EMPLOYMENT TRIBUNALS

Claimant: **Mr N Thomas**

Respondent: **Erno's BV (Trading as G-Star Raw)**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **22 – 24 September 2020**

Before: **Employment Judge McLaren**
Members: **Mr. T Burrows**
Ms A Berry

Representation
Claimant: In person
Respondent: Mr T Gillie, Counsel

JUDGMENT

The unanimous decision of the tribunal is that the claim for direct discrimination under section 13 of the Equality Act 2010 does not succeed.

REASONS

Procedure

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by CVP.A face to face hearing was not held because it was not practicable. Both parties were able to take an active part in the proceedings and had a full opportunity to put their case.

Documentation

2. There was a dispute about documents. The respondent objected to the production of the claimant's supplemental bundle. The respondent considered that the documents were not relevant and contained commercially sensitive

information and personal data. These parts had not been redacted by the claimant. The claimant considered that all the documentation that he had provided was relevant and told us that the respondent had failed to include these documents in the joint bundle.

3. To avoid delay Mr Ghillie proposed the hearing continue but that an order be made under Rule 50 to seal the supplemental bundle on the tribunal file so as to protect disclosure of highly sensitive confidential business information which would be commercially damaging to the respondent if it became public as to protect the personal data of individuals who are referred to but who have no part in these proceedings.

4. We revisited this question at the end of the hearing. At that point we were able to identify that only a limited number of documents in the supplemental bundle had been adduced as evidence. Those that had not been adduced in evidence were not, therefore, before the tribunal and did not need to form a part of the tribunal file.

5. The claimant also accepted those documents that had been adduced in evidence should have the highly confidential business information and personal data that will identify other individuals who are not part of these proceedings redacted. We agreed that the tribunal would make an order that the current supplemental bundle would be held as sealed on the tribunal file and not provided to 3rd parties without the tribunal's consent. The respondent's solicitor would send the tribunal redacted copies of those parts that were adduced in evidence. These would then be placed on the tribunal file and the additional documentation which should not have been before us, together with the non-redacted copies, whether in hard or soft copy would be removed from the tribunal and would be deleted.

Evidence

6. We heard evidence from the claimant on his own account and from Mr Knol, Mr Hockney and Mr Millard on behalf of the respondent. We were provided with an agreed bundle of 198 pages the respondent and a separate bundle with 134 pages (of which 14 pages were adduced in evidence) by the claimant.

7. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by helpful submissions from both parties.

Issues

8. There was some initial discussion about the issues. While these had been set out in terms at the preliminary hearing on 20 January 2020, it had been agreed that the parties would provide some additional particularisation. The parties, however, had been unable to agree the final list and the bundle presented to the tribunal contained two versions, one by the respondent and one by the claimant.

9. After some discussion the claimant confirmed that he was happy to accept the list of issues as drafted by the respondent, save that he did not think the section on limitation, considering the three-month time limit issue, should be included. He believed that Employment Judge Massarella had confirmed at the preliminary hearing in January 2020 that he was able to raise matters that occurred during his employment.

10. We discussed this and I confirmed that while he could rely on all the matters set out in the issues list, the tribunal had to consider its jurisdiction. The tribunal was obliged to address the question of whether the complaints had been brought more than three months after the events occurred and, if so, if there was a just and equitable reason to extend the time limit.

11. The claimant made a concession that he was relying on hypothetical comparators for all points. The issues were accordingly confirmed as follows:

EqA 2010: Equality Act 2010

1. <u>Direct Race Discrimination (s13 EqA 2010)</u>

1.1 Did the Respondent treat the Claimant less favourably because of race, contrary to s13 EqA 2010? The Claimant says his protected characteristic is 'non-white'.

1.2 The alleged less favourable treatment complained of is:

1.2.1 Questioning the Claimant about a number of other issues during the investigation meeting on 23 May 2019 which were not relevant to the alleged theft on 16 May 2019. The questions the Claimant says should not have been asked are as follows:

(a) I have some further questions regarding processes and control around RFID and scheduling. Can you clarify for me who signs of the RFID and scheduling of the Stratford store?

