EMPLOYMENT TRIBUNALS

Claimant: **Mr K Grzyb**

Respondent: **Lidl Limited**

Heard at: **Leicester**

On: **6, 9, 10 - 12 October 2017**

Before: **Employment Judge Ahmed**

Members: **Mrs C A Pattinson**
Mr P Martindale

Representatives

Claimant: **In Person**
Respondent: **Mrs Gill Williams, Consultant, Gregsons, Solicitors**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The complaint of an unlawful deduction of wages is dismissed upon withdrawal.

2. The complaints of direct race discrimination, direct and indirect discrimination by reason of religion or belief are dismissed.

REASONS

1. By a claim form presented and ultimately accepted on 6 June 2016 - the Claimant having unsuccessfully attempted presentation earlier - Mr Karol Grzyb brought complaints of unfair dismissal, age discrimination, sex discrimination, race discrimination and an unlawful deduction of wages and unpaid holiday pay. Mr Grzyb is of Polish origin, of white skin colour and of the Christian faith. The Claimant's evidence throughout was given via an interpreter.

2. At a Preliminary Hearing on 11 October 2016, at a time when the Claimant was legally represented, the complaints of unfair dismissal and breach of contract were correctly withdrawn because the Claimant was then (and remains) in

employment with the Respondent. In addition the complaints of age discrimination, sex discrimination and unpaid holiday pay were withdrawn. An amendment to allow a complaint of discrimination by reason of religion or belief of both direct and indirect discrimination was permitted. At the commencement of this hearing the complaints of an unlawful deduction of wages and unpaid holiday pay were withdrawn on the basis that the Claimant intends to pursue those in another jurisdiction along with other claims.

3. The claim form (ET1) as originally presented was extremely brief and simply stated:-

> "I worked more than 8 hours and my employer didn't allow me a lunch break, sometimes before 6.5 hours. Employer books my holiday when he wants. And doesn't give me my contract hours to complite my weekly contract (sic)."

4. When the claim was rejected for failure to comply with the early conciliation requirements, the Claimant re-submitted his ET1 and attached with it a much longer statement which is now found at pages 14-19 of the bundle. Attached to the statement were various enclosures.

5. By a letter from the Employment Tribunal dated 14 June 2016 the statement attached to the ET1 was treated not only as an addendum but also as an amendment to the claim. It thus became the Claimant's particulars of claim. By the time the matter came for a Preliminary Hearing on 11 October 2016 the Claimant was legally represented and a document prepared by his legal representative, Mr Kozik, was prepared and submitted headed "Clarified Particulars of Claim". That set out no more than 3 - 4 allegations of discrimination of both race and religion. Various case management orders were made at the same hearing as to the future conduct of the case including service of a schedule of loss by the Claimant, mutual disclosure of documents, agreement of a common single bundle of documents and mutual exchange of witness statements. The Claimant later wrote to say that he was no longer legally represented.

6. At the start of this hearing, it became clear the Claimant had failed to comply with any of the directions on his part. An application for strike out for failure to serve a schedule of loss and disclosure of documents had been considered but refused, primarily on the grounds that it would be disproportionate. He had still not served a witness statement. The Claimant said that his understanding was that it referred to other witnesses, that is someone other than himself. In terms of the absence of a witness statement we decided that the best course of action was to take the amended particulars of claim as his witness statement at pages 14 – 19 of the bundle.

7. The Claimant was also asked at the start of the hearing what his allegations were as these were not entirely clear from the amended claim. He identified 18 allegations. These allegations are set out below. They are all, with the exception of a few, accepted by the Respondent as being included or referred to a greater or lesser extent to in the amended ET1. Those allegations which were not referred to at all were treated as an application to amend. It was identified that the third and fifth allegations were new as were parts of allegations 8 and 9. We considered the application for an amendment after submissions. Our decision, taking into account all of the circumstances and having regard to the guidance in **Selkent Bus co. v Moore** [1996] IRLR 661, was that the amendment application should be refused. Our reasons were as follows:-

7.1 The application was made at a very late stage in the proceedings. The Respondents had reasonably believed that the 'clarified particulars of claim' had limited the case to no more than 3 – 4 allegations.

