RESERVED **Case No. 2401886/2019**

EMPLOYMENT TRIBUNALS

Claimant: Mr M Masuri
Respondent: Lidl Great Britain Ltd

HELD AT: Liverpool **ON:** 18,19 & 20 March 2020 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr A Clarke
Mr M Stemp

REPRESENTATION:

Claimant: Mr J Halson, solicitor
Respondent: Ms R Kight, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent was not in breach of contract and the claimant was not unfairly dismissed; his claim for constructive unfair dismissal is not well-founded and is dismissed.

2. The claimant was not unlawfully discriminated against on the grounds of his race and his claim for direct unlawful race discrimination is not well-founded and is dismissed.

3. The claimant's claim for unpaid accrued holidays brought under the Working Time Regulations 1998 is not well-founded and is dismissed.

4. The claim for unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 as amended, was not presented before the end of the period of 3 months beginning with the operative date from which time starts to run the end of August 2018 payment from which the deduction was made and the Tribunal was satisfied that it was reasonably practicable for a

complaint to be presented before the end of that period of 3 months, it does not have the jurisdiction to consider the complaint, which is dismissed.

REASONS

Preamble

The claim

1. In a claim form received on 12 February 2019 following ACAS Early Conciliation between 13 December and 13 January 2019, the claimant brings a number of complaints including that the respondent had discriminated against him because of his race by making false allegations of threatening behaviour and by constructively dismissing him as defined by section 39(7)(b), contrary to section 13(1) and section 39(2)(c) of the Equality Act 2010 ("EqA"). The claimant relies upon the protected characteristics of colour and national origin, describing himself as a black man of Nigerian origin. The claimant also complained that the respondent had made unauthorised deductions from wages contrary to section 13(1) of the Employment Rights Act 1996 as amended ("the ERA") and he was owed 12.5 days accrued holidays under regulation 30 of the Working Time Regulations 1998. At the liability hearing the number of days holiday owed was reduced to 1.5 days.

2. The respondent denied the claimant's claims, disputing the start and termination dates provided in the claim form, maintaining the claimant had been sent home after arriving to work 2-hours late on the 12 August 2018, he then demonstrated unacceptable behaviour towards a manager, was investigated for this and invited to a number of meetings that culminated in a written warning, following which the claimant resigned on 14 September 2018 without giving notice.

3. A Preliminary Hearing dealing with case management took place on the 20 May 2019 at which the claimant was represented by Mr John Halson. The Minute of the Preliminary Hearing records the claimant resigned on the 14 September 2018 whilst he was awaiting the outcome of disciplinary proceedings in respect of an incident at work and the "false allegations" made against him breached the implied term of trust and confidence. It was alleged there was a "collusion" against the claimant in that the respondent did not show CCTV evidence which would have exonerated him. The false allegations were less favourable treatment than would be given to a hypothetical comparator because of his colour. The unlawful deduction of wages claim relates to the 12 August 2018 in respect of the shift the claimant "worked".

4. It was noted in the Preliminary Hearing Minute that there is an issue relating to the alleged race discrimination that occurred on 12 August 2018 giving a primary limitation of 11 November 2018, and the claimant approaching ACAS Early Conciliation out of time on the 13 December 2018 as set out in the EC Certificate. The respondent's position was that the time limit issue is also relevant to the constructive unfair dismissal claim which relies on the 12 August 2018 allegation. The Minute records that Mr Halsall did not concede the time points and confirmed "the claimant has not pleaded a detriment by way of race discrimination relating to the allegations made on 12 August t2018, but rather that date is…the start of a continuous series of

acts relating to the false allegations and collusion culminating in the claimant's resignation on 14 September 2018 such that his claim was presented in time."

5. Time limit issues were also raised in relation to the unauthorised deduction of wages clam in respect of the 12 August 2018 shift where the claimant's wages were due to be paid by the end of August leading to a primary time limit expiring at the end of November 2018.

6. The Tribunal has before it a chronology that has largely been agreed between the parties with the exception of the 8 August 2018 entry and the dates relating to time limits inserted in red. The remaining entries are agreed and as such, have been incorporated into the Tribunal's findings of facts below.

Agreed issues

7. The parties agreed the issues as follows:

7.1 Was the entirety of C's claim brought within the relevant time period, or are there parts of it which have been brought out of time?

7.2 If so, was there a continuing act pursuant to s.123(3) EqA 2010?

7.3 If not, were those parts of the claim which were not presented in time presented within such further period as is just and equitable in all the circumstances?

DIRECT RACE DISCRIMINATION

7.4 Did the Respondent treat the Claimant less favourably by, between 12-14 August 2018, Mel Roberts and Jack Pope allegedly making "false allegations" that the Claimant's behaviour on 12 August 2018 amounted to threatening behaviour.

a. Were the allegations made false?

7.5 If so, was that treatment because of the Claimant's skin colour as compared to a hypothetical comparator?

7.6 If so, did that treatment amount to a fundamental breach of contract (implied term of mutual trust and confidence)?

7.7 If so, did the Claimant resign in response to that breach?

7.8 Did the Claimant delay and/or otherwise affirm the breach?

UNLAWFUL DEDUCTIONS FROM WAGES

7.9 Has the Respondent made an unlawful deduction from the Claimant's wages by:

7.10 Not paying the Claimant in respect of his shift on 12 August 2018?

7.11 Allegedly underpaying the Claimant in respect of his prorated holiday pay entitlement up to his termination date on 26 September 2018?

7.12 If so, what is the Claimant owed?

Evidence

8 The Tribunal heard evidence from the claimant on his own account, and on behalf of the respondent it heard from Melanie Roberts, shift manager, Richard Watts, area manager, Justine Woodward, area manager and it had before it a written statement unsigned and undated from Jack Pope, deputy store manager, who was unable to give evidence due to self-isolation as a result of the COVID19 pandemic. The respondent did not seek an adjournment and the Tribunal heard submissions dealing with the weight to give Jack Pope's evidence before deciding to give it little weight unless it was either undisputed or corroborated by other evidence.

9 . There were a number of conflicts between the evidence given by the claimant, and that given by the respondent's witnesses which the Tribunal resolved as set out below.

10 The Tribunal was referred to an agreed bundle, which it has taken into account. It has heard oral submissions made on behalf of both parties, which the Tribunal does not intend to repeat, it has attempted to incorporate the points made by the parties within the body of this judgment with reasons and has made the following findings of the relevant facts.

Facts

17 The respondent is a supermarket with nationwide stores. On the 12 July 2017 the claimant commenced his employment as a customer assistant working 30-hours per week (described as contracted hours) at the St Helen's site, and in May 2018 he moved to the Runcorn Store. The claimant was thought by managers to be a good employee and excellent with customer relations. His role as a customer assistant involved shift work often starting early in the morning when a skeleton team was in store.

