was that Mr Sthapit acted as he did on 20 July and 7 August because he personally disliked him and had started picking on him in 2015 and he concluded that this was due to them having different ethnic backgrounds as the Claimant is from Pakistan and Mr Sthapit from Nepal. The Claimant also stated that he is a Muslim and Mr Sthapit is a Hindu. However the evidence before the Tribunal was that that Mr Sthapit is a Buddhist and there was no evidence of less favourable treatment because of religion or belief. Although the Claimant alleged that Mr Sthapit would sit with people of the same ethnic and religious background in the canteen, it was put to the Claimant in cross examination that Mr Sthapit had breakfast

with his Muslim colleagues every Sunday. There was no consistent evidence before the Tribunal to suggest that Mr Sthapit treated those of the Muslim faith or Pakistani employees less favourably than he treated other employees not of that faith or ethnic origins.

48. The Claimant had provided no evidence to suggest that Mr Sthapit had decided that he wished to get rid of the Claimant and there was similarly no evidence that Mr Gafre or Mr Sthapit had formed a negative perception of the Claimant after he had raised a grievance. All the evidence before the Tribunal suggested that the grievance had been resolved and a positive working relationship had been established. This was illustrated by Mr Gafre's interceding in the incident on the 20 July to try and sort matters out. There was also no evidence to suggest that the Claimant had been treated less favourably because of race, religion or belief; the Tribunal accept the evidence of the Respondent that if any employee had been suspected of dishonesty or theft, an investigation would have to take place with the option of involving the police (although the Tribunal heard that this would be unlikely for an offence involving only £7).
49. The Claimant's case was that he was constructively dismissed. He stated that he was threatened and told what to write and it was made clear to him he would be dismissed and would face criminal charges "**based on lies and exaggeration**". He stated that Mr Sthapit "**had it in for me because of my race and religion**". He stated that he had no choice but to resign. The Tribunal find as a fact that the Claimant resigned, he was not dismissed. There was no evidence of coercion and the Claimant's recollection of the events given in Tribunal were inconsistent with his own grievance. The Tribunal conclude that where the Claimant and Respondent's evidence conflicted in relation to the conduct of this meeting, we prefer the evidence of the Respondent as their evidence on the whole was found to be measured and consistent. We conclude that the Claimant resigned rather than face a disciplinary process and possible criminal charges, there was no evidence that the conduct of the meeting amounted to a fundamental breach of the common law duty of trust and confidence.
50. The Claimant also referred to being called names by Mr Sthapit such as "Paki" "Bastard" and Taliban" in or around September 2015 on about three or four occasions; he told the Tribunal that he had complained about Mr Sthapit's behaviour to Miss Carter and to Mr Gafre. However, there was no evidence before the Tribunal that this was the case (see his statement at paragraph 46). The Claimant did not mention this in his grievance letter to the Respondent written after his employment had ended (see pages 121-5) because he hoped he might get his job back and he felt therefore if this was included in his complaint letter things will become worse for him should he re-join the company. The Claimant also stated that he had not informed his solicitors of this additional complaint and his delay in mentioning it was due to stress and depression. He accepted in cross examination that his claim form was written by Counsel and it made no mention of this allegation. He also accepted that at the time he signed his statement (25 May 2017) he had been signed off with anxiety and depression (see page 181 of the bundle) but there was no evidence that at the time his ET1 was presented (19 December 2016) he was suffering from depression and he did not visit his GP until May 2017. The Claimant

told the Tribunal that before that date he was taking “over the counter” medication.

