



EMPLOYMENT TRIBUNALS

Claimant

Ms R Hayles

Respondents

**Tesco Stores Ltd (1)
Yan Damalitis (2)
Alyson Hart (3)
Jo Childs (4)
Nikki Mendes (5)**

Heard at: Watford

On: 2nd 9 May 2017

Before: Employment Judge Manley

Members: Mr I Bone
Mr D Bean

Representation

For the Claimant: In person

For the Respondent: Mr P Gorasia, Counsel

RESERVED JUDGMENT

1. The claimant's complaints of race discrimination, harassment and victimisation fail and are dismissed.
2. The claimant was dismissed for some other substantial reason of a kind such as to justify the dismissal of an employee holding her position. That dismissal was not unfair.
3. The claimant is not entitled to any further payments by way of damages for breach of contract relating to bonus payments in 2014/15 and 2015/16 or holidays for 2014/15.
4. The claimant's complaints fail and are hereby dismissed.

REASONS

Introduction and Issues

1. The claimant brought claims in the Employment Tribunal on 14 August 2016. These were discussed at a Preliminary Hearing (PH) in October 2016 and a list of issues was prepared. There had been some mistyping with respect to the issues sent to the parties. There was also further clarification as the hearing progressed. The issues to be determined are now set out below:-

2. **Unfair dismissal claim**

- 2.1. *What was the reason for the dismissal? The respondent asserts that it was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held which is a potentially fair reason under section 98(1) b) Employment Rights Act 1996.*
- 2.2. *Did the respondent hold that belief in the substantial reason on reasonable grounds? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:*
 - 2.2.1 *The claimant was not informed that disciplinary proceedings would be instituted against her.*
 - 2.2.2 *The respondent failed to take in to account that Miss Nikki Mendes, had bullied and harassed her and wanted her dismissed.*
- 2.3. *Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?*
- 2.4. *If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed any misconduct alleged.*
- 2.5. *Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when? It is the claimant's case that dismissal was outside the range of reasonable responses as the respondent failed to take in to account that the source of her concern was the behaviour of Miss Mendes.*

3. **Direct race discrimination**

- 3.1. *Have the respondents subjected the claimant to the following treatment falling within s.39 Equality Act 2010?*

As against Mr Yan Damalitis

- 3.1.1 *Taking in to account Ms Mendes' complaint to USDAW dated 20 June 2013 concerning the claimant.*

3.1.2 *Using documents presented by Ms Mendes about the claimant without the claimant being given the opportunity of challenging their contents.*

3.1.3 *Dismissing the claimant.*

Miss A Hart

3.1.4 *Miss Hart used Ms Mendes' letter of 20 June 2013 to initiate disciplinary proceedings against the claimant by sending it to Miss Jo Childs and instructing her to conduct a review.*

3.1.5 *Denying the claimant the opportunity of challenging Ms Mendes' letter.*

3.1.6 *Advising Mr Damalitis that he could continue with the disciplinary hearing notwithstanding the fact that the claimant had complained about him.*

Jo Childs

3.1.7 *Viewing the claimant's personnel file without prior knowledge or consent of the claimant.*

3.1.8 *Deciding that there should be disciplinary proceedings against the claimant without hearing from her first.*

Miss Nikki Mendes

3.1.9 *Lodging her complaint about the claimant on 20 June 2013 with USDAW.*

3.1.10 *Questioning the claimant's race and style of speaking and mannerisms such as greeting Miss Childs by putting her hands in prayer.*

3.1.11 *Conspiring with others to secure the claimant's dismissal.*

3.1.12 *Instructing Miss Maria Mersina and Derean Roach, Customer Assistants in January 2016, to take out grievances against the claimant.*

3.2 *Has the respondent treated the claimant as alleged less favourably than it treated or would have treated her comparators? The claimant relies on the hypothetical comparator, namely a white Customer Assistant.*

- 3.3 *If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*
- 3.4 *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

4 Harassment related to race

- 4.1 *The claimant will rely on Miss Mendes' conduct towards her in support of her harassment claim as referred to under direct race discrimination.*
- 4.2 *Did Ms Mendes engage in such unwanted conduct?*
- 4.3 *Was the conduct related to the claimant's protected characteristic?*
- 4.4 *Did the conduct have the purpose of violating the claimant's dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*
- 4.5 *If not, did the conduct have the effect of violating the claimant's dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*
- 4.6 *In considering whether the conduct had that effect, the tribunal will take in to account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

5 Victimisation

- 5.1 *Had the claimant made a protected act by giving evidence in the case of Ghosh v Tesco Stores Limited, case number 3302038/2014? The claimant in that case alleging sex discrimination.*
- 5.2 *Background only – no finding necessary - Did the first respondent's counsel in that case say to the claimant and to Mr Mark Bruce, Customer Assistant, during the course of that hearing, that when they returned to work they would be dismissed?*
- 5.3 *Was the disciplinary process leading to the claimant's dismissal and including the dismissal significantly influenced by, or was caused by, the protected act?*

6 Breach of contract

- 6.1 *Is the claimant entitled to the reimbursement of the sum of £350 by way of a bonus payment for the year 2014/2015?*
- 6.2 *Is the claimant entitled to the sum of £450 by way of a bonus payment for the year 2015/2016?*

6.3 *It is the respondent's case that the claimant was not in employment at the times she would have been entitled to the bonus, namely on 22 May 2018 and 23 May 2016.*

7 Holiday pay

7.1 *Is the claimant entitled to carry holiday entitlement over from one year to another and, if so, is she entitled to a further 1 day holiday pay in the sum of around £51.92?*

8 Time/limitation issues

8.1 *The claim form was presented on 14 August 2016. Accordingly, any act or omission which took place before 15 May 2016 is potentially out of time, so that the tribunal may not have jurisdiction.*

8.2 *Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?*

8.3 *Was any complaint presented within such other period as the employment Tribunal considers just and equitable?*

9 Remedies

9.1 *If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.*

9.2 *There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.*

The Hearing

10 There was some clarification of the issues at the commencement of the hearing. The tribunal also had before it two lever-arch files with documents numbering over 800 pages. One of those bundles contained the documents which had been considered in a review Ms Childs carried out which we will come to later in the findings of fact. It is true to say that a considerable number of those documents needed to be considered over the course of the hearing.