7.2 The Claimant had already had two bites of the cherry in amending his claim, both of which had been allowed. There was no reason why this particular application to amend could not have been made earlier, especially when the Claimant had been legally represented. We note that the Claimant appears unhappy with his representation but that is a matter between him and his adviser;

7.3 This was not a re-labelling exercise but new and additional allegations which the Respondent could not reasonably have anticipated;

7.4 The new allegations would be out of time;

7.5 The balance of hardship favoured the Respondent who would not now be able to deal with those allegations as two of them related to a former employee, Mr John Carling, who was no longer with the Respondent.

THE FACTS

8. The facts of the case are relatively straightforward and unless otherwise indicated not in dispute. The Respondent is a well known supermarket. Mr Grzyb has been employed by the Respondent since 3 February 2011 as a Customer Assistant working in the Respondent's Oxford store. He worked almost exclusively on the tills. Until November 2015 his line manager was Mr John Carling, the Store Manager. Mr Carling appears to have left his employment with the Respondent rather suddenly in or about the end of October 2015. Mr Ismail Gokberk, who is of German/Turkish origin, was appointed Temporary Relief Manager for the Oxford Store in November 2015. Mr Gokberk is a Muslim by faith.

9. The Oxford store had been subject to significant operating losses at the time of Mr Carling's departure. Mr Gokberk immediately initiated procedures to curb stock losses where inventory loss was running at approximately £98,000 a quarter. That is roughly the amount of loss one would expect in 3 stores over an entire year. The procedures included regular spot checks on shoppers, including staff.

10. On 23 November 2015, Mr Gokberk was doing his rounds and decided to do a random spot check on items purchased at the Claimant's till by Ms Patrycja Rosada, another member of staff. Ms Rosada is also of Polish origin. Ms Rosada had just finished her shift and was doing her shopping before going home. At that point she would be viewed as a customer and not a member of staff. Mr Gokberk checked the receipt and noticed that one item had not been scanned and thus not paid for. The item in question was a large Lidl shopping bag which costs 59p. He asked the Claimant why it had not been scanned. Mr Grzyb failed to give any or any proper explanation.

11. Mr Gokberk as Store Manager did not have the authority to suspend the Claimant. He spoke to Mr Gary Lowe Brown, the Area Manager, who took the usual routine step of suspending the Claimant. Mr Brown then confirmed the suspension in writing and within the same letter invited the Claimant to an investigation meeting on 30 November. The investigation was to be conducted by Mr Gupinder Singh, an Area Manager.

12. Mr Grzyb failed to attend the investigation meeting on 30 November nor did he respond to any telephone calls attempting to contact him.

13. On 3 December 2015, Mr Brown wrote to the Claimant inviting him to an adjourned investigatory meeting on 11 December 2015. The Claimant failed to attend or make any contact with the Respondent.

14. On 17 December 2015, Mr Grzyb was sent a letter inviting him to a disciplinary hearing on 19 December. Mr Grzyb failed to attend the disciplinary hearing. Neither Mr Brown nor anyone from the Personnel Department could contact him on the telephone number on their records. Mr Brown decided that instead of making a decision in the Claimant's absence to reschedule the disciplinary hearing. On 21 December he wrote to the Claimant to fix the disciplinary hearing for 28 December.

15. By a letter dated 19 December Mr Grzyb wrote to say that he had picked up a letter from the Post Office dated 2 December 2015 (there is in fact no such letter of that date) but had realised that the investigatory meeting would now taken place and it was too late. He went on to say "because my phone is broken, so I immediately write back to your letter". He made no attempt to telephone HR or Mr Brown to ascertain what the state of affairs was and when the next meeting would take place.

16. The Claimant did not attend the disciplinary hearing on 28 December. A decision was made in his absence that he would be dismissed. Confirmation of the dismissal was sent to him on 30 December 2015. All letters sent to the Claimant were sent by first class post and some by Special Delivery requiring a signature. Where a signature was required a note was put through the door for the Claimant to collect the item.