The employment contract.

18 The claimant was issued with a Contract of Employment which he signed on the 27 June 2016. The relevant clauses are as follows;

18.1 Under clause 6 salary was payable monthly in arrears and if the claimant worked undertime (as opposed to overtime in excess of the contracted hours) undertime could be deducted from the monthly salary – 6.2, 6.3 & 6.4). The claimant hours were undertime by the date of resignation as he had been paid for hours not worked, and the claimant accepted the respondent was contractual entitled to deduct the overpayment out of salary.

18.2 The claimant was entitled to 30-days holiday pay if working full-time, otherwise it was pro-rated. The holiday year ran 1 April to 31 March.

18.3 At paragraph 12 reference was made to the disciplinary and grievance procedures provided to the claimant in the induction pack which expressly did not form part of the claimant's terms and conditions of employment, and were non-contractual in effect.

18.4 At paragraph 13.1 the claimant authorised the respondent to make a number of deductions from his salary.

19 Within the contract there exists no contractual obligation to pay the claimant if he does not carry out any work.

Unauthorised Absence AWOL Policy ("the AWOL Policy")

20 The Tribunal was referred to the non-contractual AWAOL Policy dated the 3 June 2018 which applied to the claimant and all employees "where an employee is absent from work without good cause, and without agreement or notification."

Unauthorised Absence AWOL – Managers Procedure dated 1 June 2018

21 In the paragraph headed "Overview" the procedure provided that unauthorised absence "may occur when an employee fails to attend work within an hour of their scheduled start time…" and steps are set out which follows including trying to contact the employee through to termination of employment if less than 2-years' service or disciplinary proceedings for employees with 2 or more years' service and the right to an appeal.

Disciplinary Policy May 2018

22 The Disciplinary Policy is non-contractual and provides for suspension from work on full pay, first and final warnings as sanctions including dismissal and appeals. Unauthorised absence can result in summary dismissal. The claimant's contract and the Disciplinary Policy included a non-exhaustive list of gross misconduct offences which included physical assault.

23 The claimant worked a variety of shifts due to family responsibilities including an early shift and a late shift. The deputy manager responsible for arranging the shift pattern was Melanie Roberts known to the claimant as Mel. The store manager Paul Ladanowski had delegated responsibility for the shift pattern to Melanie Roberts, but the ultimate responsibility lay with him.

24 Melanie Roberts shared managerial responsibilities with Jack Pope, deputy store manager. Both took on the role of acting store manager when required. At no stage did the claimant raised allegations of race discrimination against either of the store managers. The Tribunal on the balance of probabilities preferred the evidence of Richard Watts that the claimant did not raise any allegations of race discrimination as the claimant now alleges in oral evidence, despite his written witness statement and claim form being silent on this point. It is notable that there was no mention of race discrimination in the disciplinary process. Mr Halson in submissions argued that the claimant did not want to "burn his bridges" by making a formal complaint of race discrimination and yet the claimant's oral evidence on cross-examination was that he had spoken to Richard Watts about it.

25 The claimant did raise issues about shift rotas, which was not unusual in the industry, and his issues were resolved. At no stage did he link his complaints about shifts to a specific manager or his race. The claimant also raised an issue about headsets and people ignoring requests for help, Richard Watts indicated that headsets were expensive and he would instruct the whole team to use them. The claimant did not complaint about Melanie Roberts ignoring his requests for help, and he did not raise any issue of race discrimination.

Incident

26 The claimant was due to work the early shift on the 12 August 2018; 6am to 4pm. Paul Ladanowski agreed a shift change to 8am and there is a dispute concerning whether a further shift change to 10am was agreed. It is not disputed the 10am start time was not recorded on the claimant's shift pattern displayed in the staff room/canteen, and the 8am start had been handwritten in by Paul Ladanowski.

27 The Tribunal concluded Melanie Roberts and Jack Pope, acting in the capacity as deputy managers, could reasonably only have known the claimant's start time was 8am, Melanie Roberts had not checked the rota and believed the claimant was due to start at 6am. She was unaware of the change to 8am until she rang Paul Ladanowski when the claimant did not turn up for work at 6am.

28 The claimant turned into work at 9.50am to get changed and ready to start his shift. There is an issue as to whether Melanie Roberts and Jack Pope were sitting together in the canteen. What is not in dispute is that Melanie Roberts pointed out to the claimant he was late, she then stayed seated in the canteen and on the claimant's evidence Jack Pope told the claimant not to clock in (which he did not do), not to get a till and to come into the office to discuss his lateness. There is a conflict in the evidence as to what transpired next. Melanie Roberts' evidence was that she heard raised voices, she went into the office and witnessed Jack Pope not getting a straight answer in relation to the claimant's lateness, the claimant was "speaking in a loud voice and had his hands-on Jack's chest tapping him…intimidating and aggressive."

29 Jack Pope's written evidence, which could not be tested on cross-examination, was the claimant spoke "with a raised voice…standing very close to me…and prodding me in the chest area."

30 The claimant's evidence was that he was being asked by Jack Pope about his start time in a "friendly and good-natured way…and told me if I was late again he would just send me home."

31 Melanie Roberts and Jack Pope believed the claimant was 2-hours late, and arrangements had been put in place for another employee to cover the claimant's shift. The Tribunal concluded on the balance of probabilities that (a) the claimant had been stopped from working his shift by Jack Pope, (b) this was not a friendly and good-natured act with the claimant stating he had evidence of the agreed shift starting at 10am, (c) the claimant was asked for an explanation and was unable to give one, the meeting became fraught, the claimant raised his voice and touched Jack Pope a number of times in the chest area.

32 At the liability hearing the claimant explained that he had produced a screen shot of the 10am staff list, and when asked why that document had not been included in the trial bundle the claimant's explanation was that he had shown it to his solicitor and left it to him. The screen shot was not before the Tribunal, and the respondent had not been sent a copy so that it could be included in the bundle. It is notable that throughout the disciplinary process, when the screen shot evidence was at its most relevant, the claimant did not produce it. The claimant was unable to produce/retrieve the screen shot at the liability hearing, the Tribunal concluded he was a less than accurate historian and would have appreciated the importance of the screen short confirming he had been included in the 10am shift with other staff.