11 The claimant's and the respondents' representative co-operated fully with the tribunal in agreeing a timetable to ensure the evidence was completed within the time allowed and concentrating their questions on those matters which were relevant to the issues to be determined.

12 The tribunal heard from the following witnesses:-

12.1 For the claimant, we heard from

- the claimant;
- Ms Ford, a colleague at the same store as the claimant;
- Mr Bruce, a colleague and the person who attended some of the relevant meetings as a representative of the claimant.

12.2 The claimant also submitted other witness statements which it was agreed could be “taken as read”. This meant that the tribunal read those statements and, where appropriate, they were taken into account in our fact finding. They were as follows:-

- Mr A Islam, an ex employee of the first respondent;
- Everald Brown, a character witness;
- Jennifer Asad, a colleague and ex Tesco employee;
- Joyce Mukoko, a colleague and someone the claimant had represented;
- William Adenonjobi, a colleague and a character witness;
- Valerie Williams, a colleague and a character witness.

12.3 For the respondents, the tribunal heard from the following witnesses:-

- Alyson Hart, Regional People Manager;
- Jo Childs, Group Personnel Manager;
- Nikki Mendes, Group Personnel Manager;
- Yan Damalitis, Store Manager;
- Colin Hamilton, Store Director.

13 Generally, the Hearing proceeded normally. The claimant mentioned the possibility of making an application for a witness order for the Chairman of Tesco but that was not formally proceeded with until the fourth day of the tribunal. The application was then made as the claimant was concerned by comments allegedly made by the Chairman which had been reported in the press on 10 March 2017. It was reported that, amongst other things, the Chairman had said something like “*white men are an endangered species*”. The employment judge asked the claimant to explain how this evidence could be relevant to the facts in her case. The claimant indicated that she believed this attitude might be something which affected those who took decisions in her case. She said that she believed there were no representatives of BME groups on the first respondent’s board.

14 The respondents objected to a witness order being made. Mr Gorasia read out more of the surrounding comments of the remark which had been reported to us and it was clear that that remark alone was being taken out of context. He submitted there was no relevant evidence and there was no link between anything the Chairman said and any decisions taken about the claimant. He said it was not proportionate to make a witness order. The tribunal discussed the application and concluded that there was no evidence that the Chairman could give which would be relevant to the facts in the

claimant's case. There had been no approach to the Chairman to attend voluntarily and the application was made very late in the hearing, very close towards the end of all the oral evidence. The tribunal decided that it would not be proportionate to make a witness order and declined to do so.

Facts

- 15 The tribunal find the following facts to be those which are relevant to the issues to be determined. As is usual, in a case where we hear evidence over a few days and, particularly where a party is a litigant in person, we may well have heard other evidence that is, in our view, irrelevant to the issues to be determined.
- 16 We start by listing some of the people whose names might arise later in our findings of fact. Apart from the named individual respondents set out above, a number of other people took a role in dealing with the claimant's concerns and grievances and they were mentioned from time to time. In no particular order the people to whom reference is made are as follows:-
 - Mr Paul McNulty – Store Manager at the Ponders End Tesco Extra
 - Ms Mel Backhouse – ER Manager at Ponders End store up to July 2015
 - Ms Derean Roach – USDAW Representative at the Ponders End store.
 - Ms Rhianon Halford, People Manager Group
 - Ms Kirsty Lay – note taker at one of the meetings
 - Mr Christopher Hope, Area Organiser, Eastern Division USDAW
 - Mr McCrossen, Divisional Officer USDAW
 - Ms Shelly Slater/Dickinson, Store People Manager and People Manager
 - Mr Dan Cattle, Store Customer Services Manager and People Manager
 - Mr D Haffenden, Store Manager at a different store
 - Mr Jez Buttwell, Store Director
- 17 The claimant commenced employment as a Customer Assistant with the first respondent on 19 October 2005. She was based at Tesco Extra at Ponders End in Enfield. The first respondent is a very large and well known retail organisation with many thousands of employees. The Ponders End store is a large store. The first respondent has a partnership agreement with the Shop Workers' Union USDAW and USDAW representatives often assist employees during meetings with their managers and so on.
- 18 As is common with an organization of this size the respondent has workplace policies. In particular, it has a Disciplinary Procedure and a Grievance Policy. One of the documents that we were referred to and which was sent to the claimant during the dismissal process, was a document entitled '*Solving Problems At Work (Staff Guide)*'. It includes details on representation and the disciplinary procedure with the most common steps for such a procedure. The procedure refers to conduct and capability specifically. We also saw a further internal document which refers to the disciplinary procedure; the right to be accompanied and so on. This states that the respondent will carry out an investigation before any disciplinary

action is taken. We also saw check lists for use by management with respect to conducting meetings and grievances where the matter complained of is “*discrimination / harassment / bullying*”. The policies are non-contractual.