51. The Tribunal find as a fact that there was no evidence that the Claimant was called offensive names at any stage of his employment; these were serious allegations which the Tribunal conclude he would have mentioned at the time, if they had been true. There was no consistent evidence that the Claimant had been suffering from depression at the time he instructed solicitors which prevented him from mentioning the alleged racial abuse. The Tribunal heard that the Claimant had previously raised a grievance during his employment, which had been dealt with professionally which resulted in a successful outcome. There was no reason why such a serious complaint, had it occurred, would not have been raised at the time. We conclude that the allegation of offensive name calling are unreliable and inconsistent.
52. After his employment ended the Claimant sent a grievance document which was at pages 121-5 of the bundle. This was handed to his ex-colleague Carol at the end of August 2016. The Claimant said he wrote this on 23 August 2016. Ms Armstrong accepted she was handed this letter and read the contents but did not investigate because she was waiting to speak to the Claimant first. The Claimant accepted that he failed to mention in this document a number of matters that he sought to rely on in Tribunal.
53. In relation to the first incident on the 20 July the Claimant failed to mention that there was a minimum charge for petrol which he accepted was an embellishment. The grievance also failed to mention being called “Paki, Taliban and Bastard”. The Tribunal conclude that this corroborated our view that this allegation was without foundation.
54. The second document at page 123-5 dealt with the incident that led to dismissal. In this document the Claimant stated that he had “lied to him about a week to 10 days ago and don’t have receipt for that (the glue). He kept both, deep heat cream and glue and ask for me to go”. This sentence corroborated the Respondent’s evidence that the Claimant had lied to them in the meeting about not paying for the glue and this was corroborated by the Claimant in his own document on the same page where he states “I got scared and told them the truth that I did not pay for it, it was clear to zero product”. On the last page of this document the Claimant made reference to the alleged threat made in the meeting that he would be “arrested and walk in front of the staff” unless he resigned. The Claimant admitted that he had not paid for the product and he accepted that he was trying to exchange the product for an item worth £7 which corroborated that this was an act of dishonesty.
55. Ms Armstrong was away on annual leave from the 22 August to the 5 September and received the Claimant’s written complaint on or around the 9 September 2016. She met him at a local McDonald’s on the 7 October 2016, after the Claimant had contacted his old manager. No notes were taken of this discussion (however the Claimant gave his account of the meeting at paragraphs 36-38 of his statement). In Ms Armstrong’s statement at paragraph 9 she stated that the Claimant admitted to her that he had taken a zero to clear product and was trying to swap it for a full

price item. She also recalled that he stated that he had resigned "in order to avoid disciplinary action and because he felt intimidated by Mr Sthapit". She asked why he felt intimidated by Mr Sthapit and he replied that he "could look into the Claimant's full transaction history" and that he had shouted at him before. This evidence was consistent with that given by the Respondent's other witnesses that the Claimant resigned in order to avoid a disciplinary hearing and that Mr Sthapit's behaviour only consisted of raised voices and frustration not of physically aggressive or intimidatory conduct.

## **The Law**

### **Employment Rights Act 1996**

#### **95 Circumstances in which an employee is dismissed**

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

(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.

#### **98 General**

(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--

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) 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--

(b) relates to the conduct of the employee,

(4) [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.

### **Equality Act 2010**

#### **13 Direct discrimination**

(1) 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.

### Closing Submissions

56. The submissions were oral and in outline Respondent's submissions were as follows:
57. This case turns on credibility and in my submission, the Claimant's credibility is shot to pieces. I refer to paragraphs 42 and 46 of his statement and these are the allegations that go to the root of his claim for discrimination. The question of abuse goes to the root of how Mr Sthapit treated him, we hear nothing of this until weeks before the trial. We heard about the Claimant's stress and depression but at pages 181 to 182 show that this was provided in May 2017 when he signed his statement. This goes against his explanation and there was no evidence of his state of health. When he presented his claim and at the preliminary hearing where the issues were confirmed and even in cross examination, his evidence was muddled.
58. The Claimant said he was on medication from mid-May and suggested that he took medication from over-the-counter prior to then, I ask you to treat this with caution, one would expect this to be supported by proof. You will also note that the Claimant was able to instruct Mr McCracken f Counsel to draft his claim form and the central allegations were left out of his claim form and not mentioned in the preliminary hearing.
59. The allegations were vague and un-particularised and totally illogical. There was no reason why Mr Sthapit would suddenly in September 2015 make these comments. The Claimant originally said he thought they were a joke. Then he changed his mind, one couldn't see how he would see them as a joke. It all stopped in September 2015 when he said he complained to Emma that this runs counter to his evidence that he was too scared to complain.
60. On the morning of the hearing, the Claimant without reason, withdrew his complaint against Mr Gafre but he has now bolstered his complaint against Mr Sthapit. Mr Sthapit said he was a Buddhist and he believed everyone should be treated equally; he also told the tribunal he had breakfast every Sunday with other Muslims. He had never had a complaint like this against him before. He said he would never use the word Paki as he has been called this name as it is a term of abuse against Asians. The Claimant's evidence is so tainted you should not believe anything and if there is a conflict in evidence you should prefer the Respondent. He has bolstered his evidence and Mr Sthapit's evidence goes against it.
61. In relation to incident one, much has been made about the Claimant's evidence at paragraph 3. Mr Gafre asked him to work at the Kennington store. It doesn't say that the Claimant was paid in cash for expenses and this was denied by Mr Gafre and I ask you to accept his evidence. You should not get bogged down with policy issues as the Claimant was not dismissed for breaching them. The Tesco policy says that mileage is paid