Suspension 14 August 2018

33 Richard Watts, the area manager, decided it was appropriate to suspend the claimant on full pay given allegations of threatening behaviour had been made against him, pending an investigation also carried out by Richard Watts, who interviewed six employees including the claimant and arranged for a report from the respondent's National Data Protection Office of the CCTV footage taken from the office covering the period in question. With reference to the CCTV evidence, whilst the Tribunal took the view that it would have been preferable for the claimant to have viewed the actual CCTV footage, on balance it accepted Richard Watts' understanding was that due to data protection obligations a report of the CCTV evidence should be obtained from the CCTV Evaluation Team. As it transpired, the evaluation report was favourable to the claimant which strongly suggests it was independently produced and there was no conspiracy as alleged by him.

34 The claimant was sent home and he reported the incident to Richard Watts, who promised to look into it, which he did. Richard Watts had been employed by the respondent as a store manager for 14-years before being promoted to area manager, a position he had held for 2-years before the incident. He was fully aware of how the stores were run and the fact that employees were often disgruntled with their allocated shift patterns. It is undisputed the claimant and Richard Watts had a good working relationship, with Richard Watts holding the claimant in high regard. It found, contrary to the claimant's evidence, he did not raise any allegations of race discrimination to Richard Watts, despite their good relationship.

35 Referencing the 14 August 2018 telephone conversation Richard Watts described the claimant's tone of voice as "very angry" and how he was spoken to in a raised voice. There was no reason to disbelieve Richard Watts. The Tribunal accepted Richard Watts' evidence and found that the claimant was angry and spoke in a raised voice; according to the claimant his shift was to have started at 10am and yet he had been sent home and it is entirely credible that the claimant was unhappy with this turn of events. It is not credible that, on the claimant's evidence, the conversations that took place with Jack Pope and Richard Watts were calm, friendly and good natured given the fact the claimant was losing approximately one third of his pay, had a family to feed and on his evidence, was not late for his shift and should have been allowed to work it.

The investigation

36 Richard Watts immediately carried out an investigation and took witness statements from a number of employees, all of whom signed, as it was the respondent's practice to show the notes to the witness at the end of the meeting for them to check over and sign as confirmation, that "the above statement is true to the best of your knowledge and belief" at the bottom of each page. The claimant in oral evidence when explaining why important matters he had allegedly raised when interviewed by Richard Watts were missing, stated that he was made to sign the statement evidencing his attendance at the meeting and it was not confirmation that the document was true. The Tribunal found this explanation was not credible and undermined the claimant's evidence taken in the round. It is undisputed the claimant signed each page confirming the statement was true and he would have had the opportunity to point out any information that was missing and he did not. The meeting notes clearly showed the claimant had attended and taken part, and there was no logical need for him to sign each sheet, as he had, to prove he was there. It is notable the claimant took no notes himself, and his memory many months/years down the line of what he had allegedly said and/or was missed out, could not be relied upon.

37 Jack Pope was questioned by Richard Watts on the 13 August 2018 and confirmed he was aware of the 8am start. Different versions as to when he became aware have been given, but nothing much hangs on this because by the morning in question he knew the claimant's shift was to start at 8.00am. With reference to his meeting with the claimant in the meeting in office Jack Pope described the claimant as "irate and started rising his voice…and started using his physical presence in an intimidating manner. He got within a few inches of my face and repeatedly pointed his finger in my face. He also several times pushed me in the shoulder. Melanie was witness to this. We decided to send Monoh home because he was 2-hours late and we felt his behaviour was unacceptable. He continued to point in my face and intimidate me in the staff canteen whilst looking at the rota. I think Michelle Watkinson was a witness to this."

38 Michelle Watkinson in her statement given to Richard Watts on 15 August 2018 corroborated the statements of Melanie Roberts and Jack Pope; "Mo was extremely close to Jack…I could hear Mo's raised voice in the office." The Tribunal took the view that Michelle Watkinson was not part of any conspiracy against the claimant, as alleged, given the way her witness statement was drafted and the likelihood that a number of employees conspired to get the claimant, who was well-liked, into trouble on the basis of his colour and national origin was a remote possibility and unlikely in the circumstances. Michelle Watkinson referred to the claimant as follows; "Mo went up to Jack and said he had proof on the phone which Jack asked to see." There was no reference in the claimant's witness statement prepared for this litigation to the phone being viewed and/or what was on that phone until the claimant gave oral evidence at this liability hearing. The phone has never been shown to the respondent at any stage, including when documents were exchanged, and the claimant sought to blame his solicitor for this despite the fact he was unable to produce this evidence at the liability hearing.

39 Melanie Roberts was interviewed on the 14 August 2018 and she described how the claimant had explained his lateness by stating "he had already worked his one

early that week." Melanie Roberts described how the claimant was "very close to Jack and had his hand on his chest and raising his voice in an aggressive manner…I felt Momoh's behaviour was unacceptable and the situation was unresolvable with him in that frame of mind so I asked him to leave the store. He continued in the staff room to raise his voice at Jack and point his finger in his face." Melanie Roberts duly signed the statement as true at the bottom of the pages.

40 In cross-examination at this liability hearing Melanie Roberts explained she had not mentioned shift cover at the time because the claimant's behaviour was the issue, the most important thing for her was his behaviour, and she confirmed that it was her decision to send the claimant home at that stage. The Tribunal accepted Melanie Roberts' action to send the claimant home at that stage was not unreasonable, she had not fabricated the allegations in order to do so, and preferred her evidence supported by contemporaneous documentation and other witnesses to that given by the claimant.

41 Janet Whittle was interviewed on the 15 August 2018 and confirmed raised voiced was heard from the office, "the two voices I heard was Mo and Mel" which fits into Melanie Robert's evidence that she sent the claimant home.

42 Paul Ladanowski, manager, in a witness statement taken on 15 August 2018 stated he had changed the claimant's shift from 6-4, then at the claimant's request 7-5 and again a final time at the claimant's request 8-5 while the claimant "stood in front of me and [I] amended it with a pen." On the contemporaneous evidence, the claimant was due to have started work at 8am and not 10am as alleged by the claimant who produced no supporting contemporaneous documents or credible evidence to the effect that he was not late and due to start work at 10am.

43 Some of the incident was caught on one of the stores CCTV cameras and a report was provided.

CCTV report dated 6 September 2018

44 The Tribunal did not accept the claimant's proposition that the allegations were fabricated as part of a conspiracy against him, including the production of the CCTV report by an independent department. The claimant's oral evidence on cross-examination was that the CCTV report dated 6 September 2018 following a request made on the 16 August 2018 was part of the conspiracy. The report confirmed the CCTV was "double checked" and the footage showed "the EE in question speaking with the SM, touching the SM's shoulder a number of times but not forcefully. There is no suggestion of physical aggression within the footage." The claimant requested a copy of the CCTV footage, it was not provided and the Tribunal has been given two different versions as to why. One the one hand Justine Woodward in oral evidence confirmed she could either have the CCTV report or the footage produced and it made no difference, as the report was objective and could be relied upon. Richard Watts gave evidence that the CCTV footage could not have been disclosed due to data protection obligations and "it was company policy not to provide of the CCTV footage itself, but instead get the CCTV evaluation team…to review the footage and produce a report." In closing submissions Mr Halson invited the Tribunal to draw adverse inferences about the

respondent's failure to produce the CCTV evidence. He did not refer to the conflict in the evidence explored by the Tribunal above, who decided on balance that as the CCTV report was objective, and more favourable to the claimant than not, an adverse inference should not be drawn.