- 19 The first respondent also operates a share bonus scheme and the tribunal saw the relevant documents about it. The scheme for 2014-2015 stated that the employee who left before 22 May 2018 would forfeit the shares. An employee leaving before 23 May 2016 would forfeit the shares under the 2015-2016 scheme. The first respondent’s holiday policy states that untaken holiday cannot be carried forward and the tribunal were shown written information provided to staff which said – “ *You are unable to carry over any outstanding holiday allowance at the end of the holiday year into the new holiday year, or to be paid for outstanding holiday*”.
- 20 At some point the claimant became an USDAW representative and attended a significant number of meetings with staff colleagues before 2013. Apparently, at some point, the claimant refused to sign a document which was her ‘Terms and Conditions of Employment’ but we did not go into this in any detail.
- 21 Mr McNulty was the Store Manager at the Ponders End store in early 2013 when he began to raise concerns with Christopher Hope, the area organizer at USDAW about the claimant. By an email on 2 March 2013 he made a request that she “*be relieved of her union duties as a union rep in store*”. He referred to a series of incidents and a chronology was then drawn up which set out details of the alleged difficulties with the claimant.
- 22 The fifth respondent is a Ms Mendes. Ms Mendes was a Group Personnel Manager which is a relatively senior position. She had responsibility for 25 stores and some 7000 colleagues. In common with all the witnesses who appeared before us, she had undertaken diversity training. She followed up the communication with Mr Hope at USDAW by email of 17 May again raising concerns about the claimant’s behaviour. She included in that email what she considered to be the difficulties with the claimant she had witnessed at an appeal hearing where she was taking notes. This was copied to Ms Backhouse being the Store Personnel Manager. Ms Mendes then discussed matters with Mr Cattle who was a Personnel Manager at Ponders End and with Ms Backhouse about an appropriate follow-up letter to be sent to the trade union.
- 23 Eventually on 20 June 2013 Ms Mendes sent a letter to Mr Hope which starts: “*I am writing further to our recent conversations and meetings regarding the conduct of Ruth Hayles as an USDAW representative from Ponders End Extra*”. The letter was a formal request that the claimant be no longer recognised as an USDAW representative. The letter contained a summary of the “key issues” with eight bullet points and then details of the alleged problems. It is not necessary to repeat all these here but one particular passage has led to some cross-examination and it will therefore be quoted now:

“Firstly, the appeal letter was very long, complicated and lacked clarity. The letter was initially based around the four reasons for dismissal, but then went on to list multiple other reasons. There was a lot of repetition, long words and essentially it made it very difficult to really understand what the appeal was centered around.

At the appeal meeting, Ruth appeared to use this as a platform for herself, trying to hold court during much of the meeting. Obviously the representative is able to talk on behalf of the colleague but Ruth wanted to talk endlessly, using long words and sentences so it really did not make much sense. I, as a note taker, found it incredibly difficult to note the key points that she was making as her points were so confused and long.”

- 24 When she was asked questions about this concern about the claimant's language in the tribunal hearing Ms Mendes said, and we accept, that her concern was that the people the claimant was representing might not always follow it. She said she had no difficulty herself understanding the claimant. By a letter of 8 July Mr Hope notified Ms Mendes that the claimant's credentials had been withdrawn but that she had a right to appeal. Ms Mendes later sent another letter to USDAW, this time to Mr McCrossen, because, in her view, there had been some developments with respect to the claimant's activities. It appears that there might have been an appeal and it was not entirely clear to the tribunal when the claimant was entitled to act as a trade union representative. In any event, by a letter of 8 November the claimant was told that USDAW had *“decided to withdraw your credentials as USDAW rep. This means that you will no longer be recognized as shop steward in your store or act as union rep in anywhere outside of your store”*.
- 25 The claimant had seen at least some of this correspondence as she then complained about it in a letter to Ms Mendes on 9 December 2013. The claimant said: *“I feel you have deliberately chosen to victimise and discriminate against me through false representations to USDAW. As I believe, your actions appear to be on a deliberate collusion with a Ponders End Personal Manager, Daniel Cantle in a bid to remove me as an USDAW shop steward”*. The claimant went into more detail as to why she disagreed with her removal.
- 26 Although the claimant was no longer an USDAW rep, she continued to represent colleagues as a colleague rep at a number of internal hearings. Mr Damalitis estimated that by the time he arrived at the store in July 2015, she was acting as a representative in about 90% of hearings.
- 27 During 2014 the claimant was pursuing a claim in the employment tribunal which did not proceed after she did not pay a deposit which was ordered. This claim alleged race discrimination and discrimination on the grounds of trade union activities. She also gave evidence in another case in the employment tribunal where Ms Ghost was claiming sex discrimination. The claimant accepted that the only person involved in the matters with which

this tribunal is concerned who knew the claimant had given evidence is Ms Mendes.

- 28 Over a period of time, the claimant had presented nine grievances and complaints concerning different people. By letter of 20 February 2015 Ms Backhouse wrote to the claimant suggesting a meeting to consider all those grievances. She suggested that they be dealt with as a single grievance and listed the issues the claimant had raised. These involved a number of different people including Check-Out Team Leaders, Store Managers, Bakery Manager and more general concerns. The meeting was to be held later in February.
- 29 By email of 24 February the claimant said that she was attending that meeting and took exception to matters raised in the letter. She included a table of the incidents which concerned her referring to a number of individuals including Shelly (Slater) who was a People Manager, Ms Graham, another People Manager, Ms Mendes, Mr Cattle and someone *“yet to be identified - - - I believe a very senior person is involved and is supporting this”*.
- 30 Ms Backhouse continued to look into these matters. In the course of her considerations, she wrote an email to Ms Mendes dated 12 June 2015. We heard from Ms Mendes who told us, and we accept, that she told no one about this email which she felt was inappropriate. Ms Backhouse sent it only to Ms Mendes. It starts in this way:

“Though there are some learnings to the management team the outcome of my investigation is that Ruth is referred to disciplinary as I believe the sanction appropriate as well as a behaviour contract. This will come under misconduct but will result in dismissal under ‘other substantial reason’ namely choosing to behave in manners that is not in line with company values and expectations – may tweak wording”.