(b) Could you explain to me whether you would have any reason to believe why the opening and closing Managers would be different to the signed off schedules?

(c) Can you confirm to me whom closes/banks and counter checks the money deposited each day?

(d) Is there a standard process you follow when G4S come to collect the store's cash takings?

(e) Can you explain to me when does this collection from G4S fall within the schedule?

(f) Are you aware or have any reason to believe why the X and Z reports would be different to the actual cash banking?

1.2.2 The Respondent did not at any point during the Claimant's employment, increase his salary

1.2.3 On 21 May 2019 a senior manager, a loss prevention officer and an accountant in the Respondent, communicating allegations to the police, in relation to allegations expressly made against the Claimant in relation to the alleged theft of approximately £170,000.

1.2.4 Terminating the Claimant's employment without first providing him with an opportunity to transfer to another store

1.3 For the purpose of determining these issues, who are the persons relied upon by the Claimant as actual (or hypothetical) comparators?

1.3.1 It is the Claimant's case that the comparator in respect of 1.2.1 above is *[The Claimant seeks to rely on a hypothetical comparator];*

1.3.3 It is the Claimant's case that the comparators in respect of 1.2.3 above is *[The Claimant seeks to rely on a hypothetical comparator]*;

1.3.4 It is the Claimant's case that the comparator in respect of 1.2.4 above is Michael Millard.

1.4 Were the relevant circumstances of the comparator materially different from those of the Claimant?

1.5 If so, can the Claimant provide primary facts from which the Employment Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's race?

1.6 If so, can the Respondent prove a non-discriminatory reason for the treatment?

2. **Limitation**

In respect of any acts or failures to act which constitute a breach of the EqA 2010 as alleged above:

2.1 Which, if any, formed part of a continuing act of discrimination?

2.2 Did the Claimant make a complaint to the Tribunal before the end of a period three months beginning on the date of that act or failure

(taking into account such extension of time as is provided for by s.207B of the Employment Rights Act 1996)?

2.3 Where such acts or failures were part of a continuing act of discrimination, did the Claimant make a complaint to the Tribunal before the end of a period three months beginning on the date of that act or failure (taking into account such extension of time as is provided for by s.207B of the Employment Rights Act 1996)?

2.4 Where the Claimant did not make a complaint before the end of the period of three months in either case, would it be just and equitable for the Tribunal to extend the relevant time limit within the meaning of s.123(1)(b) EqA 2010?

3. **Remedy**

If the Claimant's claim is upheld what are the appropriate remedies?

Finding of facts

Contractual position/disciplinary policy

12. The claimant has considerable retail experience and joined the respondent as a store manager, working in the Stratford store based at the Westfield shopping centre. All the respondents' staff who worked at Westfield required the permission of the Westfield centre to access the centre and therefore to attend their place of work.

13. The claimant's contract of employment was in the bundle at page 64 -71. Clause 6 deals with salary. It provided that salaries would normally be reviewed every year, but there was no right to a review or increase. When reviewing salaries, the respondent could take into account whatever factors are considered appropriate. These are not necessarily the same each year or th same between employees of similar status. Any increase was expressed to be discretionary. We accept that no employee had the right to a pay rise, these were awarded entirely as the respondent determined, using any factors it chose.

14. The respondent also operated a company handbook, and this included a disciplinary policy at page 49-51. It specified that the company required high standards of discipline. It gives examples of gross misconduct. The list set out in the policy was expressed be non-exhaustive and included theft or dishonesty.

15. There was a difference between the parties as to the claimant's start date, but this was not a material issue which the tribunal had to determine. The discrepancy was a matter of days and it is agreed that the claimant started in April 2018.

The claimant's performance

16. The claimant told us that, upon joining, he had three days training in which he was shown how to open and close the store and how to record everything with pen and paper. He was not provided with any mandatory training for health and safety, or indeed any formal training.