17. On 8 January 2015, Mr Grzyb having received the letter of dismissal appealed against the decision. In a fairly long letter he gave, for the first time, his account of the events of the day in question. He also attended the appeal hearing on 22 January 2016 which was undertaken by Mr Brian Barbara-Reilly, Head of Sales Operations. After hearing the appeal, Mr Barbara-Reilly wrote to the Claimant on 27 January 2016 to say that the appeal was allowed and the Claimant was reinstated. He came to that conclusion because he felt that the sanction of dismissal was too severe and the fact that the bag was not scanned could be put down to a mistake. He did go on to say that the Claimant had failed to engage in the process and that had hindered and frustrated efforts to conduct a clear investigation. Mr Grzyb received full pay during the period of suspension up to the point of his reinstatement.

18. Two days after the reinstatement the Claimant went absent without leave. He returned to work on 26 January 2017 but then went off sick again in April 2017. He continues to be employed by the Respondent but remains on sick leave for stress and anxiety.

19. The Claimant's employment with Lidl was one of two jobs he undertook concurrently. His other part-time job was with BMW. Since October 2013 the Claimant's contractual hours with Lidl had been 20 hours per week. His employment with BMW, where he continued to work until recently, was 30 hours per week.

20. The Claimant relies upon two comparators for his direct race and religious

discrimination complaints. They are Mr James Barker and Ms Abdelgadir Sawsan, both of whom are black and work mainly on the tills.

THE LAW

21. The relevant law in this case is not in dispute. The applicable statutory provisions are all contained in the Equality Act 2010. They are as follows:-

Section 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.

Section 19 - Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, an

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 39 - Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B):-

(d) by subjecting B to any other detriment.

Section 123 - Jurisdiction

(1) Subject to section 140A and 140B 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.

Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

22. In relation to amendments and time limits, the EAT in **Rawson v Doncaster NHS Primary Care Trust** (UK) EAT/0022/08) (at paragraph 14) said that:

"The effect of an amendment is to backdate the new claim to the date on which the original claim form is presented. Once the amendment is granted, the Respondent is thereafter from prevented from raising the limitation defence."

23. In relation to the burden of proof provisions under Section 136 EA 2010 the Court of Appeal has held in **Madarassy v Nomura International Plc** [2007] ICR 867 that in deciding whether there is discrimination, there is a burden on the Claimant to establish a prima facie case (the 'first stage' of the process) and for the Respondent then to discharge the burden of proof in proving the absence of discrimination (the 'second stage'). The alternative approach to the two stage process is to simply ask the 'reason why' for the treatment – that is why did the alleged discriminator did what he did – see for example, **Laing v Manchester City Council** [2006] ICR 1519.

24. The EAT has however recently held in **Efobi v Royal Mail** (UKEAT/0203) that no burden is placed on a Claimant under Section 136(2) EA 2010. However, as this case does not depend upon a detailed consideration of the burden of proof provisions it seems to us that any potential inconsistency between the authorities does not cause any difficulty. Applying the words of the statute, there are simply no facts from which an inference of discrimination, whether of race or religion, can be made for the reasons set out below.

The allegations and issues

25. The 18 numbered allegations are set out below. We use the wording adopted by the Claimant and thus they are set out in the first person:

25.1 "I was not offered holiday on the dates which I applied for it the way others were".

25.2 "I did not get back my written requests for holiday so if I did not get the holiday I have no evidence of this as the forms were not given back".

25.3 "I was asked to work at the till all the time. I could not do other jobs around the shop the way other people (Muslim workers) could".

25.4 "I could not get a holiday [annual leave] at Christmas. My whole family is in Poland and I could only have one day's holiday when the store is closed."

25.5 "My manager John Carling said that if I changed my contract from 30 hours to 20 hours per week I would be able to work the shifts I wanted to work so that I could keep both jobs as I have another job. After my change of contract to a 20 hour contract I was still not able to receive the hours I requested."

25.6 "Subsequent managers did not respect my contract so I was given (e.g 15 hours) not 20, or e.g 20 hours, not 30.

25.7 "Ismail Gokberk asked me to come to work on a Saturday even though he knew it was my day off. I sent him text messages to say I could not come to work but he put my name on the board to inform everyone that I would be at work. So when I did not come everyone was upset because there were not enough workers."

25.8 "I was accused of a failure to scan a shopping bag. This had to do with the fact that new manager Ismail Gokberk said he would do everything possible to get me sacked. He could have planned this together with the girl who came as a customer to my till. She was a Lidl employee. It was at the end of her working day."