- 31 There is then a heading which is *“What is going to happen”* and then bullet points which, on any reading, suggests the dismissal of the claimant. It sets out what appears to be a plan to end the claimant’s employment. It does also include reference to a settlement figure. The tribunal agrees with Ms Mendes who said that the contents of this email were inappropriate because it suggests a course of action which might not be a fair one. Ms Mendes said she spoke to Ms Backhouse about it but to no one else. The claimant’s case, as we understand it, is that this was what led to her dismissal some eight or nine months later. The tribunal accepts that none of the people taking decisions later in the claimant’s case had sight of that email and it played no further part in any concerns or communications about the claimant. Ms Backhouse did repeat something similar in an email to a number of people including Ms Hart of 13 July. In this letter she says: *“I believe.....that there is sufficient grounds for a disciplinary process to be instigated to look at her behaviour and conduct”*. While this might not be an appropriate suggestion, it does not necessarily suggest dismissal.

32 Ms Backhouse sent an outcome letter to the claimant on 10 July. This document is between pages 147-154 of the bundle. It is a long and detailed outcome to the claimant's grievances. Ms Backhouse set out that she had spoken to nineteen people and then considered the claimant's grievances.

33 In essence she did not uphold the claimant's grievances although she did say this:-

"You will note from the body of this letter that I have recognised and agreed with you certain elements within your grievances. However, you will also note that I have not upheld many aspects of your grievances as well and trust that you understand my rationale for doing so".

Under the heading "recommendation" she says this:

"In terms of there being a campaign to discredit you as a representative I can find no evidence to support this. As far as I can see there never has been an issue with you representing colleagues. What I have found however is that the manner in which you conduct yourself within meetings and generally within grievance processes is of real concern to me. It is clear to me the business has no issue with you raising and supporting colleagues in grievances. However, what concerns me a great deal is that there appears to be a pattern of behaviours whereby you raise a grievance or complaint that either has little substance or simply because you did not like the outcome of a particular issue. I am concerned therefore that you are not using grievances for their proper purpose".

34 By email of 14 July the claimant responded like this:

Thank you for your outcome letter.

It is no less than I expected, it is unfortunate that you spent all that time listening but never really heard my complaint.

I do intend to appeal your very biased decision as I did say to you in my last meeting I believe you to be the missing senior manager (from my chart) supporting Nikki Mendes and Paul McNulty".

35 Ms Backhouse prepared a statement relating to the claimant's response to her outcome letter. Again, we will not cover all the detail contained in that document but one matter has been raised by the claimant, not in evidence but in her submissions. This relates to something on page 172 where Ms Backhouse commented on the claimant referring to the circumstances of another USDAW rep "whose credentials were removed whilst I was the Personnel Manager at Cheshunt Extra". She went on to comment in this document that she had worked hard with this individual.

36 In the meantime, in August 2015 Ms Roach who was an USDAW representative and is, we are told, black, raised issues about the claimant and Mr Bruce. In the email sent to Ms Mavrides who is one of the People

Managers Ms Roach expressed concern that the USDAW reps were being undermined by the claimant and Mr Bruce. The tribunal is not sure what happened about this matter.

37 In the meantime, Ms Halford had been appointed to hear the claimant's appeal against the grievance outcome. As stated above, she is a People Manager for the group and she met with the claimant on 8 October. Ms Halford prepared an investigation report which was sent to the claimant.

38 She wrote:-

"My remit was to investigate whether there are any grounds to believe that there had not been a full and fair investigation into the issues you raised at stage 1 at the grievance process and on the basis of the seven appeal points you raised and as detailed below". The appeal points were all discussed with findings. Her conclusion was as follows:

"Having fully reviewed the investigation by Mel Backhouse, I conclude that it was a full and fair investigation and agree with the outcome provided to you at stage 1".

During the outcome meeting you expressed early on that you knew what my outcome was going to be and were expecting it. You went on to state that you did not believe I was impartial and felt I was complicit with others against you. I am sorry you felt this way (particularly as you said this before I had finished my investigation and given you my outcome) but I hope that I have demonstrated that I have investigated your points of appeal fairly and thoroughly".

39 By email of 26 October the respondent wrote to Ms Halford. An extract reads as follows: -

"I maintain, it appears as if you are now a part of the collective group that acted to victimise me, demonstrated through arriving at your decision, the approach of the outcome delivery and your role in accepting to conduct a meeting that clearly should have not been conducted by someone in your designation".

She goes on:-

"I believe you have deliberately breached process; it appears you deliberately did this to bring closure to the matters raised by me, by this action you have insulted and humiliated me greatly, (you have trivialised my feelings in the collective bullying and victimisation I have suffered as a result of repping my fellow colleagues). I believe that by your act of engaging in a meeting in an attempt to deliver an outcome, you expose your lack of moral ethics by facilitating the actions of your peers by using your position in an organization (Tesco) to support others in enabling unfair acts, unfair and unequal treatment of a Tesco colleague".

The email continues in a similar vein, including accusing Ms Halford to be “*part of an elite group within the company Tesco that is attempting to shut me up*”. She concluded that she wished to raise a grievance against Ms Halford.

- 40 Ms Halford was upset by the claimant’s attitude and by email of 6 November she wrote to Mr Buttwell expressing concern. Ms Halford said:-

“Some of the behaviours towards Nikki are unacceptable and the impact on both her and Paul McNulty is substantial. Both these individuals feel unprotected and that Ruth’s behaviour is unacceptable and goes unpunished. On conclusion of my dealings with Ruth, she has now adopted the same attitude towards me claiming I am bullying and victimising her and am part of this collective against her. I am concerned that whenever Ruth does not get the decision she wants, she turns on that individual and is unwilling to accept any decision as fair or impartial”.

She went on that she said she found the claimant’s comments “*deeply insulting and malicious*”.

- 41 A complaint was then made by Ms Roach about the claimant and Mr Bruce to Ms Mendes on 17 November. The People Manager, Ms Mavrides took a statement from another trade union USDAW rep, Mr Messina as well as details from Ms Roach. Ms Mendes then asked for a People Manager in a different store at Lea Valley to carry out the stage 1 grievance hearings with respect to the complaint against the claimant.