at 35p and the evidence of Mr Gafre was he told the Claimant to write down the mileage and come back to him and that makes sense. Mr Gafre was a believable witness and a caring manager, his evidence was cool calm and collected, this can be contrasted with the Claimant's evidence. as The Claimant raised a grievance against Mr Gafre about the way he spoke to him and afterwards he shook hands and he withdrew any complaint against him and this is also reflected in the fact that he withdrew all race and religious discrimination allegations against him in these proceedings. The Claimant was told to write down his mileage and return with the figures. The Claimant did not do this. The Claimant told the tribunal he looked for Mr Gafre but I say that is unlikely. He went to the canteen, then to the shop floor and it is accepted this is a big store. It is unlikely he would wander around the store aimlessly. I say it is more likely that he went directly to the Customer Services Desk to ask for his money, to hand over his receipt for petrol and ask for £12 and to suggest that the manager had authorised it. In my submissions a lot of evidence points towards this interpretation.

62. At paragraph 6 of the Claimant's statement he said he went to the Customer Service Desk and asked for Mr Gafre but Mr Sthapit was called. It is more likely that Manu was suspicious so he called Mr Sthapit, or he wanted to clarify with him as to whether the £12 was authorised. The Claimant accepted he did not know what Manu said but what he does accept was that Mr Sthapit asked him why he went to the Customer Services Desk to ask for the money. I suggest there are three possibilities firstly that Manu told him this, secondly, that there was a misunderstanding as to what was said but there were no negative motives and thirdly, that it is an outright lie. This is very unlikely.
63. This is a fundamental point about this conversation, Mr Sthapit having spoken to Mr Gafre had a genuine belief that the Claimant had tried to claim £12 because the Duty Manager had authorised it. He had a genuine belief that he had made this up because neither he nor Mr Gafre had authorised it. Mr Sthapit accepted he made assumptions which turned out to be false, but he had genuinely held the belief that the Claimant had done something wrong. He either had good reason or a mistaken belief, but this was not discrimination. Mr Sthapit did himself great credit and accepted he made false assumptions, this is credible evidence. No wonder he was frustrated when a staff member was arguing. Sometimes there are disagreements and frustrations but no racial hatred. The tribunal should use its industrial experience.
64. I say it is extraordinary that the Claimant is going down the route of why didn't you discipline me; maybe Mr Sthapit gave the Claimant the benefit of the doubt and credit to Mr Gafre for intervening, the idea that they colluded later does not make sense. This shows that Mr Sthapit was not hostile.
65. I also want to emphasise the Claimant's evidence is ridiculous in his claim form. He said Jenny was present and the meeting took place on the shop floor, it was changed in his statement and he accepted in cross examination this was an error. This is a big error to forget who was there, and where the meeting took place. I say it is likely that he only corrected his statement at this stage as the contemporaneous evidence did not



include that he was forced to change his evidence, either the claim form had a serious error or there are serious issues as to his credibility. It is agreed that this was a private conversation.