25.9 "The girl who came to my till [Ms Rosada] hid the bag or possibly arranged this with my manager. She was not suspended for this. I was suspended."

25.10 "When I returned to work I was given a different log-in to log into the system. It often happened that I had a different log-in even though I should have had my own log-in with my details."

25.11 "Ismail Gokberk told me that as I am not fully available to work in Lidl he will get me sacked."

25.12 "When I was suspended Ismail Gokberk wrote on the notice board that I was suspended informing everybody about it."

25.13 "Due to being suspended I couldn't participate at the Christmas party."

25.14 "Gary Brown did not provide me with sufficient information or enough notice when inviting me to an investigation meeting. He did not contact me by phone and did not give me a sufficient amount of time so that I could contact my trade union rep."

25.15 "James Barker in a similar situation was treated in different way to myself for a failure to scan Barkery items. He was not suspended or sacked because he is black and of a different religion. Same as Abdelgadir Sawsan because she is black and different religion."

25.16 "I was not granted break time even when working 7 hours although workers of other skin colour/religion had break times after 3 or 4 hours. They could also do other jobs in the store to relax whereas I had to work at the till all the time without any break for 7 hours."

25.17 "Patrycja Rosada was co-operating with the manager in sacking me because her husband is a Muslim and she has two children with him. She was treated in a different way [to me] and not suspended. I was sent home straightaway without any investigation.

We should say that the original allegation was: *"If Patrycja Rosada was not co-operating with the manager in sacking me because her husband is Muslim….."* but that does not seem to us make any sense and so the above appears to us to be the allegation.

25.18 "John Carling made me take holiday when I didn't want to and he would write my name on rota to say on holiday. Other employees of different skin colour or religion were given holiday when they asked for it. I was not able to travel to meet my family."

26. The issues are as follows:

26.1 Was the Claimant subjected to less favourable treatment and if so was that because of his race and/or religion?

26.2 Did the Respondent apply a provision, criterion or practice which put the Claimant at a particular disadvantage when compared with persons with whom

the Claimant did not share that characteristic (in respect of the protected characteristic of religion) and if so, was it a proportionate means of achieving a legitimate aim?

26.3 Have the claims been presented in time?

25. Allegations 3, 5 and parts of 8 and 9 were disallowed on amendment. The parts of allegations 8 and 9 which were disallowed relate to an alleged conspiracy between Mr Gokberk and others that had not been alleged in the ET1 or the first amendment.

26. Allegations 2, 6, 12 and 14 were identified by the Claimant as allegations of direct race discrimination only.

27. Allegations 4, 13, 17 and 18 are identified by the Claimant as religious discrimination only.

28. The remaining allegations are of discrimination as to both race and religion.

CONCLUSIONS

29. The determination of this case depends largely upon our findings of fact and the credibility of the Claimant's evidence. Those giving evidence on behalf of the Respondent were Mr Brown, who made the decision to suspend and dismiss the Claimant and Mr Ismail Gokberk who is the alleged perpetrator of the majority of the allegations of discrimination other than allegations 1, 2 and 4 which are against Mr Carling. Mr Carling did not give evidence nor was he called by either party. Ms Keely Pearce an HR officer of the Respondent also gave evidence but she is not the subject of any of the allegations. Ms Pearce helpfully explained how the system of 'bank hours' works and whether the Claimant has been deprived of potential working time.

30. We did not find the Claimant to be an honest, truthful or reliable witness. We came to that conclusion for the following reasons:-

30.1 The Claimant was untruthful in relation to the reason for his absence at the investigation and disciplinary hearings. His evidence was that the Respondents did not contact him as they were relying on an old mobile phone number which he had not used for 4 years and he did not receive the letters at all or in time. As a consequence he says he did not know what was happening until it was too late. He says that his colleagues at Lidl all knew his current phone number and the Respondents could have contacted him on that if they wished or made any reasonable enquiries but did not do so.