- 42 Ms Hart, who is the third respondent was, at the relevant time, Regional People Manager for the south format which merged with the London format region in July 2015. Ms Hart then had responsibility for 260 stores with about 64,000 staff. She became aware of issues raised about the claimant in mid July and specifically with the grievance which the claimant raised against Ms Halford after the grievance appeal was dealt with. Ms Hart took the decision to find someone to take time to look at the five files which related to the claimant. She identified Ms Childs, who is the fourth respondent, as someone who might have some capacity to do this because she was working reduced hours after a period of ongoing ill-health. Ms Childs was a Group Personnel Manager from a different Group. There was communication between people in the People Manager (HR) Team and these included a Ms Dickinson (who had been based at Ponders End but was now a People Partner) and Nikki Mendes.

- 43 In early January 2016 Ms Mendes met with Ms Childs to hand over some of the files with respect to the claimant. Ms Childs was asked to look at the papers which were handed over to her which were documents from early 2015 to early 2016. Ms Dickinson also had some contact with Ms Childs but Ms Childs’ evidence to us was that the people who were based in employee relations (such as Ms Dickinson) were only there to give her something akin to technical or administrative assistance. Ms Childs did not know the claimant or anybody in the store or its management team. She was asked

to review the files. She did not believe that she was undertaking a formal investigation in line with the disciplinary policy. Ms Childs read the files and they appear at pages 500 and 784 of the bundle. They are the documents relating to the grievances which Ms Backhouse dealt with.

44 She then prepared an investigation report which we have seen. It is a little over three pages. There are two versions of that report and it was unclear which had been used in the proceedings. One difference between the two versions is that one links the documents to their tab numbers. Another significant difference is that in one of these documents (both of which are undated), these words appear: *"I would recommend a meeting with Ruth regarding her future relationship with Tesco"* whereas the copy which we believe the claimant saw is one which says: *"I would recommend a disciplinary hearing for Ruth regarding her future employment with Tesco"*.

45 Ms Childs' report stated which documents she had looked at. She had no in depth conversations or interviews with anyone about the case. She commented on the historical relationship and the concerns raised. She listed the people against whom the claimant had raised issues. Her principal finding is as follows:-

"My general observation would be that it appears that Ruth believes there is culture of victimisation against her by senior managers within Tesco which she has described as a "collective" adding names to who she believes are a part of this, each time she gets a decision she doesn't like. On which point I would also observe that it appears to be unclear what decision or outcome Ruth would like. This point alone leaves me concerned for the relationship and how it would ever find a satisfactory resolution or be able to re-engage Ruth".

46 Ms Childs set out her reasons in more detail. She gave examples of what she saw as concerns using the following headings:-

*"Attitude towards managers and concerning behaviour i.e. refusal to sign documents and not upholding the company values;
Conduct within meetings whilst acting as an employee representative;
Wasting management time;
Inability to accept feedback"*.

47 Whilst Ms Childs had been considering the information, the store director Mr Buttwell had mentioned to Mr Damalitis that he might be needed to take this matter forwards. Mr Damalitis is the second named respondent. In his evidence, he said that he had personal experience of the claimant's disruptive manner as a representative and he was concerned that his managers were finding it difficult to manage. Mr Buttwell told Mr Damalitis that a report was being prepared and he was then sent a copy of it in early February. Mr Damalitis had no contact with Ms Childs while she drew up the report.

48 In his witness statement, Mr Damalitis set out the reason for the way in which matters proceeded once he was asked to progress matters. The

evidence is, and the tribunal accepts, that the first respondent does not have a formal policy for situations where concerns have been raised about a breakdown in a relationship between an employee (colleague) and the company. After discussing this with Mr Buttwell, Mr Damalitis decided to *“follow the spirit of Tesco disciplinary policy”*. In his evidence to us he said that the policy was used as a framework. His explanation was that this would give some structure for a meeting with the claimant, would allow her to be accompanied and have all the evidence available that the first respondent had.

- 49 Mr Damalitis therefore wrote to the claimant by 10 February. In that letter the claimant was told that *“a thorough review of your file has taken place by an independent appointed Group People Manager”* and a copy of Ms Childs’ report was sent to the claimant. He asked her to attend a meeting with himself on 18 February and he then set out that the meeting was to discuss:-

“A breakdown in the relationship with both the store team and the wider management team outside of Ponders End store. In addition, your disrespect for the core values, policies and management team your failure to listen to feedback regarding your behaviour is an overall lack of a positive working relationship with Tesco”.

The claimant was informed of her right to a representative and a copy of the staff guide referred to earlier - *“Solving Problems at Work”* was sent which was said to *“help you prepare for the meeting”*. The letter says this: *“Please be advised that this hearing may result in disciplinary action being taken against you, up to and including dismissal”*.

- 50 Although Ms Childs took very little part after this, she was named as the person to contact. By email of 11 February, Ms Dickinson stated that she believed she had a possible conflict for herself because a complaint had been made against her by the claimant earlier. She therefore withdrew from support to Mr Damalitis. Ms Dickinson and Ms Childs appeared to be aware that some questions were to be asked of the claimant in this process and Ms Childs had suggested some in an email of 9 February.
- 51 The tribunal accepts that this may well have been the first the claimant knew that there had been a review of her files. She responded to Mr Damalitis’ letter by email of 15 February saying:- *“I write to update you of the most recent act of victimisation against me. As I initially believed, it is linked to my role as a colleague representative”*. She then asked a series of questions about who carried out the review, why it commenced and so on. It was agreed that the contact person for the claimant should be Ms Hart. Ms Hart therefore wrote an email to the claimant on 17 February which informed her that Jo Childs had written the report which the claimant had seen. She stated: *“I can confirm that it was myself who asked for the investigatory report to be written as a number of concerns have been raised with regards to the potential breakdown in the relationship between yourself and Tesco management”*.