17. As store manager the claimant initially reported into Andrew Morris, Retail Operations Manager and Sade Lynch, Operations Project Manager. These two individuals were responsible for dealing with the day-to-day operations of the UK stores. They reported to Adam Hockney, the General Manager of the UK Ireland and Nordics. In November 2018 a UK area manager was appointed, Michael Millard, and from that date he became the claimant's direct line manager.

18. The claimant gave evidence that he was a strong and consistent performer. For example, page 28 of the supplemental bundle shows that on 8 April 2019 Stratford was the top performing store in the world for that week for CRM (for obtaining customer email details). This happened again the week of 29 April and Stratford were congratulated on having the best results in the world. Both Mr Millard and Mr Hockney confirmed these were good results but that they were part of a picture that needed to include financial performance as well. It was agreed that the store was performing at a reasonable level.

19. The claimant said that he achieved this despite a lot of issues in the store. This included things such as outstanding repairs and broken fixtures and fittings listed in a text in November 2018. The PDQ machine was temperamental and did not work from July 2018 for several weeks. There was evidence that it was not working in February 2019.

20. The claimant also told us about enforcement officers attending on the 17th July 2018 when business rates had not been paid. He referred a number of times in his evidence to this money being missing. We accept Mr Kol's evidence that this was an oversight because financial matters were transferred to the Netherlands and in the transition some invoices were not paid but this was rectified, and these business rates were paid.

21. Mr Hockney told us that he was made aware of concerns with the claimant's performance from the outset. This included lack of communicating with the team and failure to hit sales targets. The claimant's probationary period was not extended, and no documented concerns were ever put to him.

22. Mr Millard, who became the claimant's line manager from November 2018 also suggested there were performance concerns. He explained that when he started working with the claimant a number of employees raised concerns. He did not take any action because he wanted to give the claimant an opportunity to improve and he therefore worked on a number of performance issues together with the claimant. These included prioritisation of tasks, information he passed over and communication on when business goals should be actioned. No formal concern was raised with the claimant and we find that the type of matters raised are typical of an employment relationship and do not constitute an actionable form of poor performance.

23. Mr Hockney also gave evidence that initially, there was a disproportionate reduction in sales in Stratford store and sales were falling when compared with declining foot traffic. In January 2019 there was then a sudden improvement in the Stratford store's performance. Mr Millard also gave evidence that in January 2019 there was a sudden improvement in the claimant's performance and the store became a top performing store and the claimant received a lot of praise for improving its sales figures.

Investigation into missing funds

24. On 22nd March 2019 Wilfred Berends, General Ledger Accountant, raised a question about cash drops in the stores. His email, at page 77 of the bundle, addressed to Mr Hockney and copied to Mr Millard, said that he thought that there was a lot of cash missing and he wanted to know if every store was following the right procedure for cash drops and if all the cash drops were picked up by G4S.

25. On 25 March Mr Hockney responded to the email to let Mr Berends know that he had been informed all stores were now compliant with the process, but Mr Millard was asked to check back again. Mr Millard explained that he then telephoned the Stratford store and he asked that the end of day reconciliation sheets, G4S collection slips and the reconciliation from the bank book and G4S, all be sent to him. Once he received these, he then attempted to reconcile the paperwork. At this point Mr Millard did not think that the money had been stolen but that there could be accounting, clerical or administrative errors.

26. On 19 April Mr Berends sent a further email to Mr Hockney. He said that he had checked all the cash drops that fiscal year and had identified a gap in the not received cash in Stratford store of about a £130,000 which looked as if it had occurred in the period July to September 2018. At that time, it was hoped that there was something wrong with the cash drop administration.

27. Mr Millard continued to try to reconcile the discrepancies and spoke to the claimant to see if he understood what had happened, but the claimant also was unable to think of any reason to explain the discrepancy. In his witness statement the claimant said that the theft of this money was not mentioned to him. We accept Mr Millard's account that he did ask the claimant about the discrepancy, although not characterised as theft at this point, because this is confirmed by email 14 May at page 79.A contemporaneous record is more reliable than memory of events recollected sometime after.