30.2 The Claimant's explanations are highly implausible. It is very unlikely that several Special Delivery letters were not received and that the Claimant knew nothing about them. We are satisfied that the Claimant chose to ignore messages and letters. Whilst it is conceivable that one of the notices may not have been received in time as it was only 2 days after the letter was dispatched, the Claimant received a note from Royal Mail telling him that he had an item. Mr Grzyb chose not to collect the item until 12 days later. This was at a time he was suspended and would have expected important correspondence from his employers. His conduct is consistent with a previous occasion in 2014 when he also failed to attend a disciplinary hearing.

30.3 The explanation the Claimant now gives is different to the one he set out in his letter of 19 December 2015 when he said that he could not contact the Respondent because his phone was "broken". In oral evidence, Mr Grzyb said accepted that the phone screen being broken did not prevent him receiving calls. That is not the same as saying the phone number the Respondent had was redundant and abandoned some 4 years ago. Under cross-examination Mr Grzyb added that the old number (on the Respondent's records) was not entirely abandoned in that there was a sim card in it but he did not use that phone for making calls. However, if one looks at the first page of his ET1 the Claimant gives two telephone numbers for contacting him, one of them being the so-called redundant number which he has not apparently used for four years. It is difficult to see why the Claimant would give as a contact number to the Tribunal a phone number which he knew to be redundant and which he had not used for several years. We are satisfied that the Claimant knew the Respondent was trying to contact him and he deliberately chose to avoid the calls, even if took incoming calls only because he would know that the Respondent were trying to contact him.

30.4 The Claimant surprisingly refused to acknowledge that he had received all the pages of his employment contract. The Claimant's evidence was that whilst he had received the first page of the contract, which he could not deny as it bears his signature, he never received the remaining pages, which set out the terms. It was not a case that he could not remember whether he had received the remaining pages but that he *definitely* never received them. It is difficult to see how some 5 years later, and without any specific reason, Mr Grzyb can remember it with such. As it is the explanation is untrue because the contract of employment is in fact referred to by his former legal representative at paragraph 14 of the "clarified particulars of claim". The reason for the denial is obvious when one considers the terms of his contract. Mr Grzyb clearly recognises that the terms of his contract are damaging to his case and contrary to his suggestion that there were set parameters when he would work his hours at Lidl. He case is that he had an agreement Mr Carling as to when he would work his shifts at Lidl but clause 5.1 of the contract of employment states very clearly that:

"In view of the nature of your employment there are no normal hours of work……. You agree to work at such times and on such days that the company may require and/or is necessary for the proper performance of your duties to include when required Saturdays, Sundays and/or Public Holidays."

30.5 The Claimant has not been frank even with his own GP. He did not tell them when he was seeking a sick note (for Lidl) that he had a second job where he was continuing to work. That might have affected his GP's view as to the appropriateness of a sick note. In a letter from his surgery to Lidl, Dr Ward writes:

"You asked me to comment about him working as an operative in the BMW plant. I was not aware of this and I have not discussed this with Mr Grzyb so I cannot comment fully."

31. In relation to the evidence therefore where it conflicts, we prefer the evidence of the Respondent over the evidence of the Claimant.

32. We propose to deal with each of the allegations individually save for those of course which were rejected on the amendment application.

Allegation 1

33. The Claimant failed to comply with the holiday provisions failing to book 70% of his holiday at the commencement of the leave year as required. When Mr Carling unilaterally allocated annual leave for the Claimant it was because if such leave was not taken it would be lost as it could not be carried over. There is no evidence that the Claimant was refused holiday when he applied for it. He has never said to his employer that he needs a holiday for religious reasons. Indeed we find no reference to the Claimant's religion anywhere in the relevant documentation.

Allegation 2

34. There is no evidence of any written request for holiday by the Claimant nor has he asked for any documentation when requests for leave were not processed.

Allegation 4

35. There is no application for annual leave in December which was refused. The Oxford store is in fact closed on Christmas day which would be the only day the Claimant would require leave for religious reasons. The Claimant's inability to see his family in Poland is not a matter that relates to his religion or belief.

Allegation 6

36. The allegation, broadly, is that the Claimant was not offered work for his contractual hours. Ms Pearce in her evidence went through the hours of work undertaken by the Claimant over several months of records. With the exception of January and February 2015 which are generally regarded as slack and with reduced opportunities for work for all staff (not just the Claimant), Mr Grzyb has not only undertaken his contractual hours but has on occasions done overtime. The allegation is therefore factually incorrect. In relation to the slack months there was no less favourable treatment as they applied to everyone, not just the Claimant.