- 52 The claimant replied to that email raising concerns about the process. She complained that she had not been asked to have any input into the investigation. The claimant spoke to Ms Childs and indicated that she wanted a number of people to attend the hearing on 18 February, but the claimant was unwell and the meeting was rearranged for 3 March. The claimant then contacted Mr Damalitis to say that she could not attend the hearing on 3 March because her chosen representative, Mr Bruce, was unable to attend and the meeting was rescheduled for 14 March.
- 53 The tribunal has seen notes of that meeting. It was fairly short. The claimant and Mr Bruce raised a number of issues about the process but then went on to make a very specific allegation against Ms Kirsty Lay who was there as the note taker for the meeting. The claimant indicated that she wished to raise a grievance against Ms Lay. This was with respect to something the tribunal heard evidence from Ms Ford about. The claimant and Ms Ford allege that a person called "Sue Barton" about whom we have been given no further details, said words to the effect of "*Kirsty doesn't like you, Kirsty is not your friend*" and that she had overheard Kirsty saying: "*don't worry we will get rid of Ruth*". Ms Barton's name was not provided to the respondent at the time.
- 54 Mr Damalitis took the decision that he should adjourn matters while the complaint about Ms Lay was investigated and he rearranged the meeting for Thursday 17 March. He then decided that he could solve matters by having a different note taker, but, on 16 March, the claimant raised a further grievance against Mr Damalitis. She said that, "*on reflection*", she was concerned that the word "*we*" reported by Ms Barton to have been used by Ms Lay, meant "*this must include you as only the store manager is authorised to dismiss me*". She also raised other concerns about the process. Mr Damalitis' view was that this showed the similar behaviour by the claimant to that mentioned in the investigation report.
- 55 Ms Hart took the view that an independent investigation should be held into this complaint about Mr Damalitis. She appointed Mr Haffenden who was an independent Store Manager to look into the complaints with respect to Ms Lay and Mr Damalitis. He did this by meeting with the claimant, Ms Lay who denied the allegation, and Mr Damalitis. Mr Haffenden found that there was no reason why Mr Damalitis should not continue and he said so in an email of 25 April 2016. The meeting on 17 March had had to be abandoned because of the grievance with respect to Mr Damalitis.
- 56 By letter of 18 March 2016, Mr Damalitis wrote to the claimant. He referred to the attempts to progress matters at meetings on 14 and 17 March and said that he wanted the claimant to engage as part of the process. He said:-
- "In a last attempt to hear from you I have appended to this letter a number of questions that I would have liked to ask you during our meetings. I ask that you consider these and provide your written responses to me by no later than noon on 24 March 2016.*

I will take any written responses received by that date into consideration when making my final decision, however if I do not hear from you by this time I will be forced to conclude the process based on the information that I have available to me.

You should be aware that one possible outcome of this process could be the termination of your employment if it is found that the relationship between you and Tesco has broken down irreparably. Therefore I would urge you to respond to the questions attached to enable me to consider your views.”

57 There were 36 questions which included a number about the claimant's perception of her relationship with Tesco, colleagues and management. The claimant did not answer those questions. She did communicate with Ms Hart about the process. She also wrote to Natasha Adams who is the most senior person in the HR department, the People Director.

58 Mr Damalitis progressed with attempting to meet with the claimant and he wrote to her on 9 May asking her to meet with him on 12 May. He repeated the warning that one possible outcome was the termination of her employment. The claimant said that she was not able to attend that meeting because her chosen representative would be unavailable because of ill-health. In a letter where she apologised for not attending she said this:-

“I feel you are deliberately harassing and denying me my right to representation, not treating me fairly and consistently in accordance with Tesco policy and procedures. It is for this reason I am uncomfortable to be in a room with you in the absence of someone I can trust and rely on for support as well as confidentiality”.

59 Mr Damalitis took the view that the meeting must proceed. In an email to the claimant he pointed out that he had been trying to meet her since February and he was very keen for the meeting to go ahead. He said he would consider concluding the process if she was unable to meet him and he said he would hold the meeting in her absence. Mr Damalitis did hold the meeting on 12 May but the claimant did not attend. Mr Damalitis explained it to the tribunal in this way; that he had made a number of adjustments to the process to accommodate the claimant but she had refused to engage. In his witness statement at paragraph 72 he said: *“I didn't know what more I could do”.*

60 He then considered matters and by a letter of 14 May he informed the claimant that she was to be dismissed. She was paid money in lieu of notice with her contract ending on 14 May 2016.

61 In the letter Mr Damailitis said this:-

“I am satisfied that there is sufficient evidence to uphold each of the allegations listed above. What concerns me the most however is your apparent belief that there is culture of victimisation against you by senior colleagues within the business. The result of which is that as and when you receive a decision that you may not agree with you appear to believe that

you are being victimized in some way. Having seen examples of when businesses investigate such concerns and grievances without finding evidence in support, I find it very difficult at this juncture to see a way forward in which Tesco can rebuild that trust with you.

Taking everything into consideration it is my belief that the relationship between you and both your immediate store team and also the wider management team within Tesco has broken down irreparably. In reaching this decision I have considered whether there might be any remedial steps which could be taken to try and rebuild your relationship with the company but I have no confidence that any such steps would fix the problem and achieve the positive working relationship”.

- 62 The claimant was told that full reasons would be sent later. The claimant responded that she would be appealing the decision to dismiss and she did so after she received the full reasons which were sent to her on 28 May. In this more detailed letter, Mr Damalitis set out the background; the attempts to meet the claimant; the decision to proceed without her as well as more details of the decision. In that letter he gave examples of what concerned him and this related particularly to what the claimant said in her grievances against Ms Backhouse and then Ms Halford. He said this:-

“There appears to be a theme that you are unwilling to accept any decision or engage in any process with which you do not agree or which maybe remotely critical of you. Your previous conduct is compelling evidence that you are unable to accept any decisions that go against you or do not match your expectation. This makes it very difficult to engage with you”.