45 Drawing all the evidence together and resolving the conflicts on the balance of probabilities the Tribunal concluded on the 12 August 2018 the claimant turned into work 2-hours late, his shift had been covered by another worker by the time he had arrived. The claimant was unhappy when Jack Pope did not allow him to clock-on and take his till, he was asked why he was late and told to go into the office to explain. When he was in the office he raised his voice, and touched Jack Pope's shoulder/chest a number of times but not forcefully. Melanie Roberts entered, witnessed the incident, interpreted it as an act of aggression, voices were raised and she told the claimant to go home. The claimant did not work his shift and was not paid.

17 August 2018 claimant's knowledge of alleged race discrimination

46 The claimant met with Richard Watt's on the 17 August 2018 and gave a different version of events, denied raising his voice and maintained no physical contact was made "None whatsoever, I was 2-3 feet away from them at all times in the office so I couldn't." The claimant was suspended as recorded in the notes he had signed beneath the words "on full suspension." The claimant's evidence that he was not suspended was not credible. There was an opportunity for the claimant to raise any concerns he had, including race discrimination, and he did not. The notes record him saying "I can't understand it…I don't know where any of this is coming from." The claimant's oral evidence before the Tribunal was that it was at this meeting he realised the allegations were fabricated because of his "colour" and he resigned because of this.

Disciplinary hearing 6 September 2018

47 The claimant was invited and attended a disciplinary hearing, the CCTV report was produced on the 6 September 2018. Much was made of the fact the claimant had requested a copy of the CCTV report, which was not disclosed, and the report was commissioned on this basis. The evidence before the Tribunal was that Richard Watts commissioned the report before the claimant' and in any event, the date the report was commissioned and the fact that it was put before the claimant at the disciplinary hearing, were not matters relied upon in the claimant's claim for direct race discrimination and/or fundamental breaches of contract. The claimant's credibility has been further undermined by the contemporaneous evidence before the Tribunal from which it is apparent, contrary to the claimant's evidence, the report was commissioned before the claimant requested CCTV evidence.

48 The claimant continued to receive full pay whilst on suspension pending the disciplinary hearing, and did not resign on or around the 17 August 2018 when he concluded that the respondent had breached his contract of employment by the acts of unlawful race discrimination when a number of employees conspired against him and made untrue allegations. The Tribunal found as set out below, the allegations raised against the claimant was serious and it was not a breach of contract for the respondent to investigate and carry out a disciplinary hearing with

the result that contrary to Mr Halson's indication that there was a continuing breach of contract leading to the claimant's resignation; the Tribunal found there was not.

49 With reference to the investigation and disciplinary process the respondent complied with the ACAS Code and for the avoidance of doubt, the Tribunal found there was no breach of the implied term of trust and confidence in respect of the process followed.

6 September 2018 disciplinary outcome

50 The disciplinary hearing took place before Justine Woodward on 6 September 2018 following which the claimant was issued with a final written warning to lay on his file for 12-months, Justine Woodward having taken into account the CCTV report. Justine Woodward held a reasonable belief the claimant had committed an act of gross misconduct, and had it not been for the CCTV report it is likely he would have faced dismissal. The claimant requested a copy of the CCTV evidence and was informed it was no longer available. Justine Woodward concluded the report prepared by the National Data Protection Office was comprehensive and accepted it showed the claimant touching Jack Pope on the shoulder a number of times, undermining the statement given by the claimant at investigation stage when he denied contact was made asserting he was two to three feet away from Jack Pope at the time.

51 The notes taken at the disciplinary hearing were all signed by the claimant at the bottom of the relevant page, and on the final page when the outcome was communicated to him, the claimant was advised of his right to an appeal which was to be submitted to head of sales within 5-working days. The claimant was asked if this was understood and he wrote "yes." In oral evidence the claimant disputed that he had been advised of his right to appeal, which the Tribunal did not find credible evidence, preferring to rely on the contemporaneous notes. It did not accept the claimant's explanation that he signed the notes to reflect his presence at the meeting and no more.

52 During the disciplinary hearing Justine Woodward put the CCTV report before the claimant after asking him whether he still stood by his evidence that he did not raise his voice and did not make physical contact with anyone, to which the claimant responded "no, I stand by my statement." It was at this point the CCTV report was produced and shown to the claimant, who then explained "me and Jack were talking about next shift and I touched him on shoulder." The claimant had difficulty remembering and changed his evidence as to whether he had touched Jack Pope or not. The notes reflect it was difficult to get a straight answer out of the claimant which raised a question mark in Justine Woodward's mind as to the claimant's credibility. The claimant failing to give a straight answer was a trait which the Tribunal recognised when the claimant gave evidence before it, and on a number of occasions when he was pushed to answer cross-examination, the claimant deflected the question and blamed his solicitor.

53 Justine Woodward considered the claimant's conflicting evidence, preferring the evidence set out in witness statements made by a number of employees including those cited above, and taking into account the CCTV report she concluded a final

written warning should be issued. The claimant is not relying on this decision as an act of unlawful race discrimination.

The aftermath leading to resignation 6 September 2018 telephone conversation

54 Richard Watts had a telephone conversation with the claimant on the 6 September 2018 immediately after the disciplinary hearing. The claimant was angry, spoke in a raised voice and said it was unfair he had been issued with a final warning. Richard Watt's was eager to avoid any confusion over the claimant's shifts in the future and discussed the possibility of a flexible working application form to avoid the claimant being late in the future, with a view to hours being agreed for a 3-month trial period.

55 Richard Watts arranged a meeting with the claimant on the 8 September to discuss his return to work and rota. The claimant agreed.

56 The claimant did not turn up to work on the 8 September 2018, he failed to attend the meeting with Richard Watts and did not attempt to turn up to work on any date. After that. It is undisputed the respondent attempted to contact the claimant on the 8, 9, 10 and 12 September 2018, the claimant did not respond and was taken to be absent without leave ("AWOL").