Allegation 7

37. We prefer Mr Gokberk's evidence that his practice was to send group texts rather than individual messages so the Claimant's contention that he was sent direct personal messages is unlikely. Mr Gokberk would reply individually in response to a specific text sent by an employee and this is probably what the Claimant refers to. The Claimant was not treated less favourably. There is no evidence the Claimant was asked to attend work on a Saturday when he was unavailable.

Allegations 8 and 9

38. Both these allegations relate to the incident which led to the Claimant's suspension and subsequent dismissal. We do not find that the Claimant was specifically targeted. The spot check was entirely random.

39. We find no improper motive on the part of Mr Gokberk. The suggestion that Mr Gokberk began a campaign to get the Claimant dismissed because he was Polish and/or because he was a Christian is not plausible because:-

39.2 If, as Mr Grzyb suggests, the Claimant influenced senior managers or was seeking to get him dismissed, Mr Gokberk had the perfect opportunity to do so at the appeal stage when the Claimant was reinstated.

39.2 Mr Gokberk had been a manager at two of the Birmingham Aldi Stores where there are a large number of Polish employees and where no previous allegations have been made about Mr Gokberk's dealings with Polish workers;

39.3 There were approximately 5 - 6 other Polish workers at the Oxford store other than the Claimant but none of them have made any complaints against Mr Gokberk on the grounds that they are discriminated against by Mr Gokberk.

40. The Claimant relies on Mr James Barker as a comparator. Mr Barker had allowed a customer and another member of staff, Ms Amanda Sykes, to take items without scanning them. Ms Sykes had told Mr Barker that the items were written-off bakery items and were going to be disposed of. He was misled into believing that such items did not have to be paid for or scanned. He attended an investigation meeting. His explanation that he was misled was accepted and he was given a first written warning. His circumstances were materially different to the Claimant in that unlike the Claimant he had co-operated with the investigation process and he had been misled. Ultimately, the treatment he received was less favourable than the Claimant because Mr Grzyb did not end up with a warning. Although Mr Grzyb referred to Mr Barker being a Muslim, it is not clear what Mr Barker's religious beliefs are.

41. In the clarified particulars of claim the Claimant also refers to a black employee, Ms Sawsan, who apparently also mistakenly failed to scan a couple of items. There is no evidence of any disciplinary matter in the Respondent's personnel files for Ms Sawsan. In relation to Ms Sykes, there is no less favourable treatment because she was dismissed and not reinstated.

Allegation 10

42. It is difficult to see how this can be an allegation of less favourable treatment. All employees are given a log-in number which is peculiar to them.

Allegation 11

43. We do not find that the Claimant's assertion is factually true.

Allegation 12

44. The relevant handwriting on the notice is not that of Mr Gokberk but his assistant. In any event it was factually correct to say that the Claimant had been suspended.

Allegation 13

45. We prefer Mr Gokberk's account that the Claimant was actually at the office Christmas function on 29 November 2015. Unfortunately, the photographs in the bundle apparently showing the Claimant at the event are not the correct

ones. The Claimant seizes on this mistake to maintain the allegation but we accept Mr Gokberk's evidence that the Claimant was there. In any event, the allegation has no legal basis. Attendance at a Works Christmas function is not a matter relating to religion or belief.

46. Even if the Claimant's account was to be preferred the reason why the Claimant could not attend the Christmas function was because he was suspended, not because of his race or religion.

Allegation 14

47. We have found that the Claimant did receive adequate notices of the investigation disciplinary hearing which he either ignored or failed to collect.

Allegation 15

48. This has been dealt with elsewhere.

Allegation 16

49. The Claimant's allegation that he was not allocated break times is factually incorrect as is clear from his work schedules. The Respondent has rigorous procedures for ensuring that break times are taken. A report on breaks taken is distributed monthly to all store managers and area managers to ensure compliance. It is not factually correct that the Claimant was only confined to working on the tills as is clear from his own amended claim.