He then gave examples since the process started. He made reference to how the claimant represented colleagues in meetings and what others had considered to be disruptive behaviour.

He concluded: *“it seems clear to me that you have lost any affinity or respect towards the business that might previously have had and that you are no longer looking to try and repair the relationship between you and Tesco”.*

- 63 The claimant gave further details of her appeal in a very detailed document. She complained that the investigation was not complete; that she was not given a fair hearing; that there were some inconsistent decisions other matters. The appeal hearing was before Mr Hamilton who is a Store Director and who had had no previous dealings or knowledge of the claimant. On any account, this was an incredibly detailed appeal hearing which the claimant attended with Mr Bruce as her representative. It was 6 hours long and twenty four issues were gone through in total. The claimant expressed satisfaction with the appeal hearing towards the end commenting *“So far you have treated me with respect and dignity and I am happy with how you have conducted the meeting so far”.*

64 On 16 July Mr Hamilton gave a very detailed outcome of the appeal which was that the dismissal was upheld. He dealt with each ground raised by the claimant and gave his conclusions.

Law and Submissions

65 Both parties produced helpful written submissions and added to them orally. We have tried to incorporate the gist of what they said in this summary where necessary. There is no dispute about the legal tests which need to be applied to the facts as we find them.

Race Discrimination – Direct

66 Section 13 of The Equality Act 2010 (EQA) defines direct discrimination as less favourable treatment because of a protected characteristic which includes race. Such a complaint necessitates a comparison as between the treatment of individuals, one with and one without the protected characteristic relied upon. There must be no material difference between the circumstances relating to the claimant and the comparator (who may be hypothetical) (section 23 EQA). Establishing less favourable treatment alone will not be sufficient. The claimant must show facts from which the tribunal could decide that the less favourable treatment discrimination is on the prohibited grounds.

Race Discrimination - Harassment

67 Section 26 EQA provides that (1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Section 26(4) EQA states:

In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

- 68 In this case, the claimant needs to show that the alleged actions by one or more of the respondents was related to the fact that she was Black Guyanese, as well as showing that the conduct had the purpose of violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The tribunal should assess any conduct by reference to the matters at s26(4) EQA above.

Race Discrimination - Victimisation

- 69 Section 27 EQA provides that (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- 70 Here, the claimant needs to show that one or more of the respondents were motivated by the fact that she had done a protected act (namely giving evidence in the employment tribunal case of *Ghosh v Tesco Stores Ltd*. The important question here is, if anyone did know, was that the reason or one of the reasons for taking the decision they took.
- 71 Section 136 EQA sets out the burden of proof in relation to all the various forms of discrimination asserted here. It is for the claimant to show a *prima facie* case of discrimination on the grounds of her race. If she does, the burden shifts to the respondents to show that the alleged treatment was not on the grounds of race, failing which the tribunal is entitled to conclude that the treatment was due to the protected characteristic asserted by the her. The case of *Madarassy v Nomura* [2007] IRLR 246 reminds us that the claimant needs to show more than a mere difference in race and/or treatment for the burden to shift to the respondents.

Breach of Contract

- 72 It is for the claimant to demonstrate with evidence that the first respondent has committed a breach of her contract of employment. She brings complaints that relate to two bonus schemes and unpaid holiday in a previous holiday year. The tribunal therefore needs to read and if necessary, interpret the relevant clauses in the contract or policy to establish what the term means and whether it has been broken by the first respondent.

Unfair Dismissal

- 73 Section 98(1) and (2) of the Employment Rights Act 1996 (ERA) provide that 'SOSR' is a potentially fair reason for dismissal. The burden of proving the reason rests on the first respondent. Section 98 (1) reads:-

"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

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

74 Section 98(4) sets out the principle of fairness:

"4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances ... the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case."

75 The respondent referred the tribunal to the Court of Appeal in Perkin v St George's Healthcare NHS Trust [2005] IRLR 934, which confirmed that a breakdown in trust and confidence between an employer and employee can constitute an SOSR reason for dismissal.

76 It was also confirmed that the guidelines established in British Home Stores Ltd v Burchell [1978] IRLR 379 could be used in assessing the fairness of such dismissals. The application of that principle to misconduct cases was described in the following terms by the EAT in that case, which has been cited with approval by the Court of Appeal (i.e. Post Office v Foley [2000] ICR 1283):

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case ..."

77 The respondents' representative also referred us to the Court of Appeal decision in Whitbread PLC v Hall [2001] EWC Civ 268, which confirmed that the band of reasonable responses test applied to issues concerning procedural fairness. In Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA

Civ 1588, the Court of Appeal confirmed that the range of reasonable responses test applied to the issue of whether the investigation carried out by the employer was reasonable in all the circumstances of the case.

- 78 The tribunal is not permitted to substitute its own view for that of the employer. As *Iceland Frozen Foods v Jones* [1982] IRLR 439 makes clear, it is necessary to apply the objective standards of the reasonable employer “band of reasonable responses test” to all aspects of the question of whether the employee had been fairly or unfairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.
- 79 In a very detailed document which referred directly to the issues in this case, the claimant made a number of submissions which the tribunal considered when deliberating. As far as the unfair dismissal complaint is concerned she submitted that the first respondent did not have the genuine belief necessary; that it was procedurally flawed and was not within the range of reasonable responses to dismiss her. As for the race discrimination complaints, the claimant submitted that her treatment relate to her Black Guyanese heritage and compared herself to a white customer assistant. She expressed particular concern about being “singled out” because of her use of the English language. She also referred to the fact that another USDAW representative had been supported by Ms Backhouse (see paragraph 39) but the tribunal had heard no direct evidence about that situation. She asked the tribunal to read her witness statement for her breach of contract claims. As stated, the legal tests to be applied were not in dispute.