57 In a letter dated 13 September 2018 Justine Woodward confirmed her decision in writing, she found the claimant's evidence was not credible, concluding he had touched a member of staff repeatedly, raised his voice and become verbally aggressive. Justine Woodward wrote "I found you wouldn't give clear concise answers to a direct question, you then proceeded to become less cooperative when asked a direct question. After witnessing first-hand, the less than cooperative way in which you conducted yourself in the disciplinary hearing, I believe that there is reasonable evidence to suggest you did become verbally aggressive during the incident…As previously advised you have the right to appeal."

58 The claimant did not appeal.

59 The claimant did not attend work or any meetings and made no contact with the respondent.

60 Richard Watts wrote to the claimant on the 12 September 2018 in a letter titled "Failure to make contact in breach of your contract of employment" noting "You have been absent from work…without explanation or authorisation since 08/09/18. I have unsuccessfully attempted to contact you. I have left messages on your answerphone. You have not… contacted me…" Summary dismissal was threatened if the claimant did not make contact within 4-working days.

61 The claimant resigned by letter dated 14 September 2018. In the letter of resignation, the claimant did not deny that Richard Watts had tried to make contact and left messages, had this not been the case the claimant would have said so bearing in mind his belief that staff had conspired against him on the grounds of race.

Resignation letter dated 14 September 2018

62 The claimant wrote **"following the final written warning on 6 September, I have concluded that I cannot go back to work for Lidl** [Tribunal's emphasis]. I feel that the allegation against me was fabricated and that there has been collusion among managers and staff. I have no longer have trust in Lidl. I am also not happy about the way the matter has been investigated and dealt with at the disciplinary hearing. I believe that the reason for this treatment was due to race discrimination."

63 Given the contents of the resignation letter the Tribunal attempted to obtain clarification as to why the claimant resigned, exploring if it was linked in any way to the disciplinary process and outcome. The Tribunal was assured that the race discrimination and false allegations made in August 2018 "caused" the claimant to resign, and the claimant confirmed he would have resigned even had there being no disciplinary sanction and exonerated, the fundamental breach was the false allegation that gave rise to unlawful race discrimination. The claimant's evidence was found to be illogical by the Tribunal. The claimant had not resigned, even when on his own account given during cross-examination, he had come to the view the untrue allegations raised were an act of unlawful race discrimination by the 17 August 2018, and yet proceeded to take an active part in the disciplinary process.

64 The effective date of termination was 14 September 2018, when the claimant handed the resignation letter to Richard Watts.

65 In direct contrast to the claimant's case described by at the preliminary hearing held on the 20 May 2019 by Mr John Halson, to the effect that the claimant did resigned whilst he was awaiting the outcome of disciplinary proceedings in respect of an incident at work the Tribunal found this clearly could not have been the case. The claimant was fully aware a written warning had been issued and he had the right to an appeal.

66 The claimant was paid on an hourly basis. He was incorrectly paid too much salary for the month of September 2018 and should only have received full pay until the 7 September when his suspension finished, thereafter he was not entitled to be paid for the remainder of that month on the basis that he did not work. The claimant in his schedule of loss claimed 1-day unlawful deduction of wages which related to the date he turned up to work on 12 August 2018 and sent home.

67 There was a conflict in the evidence between the claimant stating that Richard Watts had promised him payment for 12 August 2018, and Richard Watts denying that he had, maintaining the respondent did not pay employees if they did not work. Given the claimant's less than credible evidence on a number of matters, the Tribunal preferred Richard Watt's version of events, which is that no such agreement had been reached. The claimant had turned up to work 2-hours late for his shift, he had then not worked on the 12 August 2018 and as a matter of contract had no contractual right to payment.

68 Mr Halson in closing submissions confirmed the claimant had been paid in full for the entire month of September 2018 having resigned on the 14 September 2020.

The evidence given by Richard Watts and in the contemporaneous wage slips considered by the Tribunal, support the fact that the claimant had been paid his "normal" salary totalling £1,183 in September 2018 for the month of September before payroll had received his timesheet reflecting full pay on suspension until the disciplinary hearing when the suspension was lifted following the issuing of a final written warning on 6 September 2018. The claimant did not return to work, despite an agreement that he meet up with Richard Watts on the 8 September, which did not take place. The claimant was not contractually entitled to payment from 7 September 2018 and yet he was paid in full which resulted in an overpayment of £546.

69 Richard Watt's with reference to the bundle, satisfied the Tribunal that the claimant was paid £819 in respect of 15 accrued but untaken holidays from which the overpayment of £546 was deducted and the claimant's total banked undertime which amounted to £494.22 with the result that the claimant was left owing the respondent £221.22 gross. The claimant gave evidence that he had not taken any paid holiday, and was owned 12.5 days, he was paid for the whole of September and 1.5 days holiday was owned to him. Under cross-examination the claimant disputed that he had been overpaid in September, denying that he was absent without leave from the 8 September 2018 and maintaining he was waiting for communication from the Richard Watts and/or the respondent, evidence found not to be credible by the Tribunal given Richard Watts' letter dated 12 September 2018 chasing the claimant. It is notable the claimant did not respond, and there was no attempt by the claimant at communicating or providing an explanation for his failure to attend the meeting arranged for 8 September.

Law

Direct Discrimination (s.13 of the Equality Act 2010 ("EqA"))

70 S.13(1) of the Equality Act 2010 (EqA) provides that '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'.

71 S.23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be '**no material difference between the circumstances relating to each case'** [the Tribunal's emphasis]. In the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.

72 The EHRC Employment Code states that the circumstances of the claimant and the comparator need not be identical in every way. Rather, 'what matters is that the circumstances which are relevant to the [claimant's treatment] are *the same or nearly the same* for the [claimant] and the comparator'— para 3.2.

Continuing acts

73 Ms Kight referred the Tribunal to the Court of Appeal decision in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, the Court of Appeal held when looking at continuing acts, the question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. Ms Kight submitted that there was one alleged incident and the subsequent matters complained of by the claimant did not amount to a continuing act. The Tribunal agreed.

Burden of proof

74 Ms Kight, submitting that the burden of proof should not shift, referenced the Tribunal to the judgment of Lord Justice Mummery in Madarassy v Nomura International plc [2007] ICR 867, CA, it was held: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' Ms Kight submitted there was no overt evidence of direct discrimination and reminded the Tribunal not to take a mechanistic approach to the burden of proof where the act is not inherently discrimination and to consider motivation. Reference was made to the EAT decision in Chief Constable of Kent Constabulary v Bowler [EAT] 0214/16 where Mrs Justice Simler emphasised that: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

75 Bearing in mind that it is rare to find direct evidence of an intention to discriminate and employees who discriminate may not advertise or even be aware that they are prejudiced, Ms Kight reminded the Tribunal of the well-known test set out by Lord Nicholls in the House of Lords Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL. A tribunal must ask: why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason? Ms Kight further submitted the reason why was fundamental and the Tribunal's decision should be influenced by the credibility of witnesses on the basis that unlike the claimant when he gave evidence, the respondent's witnesses gave straight-forward answers, did not avoid the question, answered the question put to them and did not divert the question, dealt with the relevant point and accepted obvious and non-controversial propositions. The Tribunal agreed that this was indeed objectively the case at the final hearing when the claimant prevaricated, diverted, blamed his solicitor, gave answers that bore little or no resemblance to the question put to him on cross-examination and was found to have been an inaccurate historian for the reasons stated above, for example, the relevance of his signature on each page of the investigation document and notes of disciplinary hearing as proof of his attendance only when the notes themselves recorded the claimant's attendance and responses to the allegations put to him.