28. As Mr Millard was unable to find an explanation, the respondent's head office decided to investigate further. This was around 8 May 2019. Arn Knol, Treasury Director and Sascha Feller, Corporate Fraud Investigator, were instructed to undertake an internal investigation.

29. We heard from Mr Knol, who has no day-to-day interaction with the retail employees of the respondent stores. He had never met the claimant before this hearing. He gathered the relevant data, the deposit slips and the company data from G4S, the deposit slips and accounting data from the bank and the deposit stubs kept in the safe at the Stratford store. He then attempted to reconcile these

to determine the exact amount of cash accounted for within the system. To do so he used data from the respondent's centralised system and the bank statements received from the bank.

30. On 14 May he sent an email summarising the current state of the investigation. P 79 – 80. This indicated that there was a gap between the sales at the Stratford store and the cash received at the bank. This gap was approximately £130,000 and the discrepancy related to the 2018 calendar year. His analysis showed that there were very few cash deposits in the bank for the Stratford store for August, September, November and December. The card machine at the Stratford store had been broken for a number of weeks during the period and there were no cash gaps in other stores which could suggest that Stratford's cash had been attributed to another store in error.

31. This email also proposed next steps which included scheduling a call with Mr Millard, the claimant and the team in Amsterdam to see if the reason for the discrepancies could be ascertained. Mr Knoll sent a further email of 15th May (page 78 the bundle) which confirms that the pin terminals (PDQ machines) were not working for a period. He identified that the issues could only be down to accounting, the store, the bank, or G4S.

32. On his account, Mr Knol and his fellow investigator continued working during that day and by the end of 15 May considered it likely that the discrepancy was the result of theft. On his account it was evident that the cash register for the Stratford store was reporting a cash collection which was not subsequently deposited at the respondent's bank during the period concerned. By this point it also became clear that the total missing amount was approximately £170,000.

33. As the investigators were now of the view the discrepancy was likely to be a result of theft, they started to think about who could have been responsible. At this point, because the claimant was store manager and therefore largely responsible for cash handling processes, it was concluded that it was not appropriate to include him in a video call to discuss the investigation as had been suggested in the email that day. The same view was taken of the assistant store manager. It was decided that the respondent would also not communicate with her about the status or progress of the investigation.

34. Page 81 of the bundle contained an end of day update which suggested that the next steps were to have face-to-face meetings with all relevant people with the knowledge of the Stratford store operation during that period in the course of the next week. Meetings were to be arranged the week starting 20 May 2019.

35. We find that, at this point, the respondent's investigation had worked though the evidence it had and suspicion that this was theft from the store was reached by a gradual process. The claimant and the assistant store manager were treated in the same way. In proposing to meet with all relevant staff to ask them about this there was no singling out of the claimant.

The claimant's arrest

36. On 16 May the claimant was arrested for theft by finding. He explained that at 2 p.m. Westfield security staff visited the store as delivery items for the GEOX store were missing. That included blue commercial toilet rolls, 50 biros and post-it notes. They told the claimant that he had been seen on CCTV moving delivery items that were left unattended in the communal corridor into the respondent store.

37. The claimant was handcuffed and removed from the site by the police. He was charged with "theft - other including theft by finding", of goods to the value of £193. He pleaded not guilty at the Magistrates Court on 14 June and his trial took place on 23 August 2019 at Stratford Magistrates court. The claimant was found not guilty.

38. As a consequence of his arrest and charge, security at Westfield issued the claimant with a red slip (page 91). This meant that he was unable to attend the Westfield site and therefore unable to attend work.