66. The Claimant's description of the incident is ludicrous. He talked about Mr Sthapit's eyes bulging, nostrils flared and there was a dispute of fact as to whether Mr Gafre was there. He stated he felt scared and that he felt that he could have hit him. He described the incident as 5 to 6 minutes of Mr Sthapit walking up and down. He was angry and furious. These were embellishments I put to him he was making it up. Mr Gafre was clear and was watching and I ask you to accept his evidence.
67. With regard to incident the point about EPW made by the Claimant that these were damaged items, but not suitable for zero to clear I ask you to accept Mr Gafre's evidence on that point.
68. On the day in question the Claimant accepted he was on the Customer Services Desk and accepted it was not his department and he was not allowed to shop during working hours. It was unusual for him to be there and Mr Gafre thought he may be asking for a cleaner; there was no surprise therefore that he was approached. It was Mr Gafre's evidence that the Claimant was nervous and his face dropped and the reason for this was that he feared he may be caught. This is key. The Claimant accepted he had lied to Mr Gafre, his evidence was that he purchased the item but he didn't have the receipt, this was a lie. When I asked him why he lied, he said he was scared ask yourself why that was. Why was he scared if he had nothing to hide? Why, if he had previously suffered racial abuse and it had stopped and he knew about the complaints procedure, didn't he complain? He was scared because he had lied and he had something to hide.
69. Mr Gafre's evidence was consistent on the broad chronology and my Learned Friend may make something of the inconsistencies. You can forgive this because it happened over a year ago; the cross examination of him was not entirely structured. I say that the chronology is the same, that the Claimant said he purchased the item, he said he bought the item on the privilege card, the Claimant admits he was asked to hand over his privilege card and one has to ask why would Mr Gafre for the card if the Claimant had not raised it? Even on the Claimant's narrative Mr Gafre was asking for help. What happened was the Claimant was hanging his case on the truth and trying to stay as close to the truth as possible. Mr Gafre then goes back and forth and with help from Mr Stapit, who had greater experience on using the computer system. Zero to clear then came up and he checked that for the reasons stated in his statement.
70. Mr Sthapit in cross examination and re-examination said he missed facts out of the chronology in paragraph 20, he said the Claimant mentioned zero to clear at that point, because Mr Gafre had already checked prior to the meeting so part of the chronology was missed. This added to the suspicion they already had refunds that had come before. He therefore had ample suspicion to start a process. Mr Sthapit was called to take notes and you have heard the reason why he was called which was because it was Sunday and HR was not on site and not many managers worked that day. The Claimant was given a chance to explain and Mr

Sthapit left the room to get some paper and soon after the Claimant admitted theft. The Claimant was adamant that no one left the room to speak to Ms Armstrong, however, Ms Armstrong remembered the call as it was on her day off. She had no motive to make it up. Mr Sthapit said in cross examination if they wanted him out, why speak to HR? Why get another manager to sign his resignation? Are they masterminds trying to cover their tracks? They could have taken notes to cover their position. However, the Claimant admitted theft and they got advice from HR and followed it. This is the simplest explanation and the truest.

71. The Claimant's explanation is ludicrous, one thing that stuck out was I asked why he did not ask to leave the room and he said he was scared and lost his senses; he also stated that they were repeatedly shouting at him like he had a gun to his head and he threatened him 10 minutes and marched around. This beggars belief. It is simply not credible that Mr Gafre shouted at him.
72. This does also beg the question if Mr Sthapit was in charge, as it was noted that the resignation letter was addressed to Simon. The evidence of Mr Ferreira was important about the signatures on the letter, what is more important is that none of us here were in the room at. He did not feel any tension.
73. On the Claimant's version of the events, if after 10 minutes of bullying he had lost his senses, Mr Ferreira would have detected something different in the room. What he detected was the Claimant was comfortable because he had decided to resign.
74. At paragraphs 25 to 26 there are embellishments in the Claimant's evidence, these allegations do not appear in his letter.
75. In respect of the aftermath, the Tribunal is to be cautious about the text messages in the bundle. There is no live evidence and no context. You only have the Claimant's view, which is totally unbelievable. His own letter at page 123, which he says was written on 23 August it could not have been because he referred to an incident that happened "a week ago", which, on his own evidence happened at the end of July. What Ms Armstrong attempts to do was to get in touch with him and she met with him, she did not investigate before as she wanted to meet him first. The tribunal will have industrial experience. They will want to hear from the person and also what they want out of it, Ms Armstrong said the Claimant did not get in touch before because he was embarrassed.
76. Based on the questioning, the Claimant will say it is a cover-up and the managers had done something wrong, but the evidence before you came nowhere close. There is no suggestion of a cover-up.
77. I say the claim for race and religious discrimination should be dismissed because it is based on lies. In the case of the unfair dismissal complaint and the incident on 20 July, I say nothing done in that meeting was wrong. It was justified on the basis of what the Claimant done and the conversation took place in private, therefore there was no breach of the duty of trust and confidence.