76 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the 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 provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

77 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Time limits

78 Section 123(1) [Subject to [sections 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.
(2)..

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Unlawful deduction of wages

79 Under part II of the Employment Rights Act 1996 (ERA) the general prohibition on deductions is set out. S.13(1) ERA states that: 'An employer shall not make a deduction from wages of a worker employed by him.' This prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b) which is applicable in the claimant's case.

80 Section 13(3) provides that where the total amount of wages paid on any occasion by the employer to the worker is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purpose of this Part as a deduction made by the employer from the worker's wages on that occasion.

81 The determination of what is 'properly payable' is relevant in this case. The approach Tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. It must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms (including the implied term of mutual trust and confidence) — Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714, CA.

Constructive unfair dismissal

82 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

83 In "Harvey on Industrial Relations and Employment Law" at paragraph DI [403]. "*In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.*"

84 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "*made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'*" (see Harvey DI [411]).

The implied term of trust and confidence

85 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

86 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. In Mr Masuri's case the proscribed conduct took place on the 12 August 2018 and yet the claimant remained in employment for a month until he resigned on 14 September 2018. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Employee must resign in response to repudiatory breach

87 "The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation …" (see Harvey paragraph DI [508]).

88 Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105, EAT "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him**" (per Arnold J) [the Tribunal's emphasis as this point is relevant to Mr Mauri's case].

Waiver of breach

89 Weston Excavating cited above; The employee "*must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

90 W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT Employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract (see Harvey DI [523]).

Conclusion – applying the law to the facts

Time limit

91 With reference to the first issue, namely, was the entirety of C's claim brought within the relevant time period, or are there parts of it which have been brought out of time, the Tribunal fond the constructive dismissal claim was brought within the statutory time limit taking into account the effect of ACAS Early conciliation. In relation to unfair constructive dismissals based on alleged discriminatory conduct, time begins to run from the date of termination of employment and not from the employer's repudiatory breach of contract i.e. when the employee resigns or, if the resignation is with notice, from the date the notice expires.

92 The claim form was received on 12 February 2019 following ACAS Early Conciliation between 13 December and 13 January 2019. The act complained of took place on the 12 August 2018, the claimant's date of knowledge was either the 12 August (according to Mr Halsall) or 17 August 2018 (according to the claimant). Any direct race discrimination claim relating to the alleged false allegations would be substantially out of time, and the claimant gave no explanation as to why this was the case, or why the Tribunal should extend time in his favour. Mr Halson concentrated on the argument that as the claimant had resigned on the 14 September 2018 the claimant was within time, and at first there was a suggestion that there was a continuing act. This could not be the case, as both the claimant and Mr Halson confirmed the discriminatory act relied upon was the fabricated allegations made on 12 August 2018, and after that there were no other discriminatory acts as conceded by the claimant and Mr Halson.

93 Mr Halson's representations were akin to those recorded at the 20 May 2019 preliminary hearing at paragraph 5, essentially that "the claimant has not pleaded a detriment by way of race discrimination relating to the allegations made on 12 August 2018 but rather that date is the start of a continuous series of acts relating to the false allegations and collusion culminating in the claimant's resignation on 14 September 2018. The Tribunal found the 12 August 2018 would be out of time, as there is no evidence of a continuing act from that date through to the resignation, Mr Halson having confirmed that the final written warning was not an act of unlawful discrimination or breach of contract and/or a last straw incident.

94 Mr Halson in oral submissions clarified that the claimant was not claiming a separate detriment alleging race discrimination; his claim was that the alleged act of race discrimination (being the false allegation raised against him on the 12-14 August 2018) was a fundamental breach of contract that led him to resign and entitled him to claim a discriminatory constructive unfair dismissal under section 39(2)(c) of the ERA which crystallised on the 14 September 2018 when the claimant resigned. Reference was made to the final written warning which, Mr Halson confirmed, did not amount to a last straw and it was the false allegations that came to his attention on the 14 August 2018 (or according to the claimant's evidence the 17 August) that led him to resign and accept that fundamental breach, as a consequence he was dismissed because of is race. Mr Halson clarified to the Tribunal that were the claimant not to succeed in his constructive dismissal claim there was no separate claim of unlawful race discrimination for the false allegations made on 14-16 August 2018.

DIRECT RACE DISCRIMINATION

95 With reference to the issue did the respondent treat the claimant less favourably by, between 12-14 August 2018, Mel Roberts and Jack Pope allegedly making "false allegations" that the Claimant's behaviour on 12 August 2018 amounted to threatening behaviour, on the balance of probabilities the Tribunal found it did not. On the balance of probabilities, it found the allegations made were not false and taking into account the mental processes of Mel Roberts and Jack Pope, the allegations were not made because of the Claimant's skin colour/race as compared to a hypothetical comparator. A hypothetical comparator in the same position as the claimant, who had arrived late and conducted himself as the claimant had in the meeting with Jack Pope, would have faced similar allegations given the claimant's inappropriate conduct towards a manager.

96 Mr Halson submitted that the central issues in the case was the conflicting evidence given by witnesses during the investigation as to whether or not the claimant had used physical force, and just because the claimant needed asking a question several times does not mean he was not telling the truth. The Tribunal accepted that a witness being asked the same question a number of times does not necessarily denote the truth is not being told. It is the manner in which the question was/ as not answered and context, which is difficult to assess when looking at meeting notes without taking into account witness evidence on what transpired during the meeting giving context to evidence. The Tribunal is aware that witnesses invariably find cross-examinations stressful and difficult to content with, questions are not always understood and may have to be repeated in a number of ways for clarity and it is in no doubt there were number of instances during cross-examination when time was given to ensure the claimant fully understood the question put to him and was given the opportunity to respond. The Tribunal agrees that this does not mean the claimant was not telling the truth, and the same point could be applied at an internal disciplinary hearing. However, there are occasions when a witness is caught out during cross-examination and prevaricates when giving evidence, avoiding answering and giving responses that bore little or no relationship to the question asked. This was, on more than one occasion, the case with the claimant when he gave evidence at this liability hearing.