Consequences of the arrest-notifying the police

39. On 17 May Mr Millard updated Mr Knol about the claimant's arrest. As the claimant had been arrested and charged with theft, Mr Knol and his fellow investigator became more suspicious about the claimant's potential involvement in the financial discrepancy. Mr Hockney thought at that point it was sensible for the respondent to make a report to the police in case the financial discrepancy was linked to the theft for which the claimant had been arrested.

40. At some point, is not clear exactly when, Mr Millard had a conversation with a police officer about the claimant's arrest for theft and was told that the claimant had a criminal record. This is not true. Mr Millard was given no details and could not remember the name or badge number of the officer who told him this fact.

41. On 21st May Mr Knol and his fellow investigator met with Mr Millard. We were told that it was a unanimous conclusion that the police should be notified about the missing money and the claimant's suspected involvement in case there was a connection between the missing money and the alleged theft of the 16 May.

42. Mr Knol set out their reasons for considering the claimant was involved in detail in his witness statement. These were that the deposit slips from G4S had been filled in and signed by one person and that the handwriting appeared to be that of the claimant. A number of people were unlikely to have had any involvement because of their start and finish dates with the respondent. As the claimant was store manager, he was able to decide who worked on which days and the schedule shows that he often closed the store and therefore had responsibility for cash handling process.G4S involvement was discounted on the basis they would not have any idea how much was in the bags of money. They concluded it was unlikely that the assistant manager was involved in any capacity because she had moved to another store in October 2018 and prior to that, the

claimant had not wanted her to be involved in the cash handling process and she was therefore only involved in a limited way.

43. Before taking the step of reporting the matter to the police, Mr Knol consulted with senior figures at the respondent in an email setting out the position at page 97 – 98. This was agreed and by email of 21 May, at page 97 of the bundle, Mr Knol asked Mr Millard to pass that information to the police. This identified that £170,000 was unaccounted for, that there were no differences between the cash deposit slips from the company's records and those included in the sealed bags for July 2018, but that the monthly amount of cash deposited was less than the amount of cash received in store. For August, the amounts on the cash deposit slips differ from those of the respondent's records and were much higher than the amount listed on the slips included in the sealed bags. There are a number of weeks where no cash was deposited in the bank account and when G4S visited the store but did not pick up any bags. The deposit slips, where discrepancies were found, were written and signed by the claimant. Mr Millard was also requested to pass to the police that it transpired the claimant had a criminal record of which the respondent was not aware. This of course, as identified above, was not factually correct, but was something the police had told the respondent.

44. We accept the respondent's account that there is a large financial discrepancy. Their reasons for considering the claimant as a possible suspect were based on his signature being on the deposit slips and stubs that do not tally, the fact that he was frequently the individual who closed the store and he had more opportunity than others to do so. Mr Knol had not met the claimant and there is no reason to believe that he had been advised of the claimant's race. We find that Mr Knol's actions throughout were dictated by the evidence that he uncovered, and the claimant's race was not a factor that was considered or played any part in his decisions.

45. The decision to inform the police was in part reached because the claimant had been arrested and that had led to information about a criminal record being passed on by the police. Their suspicion was based on evidence and circumstances and not the claimant's race.

46. Mr Millard, having received his instructions, called 101 and filed a police report on 21 May 2019. On the same day three police officers attended the respondent's office to meet with Mr Knol and Mr Millard. The police informed them that the case would be handled by the Newham CID; in the meantime, the respondent was to continue with its internal investigation.

<u>Continuing internal investigation and its conclusion</u>

47. Accordingly, the respondent continued the internal investigations. Mr Knol and his fellow investigator drew up a list of employees they wished to interview. This included the claimant. Mr Knol and Mr Millard constructed a list of questions to be put to all employees and the same questions were put to all the employees who were interviewed, including the claimant

48. On 22 May Mr Millard and Mr Knol met with three employees from the store, Mr Millard chaired the meetings and Mr Knol observed. Those employees who had not been seen on 22 May were then interviewed on 5 June.