78. On the second matter, Mr Gafre was entitled to start an investigation as there was ample evidence before him and there was no threat or coercion. The Claimant resigned willingly to avoid an investigation. I say there was no dismissal or forced resignation. The evidence before you show he resigned willingly and is not entitled to notice.
79. On the issue of whether the claim is out of time we say the first incident was out of time. I say it is not a continuing act.
80. With regard to the grievance. The Claimant put in a grievance too late. He didn't raise a grievance about discrimination at all. I say that the giving and timing of the grievance should require any damages to be reduced by 25%. My primary submission was that he withdrew the grievance because Miss Armstrong left it with him and he never got back to her. I say there was no live grievance.
81. The **Claimant's closing submissions** were oral and in outline they are as follows:
82. This case is based on credibility and the facts, I will firstly respond to the Respondent's submissions.
83. With regard to time issue, I do not accept that the incident on 20 July is out of time. You have to look at the date of the early conciliation certificate which was dated 21 November, the ET1 was dated 19 December therefore the 7 August was in time. It is ridiculous and ludicrous to suggest that the Claimant withdrew his grievance. Ms Armstrong did not say that the Claimant said he did not want to do anything about his grievance. It is not suggested that he did not write the grievance on 21 August, he is referring to the week before 7 August. Ms Armstrong said she got the grievance because Carol handed it to her on 23 August but she did not say to the Claimant when did you write the letter.
84. Why would the Claimant be scared of Mr Sthapit on 20 July? Mr Gafre had allowed him to shout at the Claimant. The Claimant made a complaint about Mr Gafre before and about how we spoke to him, maybe he was concerned about how he would be spoken to again by him. Hassan told Mr Sthapit that the Claimant had done this sort of thing before and he told me that this was in his mind and I say that is significant; they embellished their defence to make the Claimant look worse than he was. If Mr Gafre was suspicious that was wrong and unfair and not consistent evidence.
85. The submission that the management witness Mr Ferreira gave good evidence, I dispute that he only went into the room to sign the paper it does not suggest that everything was hunky-dory; his evidence was that the Claimant was "pretty willing" but he couldn't explain what he meant by this.
86. When Manu rang and spoke to Mr Sthapit, he was in the room with the Duty Manager, that meant nothing. The Claimant had no reason to know that Mr Gafre was not still the Duty Manager.
87. My submission made on the EPW point, all we heard was Mr Gafre said he looked at something on the computer and it was at full price, he

concluded it was not zero to clear. There could have been a problem with the glue. It could have been given away, the mere fact it was at full price does not mean that he was entitled to conclude that the Claimant was not telling the truth.

88. It is serious and worrying that the Claimant's allegations about verbal abuse were not in the statement. The first day of the hearing concluded the Claimant made clear he didn't say that Mr Gafre had discriminated. The Respondent says all the Claimant's evidence is tainted as the first time the evidence is mentioned is in his statement, however I say you should reject all of the Respondent's evidence as they embellished their evidence and added to it. Yes, the Claimant added to his evidence, but didn't make things up.
89. Mr Sthapit was not calm and collected, even if Mr Gafre was. Mr Sthapit does not like people talking over him or disagreeing. In my submission, it is unlikely that the Claimant would spend 10 minutes looking for Mr Gafre, why would that be? Why would the Claimant think the words used to him were a joke for example, the word Paki?
90. My last point in reply is that the Claimant's evidence was that he did not see a proper GP until May 2017, which was when he wrote his statement and the medication helped him to remember better.
91. There are two issues firstly on 20 July 2016. It is clear that Mr Sthapit was angry with the Claimant. He was honest that he made an assumption and accepted. He made an assumption and it took me half an hour to get that concession. I took him to the ET3 and asked him why he was frustrated in his statement and in the ET3. He stated that the Claimant knew the correct procedure for claiming expenses, he stated he knew this meant filling out a form and the mileage was limited and it will be paid by BACS. All accepted there was no reason to believe he had ever filled out a form or ever claimed expenses. Also going to another store was not covered by procedure, Ms Armstrong accepted that this was not covered.
92. Mr Sthapit accepted he made three assumptions that were wrong and he was frustrated because he wrongly made an assumption. He accepted he used the term defrauded and that is what Simon said, he attempted to suggest that it could be deemed to be fraud but no, I say defrauded; I also say he said he was stupid.
93. On 20 July the Claimant did nothing wrong, there was no evidence the Claimant asked for the money and no statement was taken from Manu and I asked why not. There was no evidence the Claimant said give me the money now.
94. Mr Sthapit's explanation, which is new and not in his statement as to why he did nothing about the allegation that the Claimant had defrauded the company was that Simon said he would speak to him. I say that is ridiculous and ludicrous.
95. The Claimant was treated like a criminal by Mr Sthapit on 20 July, he could not be bothered to follow proper procedure or ask advice that may explain why the Claimant was so afraid on 7 August.