Allegation 17

50. This allegation was expanded on somewhat at the hearing. The Claimant's evidence was that Mr Gokberk, being a Muslim, gave more favourable treatment to Ms Rosada's after he met her husband at the Store and he did so because Ms Rosada's husband is also a Muslim.

51. Mr Gokberk did not in fact have any discussion with Ms Rosada's husband other than to identify who he was. We accept that Mr Gokberk did not know of Ms Rosada's husband's ethnicity or his religion and whilst it may be assumed that he could be of Asian descent from his skin colour, Mr Gokberk did not know whether he was of Pakistani or Indian origin or whether he was a Muslim, Sikh or belonged to some other faith.

Allegation 18

52. There is no evidence of the Claimant being compelled to take holiday on dates stipulated by Mr Carling other than an allocation of leave at the end of the year when the Claimant would lose it anyway.

General

53. The Claimant has produced two letters of the same date setting out a list of the potential dates and times when he was available to undertake his shifts with Lidl. He says this was agreed with Mr Carling. With the exception of two weekends, the Claimant made himself available to work every Sunday from 6 April 2015 to the end of the year. It is therefore somewhat odd that the Claimant alleges religious discrimination when he has made himself available to

undertake all shifts on Sundays! The Claimant's only two opportunities for attending Mass were on Saturdays and Sundays but by insisting on working on Sundays he appears to have created an availability list which would exclude him from the opportunity to attend Mass on the holiest day of the week from a religious point of view.

54. We also note that in the same letters the reason the Claimant gives for only being available on the specified dates is because of his other job at BMW, not because of religious reasons. There is no reference to the Claimant requiring time off to attend church or for any other religious reason.

55. Although the Claimant's case at this hearing has been firmly that Mr Gokberk was picking upon him and doing so because he was of Polish origin and a Christian, it is clear from the first set of the particulars of claim that Mr Grzyb makes a number of comments about Mr Gokberk treating other staff as badly as himself. Such statements are inconsistent with the Claimant's allegation of less favourable treatment.

56. At the end of the day the simple fact is that the Claimant made an error in failing to scan an item. Given his experience it should not have happened but the assessment on appeal was correct in that it was a simple error. The Claimant could have admitted his mistake there and then which in all probability would have saved him from further processes but in any event he should have attended the investigation meetings. He failed to give a proper explanation or admit his error to Mr Gokberk which led to a suspension. The suspension was consistent with usual Lidl practice. To a large extent therefore he has brought these difficulties upon himself.

57. We do not find that Mr Gokberk had any ulterior motive against the Claimant either as a Polish employee or someone of the Christian faith. Insofar as it is necessary for us to speculate, we infer that the reason for the Claimant bringing these proceedings is as a form of retaliation or retribution against Mr Gokberk for reporting a minor error and escalating it to the Area Manager. However, Mr Gokberk was merely following procedure and his actions cannot be the subject of criticism. The Claimant has in our view simply used allegations of discrimination as a vehicle to ventilate his grievances against Mr Gokberk.

58. We will deal very briefly with the indirect religious discrimination complaint insofar as it is being pursued. The Claimant has not at any time identified any provision, criterion or practice which places him at a disadvantage in relation to the protected characteristic of religion or belief. If the relevant PCP was being compelled to work at weekends and/or having to work in December, we would be satisfied that both were a proportionate means of achieving a legitimate aim. The legitimate aim in the case of weekend working is the requirement to have a flexible workforce and in the case of requiring work in December it is to meet the demands of Christmas. The refusal to allow leave in busy periods in December is standard in the industry and proportionate.

59. We will deal finally with the out of time issue. The effect of **Rawson** is that the amendment granted earlier disposes of any limitation defence in respect of the amended claim, which is what this claim is in its entirety. If we are wrong on that point, we would extend time on the grounds that it is just and equitable to do so. The Respondents have been able to marshal their defence and to meet the case against them without undue difficulty. The delay is relatively short in

discrimination terms and with the exception of not being able to call Mr Carling the Respondents have not suffered any prejudice.

60. For the reasons given the complaints in these proceedings are dismissed.

Employment Judge Ahmed

Date: 2 November 2017

JUDGMENT SENT TO THE PARTIES ON

25 November 2017

FOR THE TRIBUNAL OFFICE