49. Mr Knol was aware that a disciplinary investigation meeting had been arranged with the claimant for the 23 May. Mr Knol and Mr Millard discussed and agreed that the 23 May meeting would be a good opportunity to ask the claimant about the missing money and the cash handling process at the Stratford store. It was agreed that the list of questions about the cash discrepancy would be incorporated into the disciplinary investigation interview.

50. We accept the respondent's account that all staff who could potentially have been involved in this cash discrepancy were asked these questions. The claimant was not treated any differently from anyone else and accordingly his race played no part in the decision to ask these questions. The timing also fitted into the wider investigation pattern. All staff were interviewed between 22 May and 5 June. An opportunity was taken to use the disciplinary investigation about the arrest to ask questions both about the arrest and the cash processes. While it may have been better to have carried out 2 interviews, this was not sufficiently significant to be unfavourable treatment and we find the decision to combine the two was not influenced by the claimant's race.

51. Mr Knol reviewed all the information provided from the interview responses from all staff and finalised an investigation report at page 151-161 of the hearing bundle. He then went to the UK and met with the police again on 22 August 2019 when he discussed this report and the respondent's investigation findings.

52. From this point onwards the matter was passed to the police. Mr Knol last spoke to his police contact in June 2020 and understands the investigation is still ongoing.

53. The claimant believes that false, malicious claims and evidence were submitted by the respondent to the police. Money went missing from July 2018 to April 2019 when nothing was mentioned to him. The weekly cash collection procedures specify that G4S come to collect the cash but page 182, information submitted by the police in support of their application for an account freezing order, states that the claimant was responsible for depositing the cash at the bank. The claimant characterises this as collusion between Mr Hockney, Mr Millard and Mr Knol to make a false statement. He also makes reference to the fact that he is said by them to have a criminal record when he has no previous convictions and is of good character.

54. We have accepted the respondent's account of its investigation and therefore that they were unaware of the discrepancies until March 2019. We also accept the account of Mr Millard that he was told by the police that the claimant had a criminal record. We also find that there is no evidence that it was the respondent who told the police that the claimant deposited money in the bank. Mr Knol's investigation report includes a description of the cash handling process which makes it clear that it is G4S who deposit money at the bank On the

balance of probabilities we conclude that any misinformation on this application did not come from the respondent.

55. The claimant also criticised the investigation. In particular the fact that when asked questions relevant to the large cash discrepancy issues he is given incorrect information as to the dates of his holiday. It was not disputed, however, that he was working on both the dates in September on which G4S picked up cash.

Disciplinary process and failure to transfer to another store

56. After the incident on 16 May, the claimant was invited to attend a disciplinary investigation with Mr Millard. That took place on 23 May 2019. In advance of that meeting Mr Millard prepared questions that he was going to ask the claimant. These were annexed to the investigation meeting notes at page 107.They included, for the reasons set out above, questions about the larger cash discrepancy as questions 6-11.

57. The claimant was asked first questions that were relevant to the arrest and allegation of theft. When he was asked if he had anything further to add the claimant gave some details of what had occurred. He confirmed that he took the toilet rolls that were in the corridor and placed them in the respondent store. He mentions the stationery items, but simply says that the other store where they were meant to be delivered had not reported the theft and therefore the issue of theft is only with Westfield. He said that he thought the police were going to take it to court because they believed he was going to resell the items for his personal gain.

58. In his witness statement prepared for the hearing, the claimant gives a more detailed account. He explained that he had moved the delivery items into the store because they were causing an obstruction by being left unattended in a fire corridor. He made no attempt to open or conceal the items and he was doing this for health and safety reasons to avoid a hazard in the corridor. The claimant did not give this explanation in his claim form or at the disciplinary or appeal meeting.

59. Mr Millard considered what he had been told. In his view the claimant had admitted to taking the items and admitted to having been arrested and charged with the offence of theft. He recommended that the matter should proceed to a disciplinary hearing.

60. As the claimant had received a red slip warning from Westfield banning him from the centre, the claimant was also told he was suspended on full pay pending the outcome of the disciplinary hearing as he could not work in the store.