96. On 7 August did the Claimant ask to resign or was it suggested or was he forced to resign? I say it was put in his head by Mr Sthapit. He wanted the Claimant gone. The Claimant did not admit that he stole he did not admit that I take you to pages 121 to 125 of the bundle; he said he lied. The Claimant admitted that when he first told him that he purchased the glue, he said it was zero to clear and he accepted that this was wrong. He did not admit to stealing and it wasn't stealing. He kept saying the Claimant was a good worker and this was not a disciplinary and there was no investigation. So why would he just resign?
97. There are inconsistencies in the ET3 and the statement normally when the ET3 refers to people they usually have some input into the drafting of it. It is serious if things are said in the form that people did not say. With regard to Mr Gafre, the ET3 was put to him that the Claimant gave various dates and he added four were paragraphs in the statement that were embellished. There was no evidence the Claimant asked customer services for a refund, Mr Gafre's statement makes no sense, the Claimant was second in the queue when was he told he had already asked someone for the cash? His recollection was wrong. He was queueing up and the Claimant asked to change the glue for deep heat. He did not ask for a refund.
98. With regard to zero to clear, I have already dealt with that, Mr Gafre said the Claimant did not mention any particular manager, but he did not ask. The only contemporaneous documents were the Claimant's letters written on 23 August apart from his letter of resignation.
99. All complaints are in the grievance written by the Claimant, it doesn't mean it was true, but it was his evidence one year ago and it is the same now. It would help if notes were made at the time where the Claimant is alleged to have said he stole it, and this was admitted by Ms Armstrong. In Ms Armstrong statement, there are the general comments but there is no detail of her saying that she would arrange representation. He took that as getting someone to witness signing his letter. There were no notes, it would be great if Ms Armstrong investigated.
100. Mr Sthapit's evidence was he was just the note taker but Ms Armstrong's interpretation was that they were doing it together. He was not just a note taker. He had no intention of taking notes because he wanted no record of them pressuring Claimant into resigning. Why didn't he tell her they have spoken to him and I ask you to accept that the Claimant asked for Nathan Best to accompany him. No one would allow someone to advise before allowing someone to resign, the manager was only called in to sign and witness the signature. Why didn't they put off by giving him a suspension letter?
101. There were two senior managers who bullied the Claimant into resigning, the Claimant was scared. The Claimant had partly lied to them and changed his story.
102. What happened after 7 August, although not relevant to the dismissal, it provides support for the case. I say that Ms Armstrong just ignored the Claimant's complaint and did nothing. She said Carol told her

that he did not want them to speak to anyone. Why didn't she speak to him? There was no telephone conversation with the Claimant. It is new evidence and not in the ET3. Page 118-9 refers to a letter she said this was a mistake, but it's not in her statement, I do not accept either letters were sent. Clearly Ms Armstrong had a discussion with Carol and/or David. I ask you to find as a fact that they gave her the Claimant's new address, she just didn't bother to use it.

103. The Respondent has known about the text messages for a while they both work for the Respondent and there was consideration being given to reinstatement and suspension. The Claimant should be reinstated and investigated. However his grievance did not get dealt with it and it was never withdrawn.

104. Turning to the disciplinary it is not alleged that the verbal abuse is discriminatory. Yes, the Claimant makes allegations for the first time in his statement yes it looks bad, but it doesn't necessarily go to his credibility. Another allegation the Claimant made for the first time was that he explained why he felt that Mr Sthapit would discriminate against him and why Mr Gafre had it in for him. Mr Gafre refused to accept it was a complaint and didn't clarify as paragraph 8 of his statement that he never had a complaint against him before. Why didn't he clarify? He didn't accept the Claimant going to HR and thereafter HR speaking to him, this goes to the Claimant's evidence we now found one of them is true, although said that the first time, the statement doesn't mean it's not true. We accept that Mr Sthapit is a Buddhist, but we don't accept he regularly sat with those of Muslim background. Whether or not he is a Buddhist doesn't mean he couldn't use the expression, I ask you to find that he did use that expression. Mr Sthapit had no good reason to conclude and act as he did on 20 July and on 7 August.