97 As set out in the findings of facts above, the Tribunal noted there were variations in the evidence given by witnesses which points away from a conspiracy, reflecting people can interpret actions from a different perspective where poking somebody in the chest can be a prodding, a touching, having a hand on Jack Pope's chest or chopping. The general perception of witnesses was that the claimant's actions were aggressive, he had physically touched a manager and witnesses had the advantage of hearing the claimant's raised voice in contrast to the CCTV evidence where noise was not recorded but the claimant's actions were. There is no reason to doubt that the recording showed the claimant touching Jack Pope a number of times, but "not forcefully." The point is the claimant denied going anywhere near Jack Pope physically, and yet the CCTV evidence undermined this.

98 Mr Halson with reference to the CCTV footage argued the respondent could have retained the original footage and in not doing so deprived the claimant of "any better evidence" inviting the Tribunal to draw adverse inferences. The Tribunal considered this matter carefully. It was concerned the original CCTV evidence had not been produced, aware that if findings of facts are made from which an inference of discrimination could properly be drawn, it will be an error of law for it not to do so, avoiding the stage two enquiry of requiring the employer to disprove the inference. In order to avoid any confusion, its primary position was that adverse inferences could not be drawn due to the nature of the report which objectively, was more favourable to the claimant than not, and the secondary position was to carry out a stage two inquiry into the respondent as an alternative concluding the explanations given were untainted by race discrimination.

99 Mr Halson suggested that the Tribunal's focus should be on whether or not the allegations was false and if satisfied that they were, section 136 reverse burden of proof would lead the Tribunal to conclude that the reason was the claimant's skin colour as there was no other motive apart from the claimant's race, there is rarely direct evidence of race discrimination and the Tribunal was entitled to draw inferences. Mr Justice Elias in Laing v Manchester City Council and anor [2006] ICR 1519, EAT — their focus 'must at all times be the question whether or not they can properly and fairly infer… discrimination.' In addition, according to the EAT in Bowler cited above, a mechanistic approach to the drawing of inferences, "which is simply part of the fact-finding process" should be avoided.

100 Taking the evidence in the round and the factual matrix found by the Tribunal above, it took the view that failure by the respondent to produce the CCTV evidence and rely on the CCTV report did not, on balance, result in adverse inferences being drawn taking into account the Tribunal's findings that there was no conspiracy and the report, objectively produced by another department, was to the claimant's advantage by confirming he had not forcefully" touched Jack Pope. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered and were. Had the burden of proof shifted, as suggested by Mr Halson, the Tribunal considered the explanations put forward for raising the allegations against the claimant and failing to provide the claimant with a copy of the CCTV evidence, concluding they were genuine and untainted by race discrimination. In short, the Tribunal found the motivation of Mel Roberts and Jack Pope was not to get the claimant into trouble by raising false allegations because he was black and

Nigerian national origin, but to manage an employee who had failed to turn into work at the right time and when pulled up about it, committed an act of misconduct against the manager. In conclusion, on the facts of this case, the burden of proof has not shifted.

101 For the avoidance of doubt, no adverse inference was raised by the fact that Jack Pope was unable to give evidence to the Tribunal and be cross-examined his undated and unsigned written statement, given the reason for Jack Pope's unavailability, namely COVID19. There existed sufficient information before the Tribunal by way of contemporaneous documentation and the claimant's less than credible evidence, for the Tribunal to make positive findings of facts and deal with credibility, particularly that of Mel Roberts who did give oral evidence.

Constructive dismissal

102 The time limits in a constructive dismissal based on discriminatory conduct starts to run from the date of termination of and not from the employer's repudiatory breach of contract — Meikle v Nottinghamshire County Council [2005] ICR 1, CA. In the claimant's case time began to run for a discriminatory dismissal when he resigned without notice, and as indicated earlier, the complaint of a discriminatory unfair constructive dismissal was received within the statutory time limit.

103 The Tribunal found there was no fundamental breach of contract given its finding that between 12 to14 August 2018 Mel Roberts and Jack Pope had not made "false allegations" that the Claimant's behaviour on 12 August 2018 amounted to threatening behaviour. The treatment of the claimant did not amount to a fundamental breach of contract (implied term of mutual trust and confidence) and the conduct of Mel Roberts and Jack Pope objectively was not likely to have destroyed or seriously damaged his trust and confidence given the Tribunal's findings on the claimant's misconduct. For the avoidance of doubt, the Tribunal found throughout the period from 12 August through to resignation, there was no evidence of the disciplinary process and respondent's dealings with the claimant being tainted by unlawful race discrimination and no breach of contract, let alone a fundamental breach.

104 Having found there was no breach of contract there is no requirement for the Tribunal to consider the remaining issues relating to constructive dismissal. In the alternative, had the Tribunal found Jack Pope and Mel Roberts had made false allegations against the claimant because of the protected characteristic of race, (which it did not) it would have gone on to find the claimant had delayed resigning based on his own evidence during cross-examination. He was clear that whatever the outcome of the disciplinary hearing, he would have resigned and yet did not on the 17 August 2018 when he formulated the belief in his own mind that the deputy managers were conspiring against him, along with other employees, and this amounted to direct race discrimination. Following suspension on full pay and in taking part in the disciplinary process the claimant affirmed the contract of employment, particularly when the claimant did not raise the issue of race discrimination and his belief that he manages and others were conspiring against him at the time.

105 Taking into account the chronology above, including the claimant's angry telephone call with Richard Watts following the disciplinary hearing when the claimant was informed of the decision to issue him with a final warning, the claimant did not return to work and 8-days later resigned. The words he used in the letter of resignation are instructive; the claimant wrote **"following the final written warning on 6 September, I have concluded that I cannot go back to work for Lidl** [Tribunal's emphasis]. I feel that the allegation against me was fabricated and that there has been collusion among managers and staff. I have no longer have trust in Lidl. I am also not happy about the way the matter has been investigated and dealt with at the disciplinary hearing. I believe that the reason for this treatment was due to race discrimination. Despite the contents of the resignation letter, the only breach of contract relied upon by the claimant was the allegation of fabrication and his evidence that the disciplinary outcome made no difference to his decision to resign is not supported by the facts. It is notable that the claimant's legal representative indicated at the preliminary hearing the claimant resigned pending the outcome of the disciplinary hearing, and yet the facts are clear; the claimant was unhappy with the final written warning outcome communicated to him on the day of the disciplinary hearing, so much so, immediately after he angrily spoke in a raised voice and said it was unfair he had been issued with a final warning when he rang Richard Watt to inform him of the outcome, and thereafter failed to attend an agreed meeting and resigned after being threatened with summary dismissal for going AWOL under the respondent's Policy.