61. The disciplinary officer did not give evidence. The claimant did not attend the disciplinary meeting and it went ahead in his absence. The notes are at page 137 and they show the decision-maker concluding that as the claimant had confirmed he had been charged with the offence of theft and he received an official ban from entering his place of work he could not uphold his duties as a store manager. There was a breach of the contract obligations and being

charged with theft was said to be an act of gross misconduct. The decision was therefore taken to dismiss the claimant.

62. The claimant appealed in a letter of 18 June at page 142. He gave five reasons for this. He said he had not been charged with theft, that the matter was going to trial and therefore as it was pending a decision should not be made, going to trial was not gross misconduct and being arrested and charged is not an admission. He made no reference to discrimination.

63. The appeal hearing was chaired by Mr Hockney and the notes are at page 168. The claimant did not bring any new evidence and had nothing to add. Mr Hockney's evidence was that he reviewed the appeal pack which included the investigation meeting and the disciplinary meeting. He found that the claimant has admitted to taking stationery items belonging to another store. The red slip meant that he was unable to attend the store and could not complete his contract obligations to work. Westfield confirmed by email 17 May that the ban would remain in place until such time as the matter was concluded at court.

64. Mr Hockney also did not agree with one of the points of the claimant's appeal letter. That said that he had not been charged with theft and Mr Hockney concluded that he had been. Given that the claimant did not produce any additional information and the red slip was not revoked, Mr Hockney concluded that there was no new evidence which warranted that the dismissal should be overturned, and he accordingly upheld this.

65. We accept that if the claimant was not allowed on the site, he could not fulfil his contractual terms. He was dismissed in circumstances which amounted to gross misconduct / inability to perform the contract and we find that anyone in similar circumstances who had been arrested and charged with theft and banned from the shopping centre would have been dismissed.

66. The claimant considers that he should have been transferred to another store until the outcome of the criminal charges was known. He referred to the fact that two other individuals who were both poor performers had been moved. Mr Hockney explained that staff would be moved for promotion or where the respondent needed additional staff at another store. That would not apply where somebody has been accused of theft and had been dismissed for gross misconduct. We accept the respondent's evidence on this point.

67. The claimant had identified Mr Millard as a comparator when considering the respondent's failure to move him to another store. Mr Millard's role is entirely different. He does not work at a store but is field based. He is not a comparator.

68. The claimant recalled that he had asked Mr Millard at the start of the disciplinary process to move him to another store. Mr Millard does not recall this, but in any event the request would have been refused as the claimant was being investigated for gross misconduct. Instead the claimant was suspended on full pay.

Salary increases

69. The claimant complains that he did not receive a salary increase during the course of his employment because of his race. The contract, referred to above specifies that pay rises are entirely discretionary. Mr Hockney told us that retail staff are only given a pay rise if they have been promoted or taken on additional responsibilities. This was not the case here. Mr Millard confirmed that his reason for not providing the claimant with a pay rise, and it would be his responsibility to do so if had been appropriate, was because he had not taken on additional responsibilities. He was competitively paid.

70. The comparator the claimant has named, Ms Cantaboni, was given a pay increase because she was promoted to general manager in June 2019. It reflected the promotion and additional responsibilities. The claimant had originally named another comparator, but confirmed at the outset of this hearing, that he was relying on hypothetical comparators only. We find that, considering the wording of the contract and the evidence we have heard, no one in identical circumstances to the claimant, namely someone whose role had not changed, would have been given a pay rise by this respondent.

Submissions and Relevant Law

71. The claim is one of direct discrimination. S13 of the Equality Act provides "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."

72. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.

73. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. For this purpose, S.23(1) stipulates that there must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator.

74. The unfavourable treatment must be "because of " the protected characteristic. It is now well established that direct discrimination can arise in one of two ways.Where a decision is taken on a ground that is inherently discriminatory, or where a decision is taken for a reason that is subjectively discriminatory.That is, where the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation; i.e. by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act

75. In some cases, there is no dispute at all about the factual criterion applied by the respondent, it will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out.