105. The **Respondent replied** on the time point; the incident was on 20 July, therefore the time limit ended on 19 October early conciliation was on 21 October. It is out of time. With regard to the queue referred to by my Learned Friend Mr Gafre said someone came and spoke to him. The contemporaneous statement is self-serving.

## **Decision**

The unanimous decision of the Tribunal is as follows:

106. The Tribunal will first deal with the issue of the credibility of the witness evidence. It was noted that all witnesses in this case had cause to withdraw or add to their evidence. Mr Gafre conceded that the Claimant had complained about him before and therefore his statement where it referred to having no disputes with the Claimant in the past (at paragraph 7) was wrong. The Claimant conceded that he was mistaken about where the dispute occurred on the 20 July and was also mistaken about the presence of his colleague Jenny. Both the Respondent's witnesses conceded that the ET3 (which they had not seen prior to it being presented) was wrong when it stated at paragraph 4 (page 23 of the bundle) that the expenses policy was explained to the Claimant by Mr Gafre. Mr Gafre also conceded that he did not inform the Claimant that he would be suspended as they did not get that far into the process therefore

paragraph 20 (page 26) of the ET3 was wrong. The Tribunal accept that witnesses sometimes may be mistaken or get facts and details wrong and even where their evidence may be unreliable in some aspects, this does not undermine other parts of their evidence. In all the examples given in this paragraph the inconsistencies did not undermine the credibility of the witnesses in other respects.

107. The last issue on the consistency or credibility of evidence was that the Claimant raised for the first time in his statement that he was subjected to racist name calling by Mr Sthapit where words such as Taliban, Bastard and Paki were used. It has been put to the Tribunal that although the failure to refer to this evidence was serious and worrying, it has been put to us that the medication somehow helped him to remember. In his statement, he gave the reason for not mentioning this allegation in his grievance was that he hoped to get his job back. The Claimant stated that he failed to mention to this allegation to his solicitor because he was suffering from stress and depression.
108. There was no evidence before the Tribunal to suggest that the Claimant had suffered memory loss or that he was suffering from a medical condition that was likely to affect his memory or recollection. There was no medical evidence to support this and the Claimant's evidence to the Tribunal lacked detail and substance. The Tribunal conclude that the Claimant's explanation of why he failed to mention this serious incident was not credible. We also conclude that the allegation that Mr Sthapit was alleged to have called the Claimant Paki, Bastard and Taliban "in or around 2015" lacked credibility because the Claimant was unable to provide any times or dates of when this occurred. The Claimant's failure to mention this in any document before the production of his statement leads the Tribunal to conclude that this evidence was entirely false and without merit.
109. The first matter before the Tribunal is whether the incident on the 20 July 2016 is a one off act and if so whether the ET1 was presented in time. We have found as a fact that this was a one-off act and therefore it is out of time. We have found as a fact above at paragraph 26 that there was no evidence that this was part of a continuing act or one of a series of complaints that would make the complaint in time. This is out of time and is dismissed
110. However even if we are wrong on the time point, we have concluded as a fact, after considering all the evidence, that the Claimant was not treated less favourably because of race and/or religion and belief in this meeting. Although the evidence was consistent before us that Mr Sthapit exhibited frustration during this meeting and the Tribunal witnessed that Mr Sthapit his frustration when being cross examined, the Tribunal conclude that his frustration was due to the Claimant's attitude in the meeting (that Mr Sthapit was 'making a fuss' and he felt that he had 'done the company a favour'). There was no evidence that Mr Sthapit exhibited frustration because of the Claimant's race or religion and belief. The Tribunal also preferred the evidence of the Respondent's witnesses to that of the Claimant on the conduct of this meeting, we found the Claimant's evidence about the demeanour of Mr Sthapit to be significantly embellished as we found as a fact about at paragraph 16-24.