106 On the balance of probabilities, the Tribunal concluded the claimant resigned because he had been issued with a final written warning, he was upset and angry. He had not resigned immediately in response to the alleged breach in August and it was confirmed the disciplinary process and outcome were not fundamental breached of contract or a last straw breach. Accordingly, had the claimant established the respondent was in fundamental breach of contract (which he did not) the Tribunal would have gone on to find the claimant resigned for some other reason than the one he stated, namely, the issuing a final written warning which was to remain on his file for 12-months. To claim constructive dismissal the claimant should leave his employment because of the breach of the implied term of trust and confidence, and this should "demonstrably be the case. It is not sufficient, we think, if he merely leaves … in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him" Walker cited above.

107 Finally, with reference to the claimant waiving the breach (had one been found to exist, which it was not) the House of Lords in Malik cited above, held that the breach occurs when the proscribed conduct takes place. In Mr Masuri's case the proscribed conduct took place on the 12 August 2018 and yet the claimant remained in employment for just over a month until he resigned on 14 September 2018. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. According to Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". On the claimant's own evidence the outcome of the disciplinary hearing held no relevance ot him;

he assured the Tribunal in oral evidence on cross-examination that he would have resigned even had there being no disciplinary sanction and exonerated, and as a consequence of this evidence the Tribunal found the claimant had delayed. In other circumstances, had an employee given evidence that he or she was waiting for the outcome of a disciplinary process whilst suspended on full pay, it may have been the case, depending on the particular facts of the case, the Tribunal would not have found the breach had been waived by a delay of just over one month.

108 The Tribunal view was that Mr Masuri by waiting and taking part in the disciplinary process in the knowledge that he was going to resign, whatever the outcome, whilst on full suspension given the factual matrix found by the Tribunal, did lose his right and was precluded from claiming unfair dismissal because he had remained in employment for four weeks after it had become clear that he would be disciplined for his alleged misconduct against the managers in question and is thus for the taken to have affirmed the contract on or soon after the 17 August 2018.

UNLAWFUL DEDUCTIONS FROM WAGES

109 With reference to the issue has the Respondent made an unlawful deduction from the Claimant's wages by not paying the Claimant in respect of his shift on 12 August 2018, the Tribunal found the claim to have been submitted outside the statutory 3-month limitation period taking into account the fact the claimant first consulted with ACAS on the 13 December 2018.The claimant's wages were due to be paid by the end of August through the normal monthly pay run, leading to a primary time limit expiring at the end of November 2018.

110 There is a three-month time limit for presenting a complaint - S.23(1) ERA — S.23(2). If the complaint relates to a deduction by the employer, the operative date from which time starts to run is 'the date of payment of the wages from which the deduction was made' — S.23(2)(a), which in the claimant's case was end of August 2018. No evidence was given by the by the claimant that it was not reasonably practicable to present a complaint within three months, and it was clear that there were no obstacles preventing the claimant from issuing proceedings within the statutory time limit, and the Tribunal finds that it was reasonably practicable for him to do so.

111 In the alternative, had the claimant's claim been lodged within the statutory limitation period (which the Tribunal found it was not) the Tribunal would have gone onto find there was no unlawful deduction of wages.

112 Section 13(3) provides that where the total amount of wages paid on any occasion by the employer to the worker is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purpose of this Part as a deduction made by the employer from the worker's wages on that occasion.

113 The determination of what is 'properly payable' is relevant in this case. The approach Tribunals should take in resolving such disputes is deciding, on the ordinary principles of common law and contract, the wages that was properly payable to the worker on the relevant occasion and this requires consideration of

all the relevant terms of the contract, including any implied terms (including the implied term of mutual trust and confidence if a promise to pay had orally been made).

114 Mr Halson submitted the claimant attended work on the 12 August 2018 and was ready and able to work his shift, before being sent home "on a whim" by Melanie Roberts who then later justified this by the untrue allegation made in relation to the claimant's conduct. The Tribunal did not accept the claimant had been sent home on a "whim" preferring the more credible evidence given by witnesses on behalf of the respondent that the claimant was due to attend work at 8am and turned up 2-hours late, by which time his shift had been covered. Mr Halson submitted that there was no evidence before the Tribunal that anyone had been asked to cover the claimant's shift, which was correct with regards to contemporaneous documents but it stands to reason if the claimant was not at work his shift would need to be covered, and the Tribunal accepted the evidence given by the respondent on this point, supported by the fact that the claimant did not work his shift at all either before or after he was told to go home.

115 The claimant's contract does not provide payment for work not carried out, and the Tribunal did not accept the claimant's evidence that an agreement had been reached with the respondent to the effect that he should be paid for the shift he turned up late to and did not work. In short, payment for the 12 August 2018 shift was not properly payable to the claimant and the claim for £54.60 unlawful deduction of wages is dismissed.

116 Turning to the holiday pay claim, in his witness statement the claimant maintained he was owned 1.5 days accrued holidays. In oral evidence the claimant admitted the respondent was contractually entitled to deduct any overpayments out of salary, and he had negative banked hours attributable to "Mel mess[ing] the rota" accepting the shifts needed to be deducted. On the evidence before it, the Tribunal found the claimant was not entitled to pay between the 7 September to the end of 30 September 2019. The claimant was overpaid salary by 24 days, and was entitled 12.5 days accrued holidays. The claimant is contractually entitled to work 30 hours per week, usually over either 3 or 4 days and from 1 April to 6 September 2018 accrued 73.5 hours holiday. The burden is on the claimant to prove that he was owned statutory holiday pay amounting to 1.5 days as alleged, and he has failed to discharge that burden on the balance of probabilities. The evidence before the Tribunal is that the claimant was overpaid salary for the month of September 2018 and is therefore not owned unpaid accrued holidays.

117 In conclusion, the respondent was not in breach of contract and the claimant was not unfairly dismissed; his claim for constructive unfair dismissal is not well-founded and is dismissed. The claimant was not unlawfully discriminated against on the grounds of his race and his claim for direct unlawful race discrimination is not well-founded and is dismissed. The claimant's claim for unpaid accrued holidays brought under the Working Time Regulations 1998 is not well-founded and is dismissed. The claim for unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 as amended, was not presented before the end of the period of 3 months beginning with the operative date from which time starts to run the end of August 2018 pay run from which the deduction was made and the Tribunal was satisfied that it was reasonably practicable for a

complaint to be presented before the end of that period of 3 months, it does not have the jurisdiction to consider the complaint, which is dismissed.

27.4.2020

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Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON
30 April 2020

FOR THE SECRETARY OF THE TRIBUNALS