76. In other cases where the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.' Accordingly, the subjective test, is only necessary where there is doubt as to the factual criteria that have caused the discriminator to discriminate'.

77. The protected characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.

Burden of proof

78. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

79. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

80. We were reminded by counsel for the respondent that the Court of Appeal confirmed in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

Limitation period

81. Claims must be brought within three months of the date on which incidents complained of arise.The question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee.

82. The claimant referred us to Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA,in relation to continuing acts. This provides that tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

83. S.123(3) EqA makes special provision relating to the date of the act complained of where a discriminatory omission may arise. In these situations itt states that conduct extending over a period is to be treated as done at the end of

that period — S.123(3)(a)failure to do something is to be treated as occurring when the person in question decided on it — S.123(3)(b). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it.

84. The tribunal may extend the time perion where it is just and equitable to do so.S 123 of the Equality Act does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons.

85. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

86. Subsequently, however, the Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in S.33 should not be elevated into a legal requirement, but should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

Conclusion

87. Having made the findings of fact set out above, we have then considered the relevant law and applied that to those findings.Using the issues list as our guide we conclude as follows.

88. The claimant has made an allegation that a number of events which occurred were unfavourable treatment and were because he is not white. He has not provided facts from which on the balance of probabilities we could infer that discrimination has taken place.

89. He has provided no other evidence of discrimination beyond the events themselves and has not established more than a difference in treatment. For three of the issues, the fact he was questioned, not transferred to another store

and not awarded a pay rise we find that they do not amount to different treatment. We conclude that he has not discharged the burden of proof and his claims are dismissed on that basis.

90. Despite this conclusion, in case we are wrong on that, we have none the less gone on to reach our conclusions on the issues.

91. The first act of less favourable treatment complained of was being asked specific questions at the meeting on 23rd of May which were not relevant to the alleged theft of 16 May 2019. We have found that these questions were asked of all staff and the claimant was therefore treated in the same way as all other staff. The treament, was because the respondent needed to investigate a serious financial issue. There was no unfavourable treatment and in any event, no discriminatory motive.

92. It is not disputed that the claimant did not have an increase in his salary. We have found that no one in similar circumstances would have been given a pay rise and conclude this is not an act of unfavourable treatment. Again, the claimant's race formed no part of this treatment which was simply the even handed application of the respondent's pay practices.

93. It is agreed on 21st of May allegations were communicated to the police. We are satisfied that the respondent did so based on objective evidence, together with concerns based on the earlier arrest and mis information given to it by a third party.It would have made the same report about any individual in the same circumstances.There is no unfavourable treatment compared to a hypothetical comparator. We are satisfied that the claimant's race played no part in this decision.

94. The last issue is that his employment was terminated without the respondent seeking to redeploy him to another store and again he relies on hypothetical comparators. We accept the respondent's evidence that they would only move people in very specific circumstances which did not apply in this case.They would not move someone under investigation and a hypothetical comparator would be treated in exactly the same way regardless of race.

95. For all of these reasons we dismiss all the claimant's complaints of discrimination on grounds of race as having no merit.

96. While we have dismissed the complaints on their merits ,we were also asked to consider issues of limitation. On its face any act before the 9th June is out of time. We consider that the failure to be awarded a pay rise is a potential discriminatory omission, a failure to do something.The act which is inconsistent with granting a pay award is the dismissal. That complaint is therefore in time

97. We considered whether the acts of the 21st and 23 May were part of a continous act linked to the dismissal. We conclude that the reporting to the police and the questions raised at the interview are linked and these can be linked to the dismissal because the suspicion created by the arrest was part of the respondent's consideration for making the report. The events were linked by the

repondent's actions.They are therefore part of a series of acts and can therefore be brought as in time. Nonetheless they fail on their merits

Employment Judge McLaren
Date: 13 October 2020