111. We conclude that a hypothetical comparator of any race, religion or belief who had displayed such an attitude in a meeting after trying to claim expenses that were not due to him under the correct interpretation of the policy, would have been treated in the same way by a manager who had wrongly assumed that the employee was aware of the expenses policy. We conclude therefore that the Claimant has failed to show that he has been treated less favourably because of race, religion or belief. The Tribunal also conclude that displaying frustration in a meeting cannot of itself amount to a fundamental breach, and there was no consistent evidence to suggest that the Claimant was called stupid or a cheater as this was denied by Mr Sthapit however the Tribunal conclude that he was accused of fraud. As the Claimant, did not resign as a result of this incident and raised no concern with line management or HR at the time we conclude that even if it had amounted to a breach he acquiesced and worked on without complaint.
112. Turning to the Claimant's claim for constructive unfair dismissal, the Claimant relies on four matters (see above at paragraph 6(a)(i) to (iv)). The first incident we have concluded above does not amount singly to a breach and the Claimant did not resign and worked on without complaint.
113. The second point is whether Mr Gafre commenced an investigation into the Claimant's "purchase" of the glue and we have found as a fact that this is not consistent with the facts before us. The consistent evidence of all the parties is that no investigation took place because the Claimant resigned. However even if the Respondent had commenced an investigation, this would not have been a breach of the common law duty of trust and confidence as this would have been provided for under the Respondent's policies and procedures and would also have been a requirement under the ACAS disciplinary procedures. It was noted that the Claimant's evidence in chief at paragraph 28 accepted that it would be appropriate for the Respondent to take formal disciplinary action if they had thought that he had stolen from them, this was clearly a concern in their mind and supported by the admission made by the Claimant that he had not told the truth and admitted that the glue had not been paid for and he was attempting to exchange it for a full price product. To take preliminary steps to investigate cannot amount either on its own or together with other incidents amount to a fundamental breach.
114. The next allegation relied on by the Claimant in support of his claim for constructive unfair dismissal is that Mr Gafre and Mr Sthapit threatened him with criminal proceedings. The Tribunal conclude on the facts that there was no evidence that this was the case. We preferred the evidence of the Respondent as to the conduct of the meeting, there was no consistent evidence that the Claimant was "threatened with criminal proceedings" at its highest he was informed that the police "could" be called in cases of theft but this did not happen. Although the Claimant also alleged that he was "threatened" with dismissal we conclude that this would not amount to a fundamental breach. The allegations against the Claimant were serious and were offences of dishonesty and could potentially amount to gross misconduct. There had yet to be an investigation or a disciplinary procedure but pointing out the seriousness of the allegations after the Claimant had admitted (at the very least) to



being dishonest and lying in the meeting, could not of itself or with the other matters raised in this meeting, amount to a fundamental breach.

115. The last allegation was that the Claimant alleged that he was instructed, coerced or encouraged to “write a resignation letter”. The Tribunal prefer the evidence of the Respondent that the Claimant offered to resign and did so of his own volition. This was corroborated by the evidence of Mr Sthapit and Ms Armstrong their consistent evidence was that a call was made in order to obtain advice on whether the resignation should be accepted; the Tribunal conclude that if there had been some ulterior motive at play, it would be highly unlikely that Mr Sthapit would seek advice from HR. The Claimant’s grievance letter at pages 123-5 did not state that he was instructed coerced or encouraged to resign, he stated that he informed the meeting he “did not have any option expect (sic) resign” and he the said that he “can resign then” and he was given a piece of paper and wrote the letter. He did not say in his grievance letter that the letter was dictated to him and he was not told what to write, the letter was in his own words and was addressed to Mr Gafre, there was no credible evidence of coercion or that he was pressurised into resigning. The Tribunal conclude on all the evidence that the Claimant resigned to avoid a disciplinary process. His claim for constructive unfair dismissal is not well founded and is dismissed.
116. There was no evidence that Mr Sthapit treated the Claimant less favourably because of race or religion and belief in this meeting by “threatening him with criminal proceedings”. The Claimant’s evidence was that Mr Sthapit “had it in for him” because of his race and religion but the allegations made against him were found to have no foundation. We conclude that if a comparator employee had been found to have been untruthful to a manager and caught trying to exchange that product that had not been paid for with a full price product, they similarly would have been informed that they had acted dishonestly and an investigation would have commenced.
117. As we have concluded that the Claimant resigned, he is not entitled to be paid notice pay, that claim is also dismissed.

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Employment Judge **Sage**

Date: 25 September 2017