Conclusions

- 80 The tribunal took the view that it would make most sense to consider the **race discrimination** issues first. We therefore refer to the list of issues to determine which aspects of the direct race discrimination claim were made out factually and then determine whether they related to race and amounted to less favourable treatment.
- 81 The claimant relies on the protected characteristic of race and identified herself as being Black Guyanese.
- 82 We therefore consider first the matters raised against Mr Damalitis at paragraph 3.1.1 of the issues above. The tribunal does not accept that Mr Damalitis took into account the complaint to USDAW in June 2013. He may well have been aware that that matter occurred but he paid little or no attention to it and was asked virtually no questions about it in this hearing. The matters with which he was concerned were those which were concentrated on in the investigation report which related to the grievance process in 2015.
- 83 As for issue 3.1.2, the tribunal is not quite sure which documents the claimant refers to here. It seems that she may be referring to the

documents which were before Jo Childs for the investigation report. It seems likely, giving the benefit of doubt to the claimant, that Mr Damalitis may well have had some awareness of some of those documents.

- 84 As far as issue 3.1.3 is concerned, Mr Damalitis did dismiss the claimant. We therefore now consider whether, looking at those facts as found, the claimant has provided sufficient information to show less favourable treatment on the grounds of race. She has not suggested any actual comparator for these purposes and we therefore consider whether there is any evidence of a hypothetical comparator being treated any differently. On the respondents' account, this was a unique situation. It had no policy to deal with it and there was no evidence that anybody else had been dismissed for similar reasons. However, there was nothing at all to suggest that any part of what Mr Damalitis did was affected by the claimant's race. The claimant has simply failed to show the facts from which we could conclude that there was any discrimination on the grounds of her race. Mr Damalitis knew that she was black as he had met her. He did not know that she was Guyanese. The burden of proof does not shift to the respondent. Even if it did, we accept the explanation given for her treatment was not tainted by race. The claimant cannot succeed with respect to a direct race discrimination claim against Mr Damalitis.
- 85 Turning then to issues 3.1.4 to 3.1.6 with respect to Ms Hart, the tribunal does not accept that Ms Hart used Ms Mendes' letter of 20 June to initiate disciplinary proceedings. What she did was to send the documents for Ms Childs to look at and asked her to conduct a review. Ms Hart had no involvement with the letter of 20 June 2013. She did advise Mr Damalitis that he could continue with the disciplinary hearing after the claimant's grievance had been considered. Again, we consider whether the claimant has shown less favourable treatment on the grounds of race. Again, she does not appear to rely on any actual comparators and she has failed to bring any evidence before us which suggests that this had any connection to her race whatsoever. What is more, Ms Hart's evidence is quite clear and unchallenged in that is that she did not know the claimant's race at all; she did not even know that the claimant is Black as she had never met her and there is nothing in the papers which makes reference to her colour, much less her Guyanese background. There can be no connection between any steps that Ms Hart took and the claimant's race. The burden of proof does not shift to the respondent.
- 86 Turning then to the direct discrimination claim against Jo Childs. This is set out at 3.1.7 and 3.1.8. The first allegation is that Ms Childs viewed the claimant's personnel file. This may be factually incorrect in that Ms Childs saw documents which cannot be the whole of the personnel file of the claimant as it only covered a period of 2015. She did see some of it but did not need consent to look at files. Whilst Ms Childs did not "decide" there should be disciplinary proceedings she appears to have recommended this, perhaps in discussion with others. The question therefore for the tribunal is whether the claimant has shown facts from which we could conclude that less favourable treatment had occurred because of her race. Again, the

claimant has particular difficulties with this. Ms Childs had not met the claimant and she did not know of her race. Even if she had, there is nothing to suggest anything that Ms Childs did was related to the claimant's race. The claimant has failed to shift the burden of proof with respect anything done by Ms Childs. Even if she had, there is a rational non-discriminatory reason given for her actions, namely carrying out a review and making recommendations for action to be taken by someone else.

- 87 We turn then to the allegations with respect of Ms Mendes. To some extent these are complicated by the fact that at least some of them would appear to be out of time unless they form part of a continuing act. We deal with them first on the grounds of their substantive merit. At 3.1.9 the claimant complains of Ms Mendes having lodged the complaint about her with USDAW on 20 June 2013. Ms Mendes did do that. At 3.1.10 it is then said that Ms Mendes questioned her race and style of speaking and mannerisms such as greeting Ms Childs by putting her hands in prayer. This is in part factually correct and in part factually incorrect. There was no evidence before us that Ms Mendes "*questioned the claimant's race*". She did refer in the letter of 20 June to the claimant's style of speaking and, at some point, did mention the claimant greeting her by putting hands in prayer which she found unsettling. These matters also seem to refer to a period of time when Ms Mendes was involved in asking USDAW to remove the claimant's credentials and may well be outside the tribunal time limit. In any event, the tribunal find that the claimant has not shown that any facts as proved here related to her race at all. Ms Mendes had met with the claimant and therefore was aware that she was black, although we accept she did not know that she was Guyanese. Even if the burden shifts to the respondent, we are satisfied by the explanations given Ms Mendes for the actions she took which were unrelated to the claimant's race. They were a response to concerns raised at the time.
- 88 We turn then to complaints about Ms Mendes in 3.1.11 and 3.1.12. She is said to have conspired "*with others to secure the claimant's dismissal*". We find no evidence that Ms Mendes did this. We accept her evidence that she saw Ms Backhouse's suggestion of disciplinary action that we refer to above at paragraphs 30 and 31 but she took no such action. Issue 3.1.12 is the allegation that she instructed Ms Messina and Ms Roach to take out grievances in January 2016 when in fact it seems to have started in November 2015. The claimant has simply not shown that Ms Mendes instructed anybody in that way. The claimant has not made out the facts and the burden does not shift with respect to these complaints.
- 89 The issues as set out at 3.2 and 3.3 are therefore answered in this way. The claimant has failed to make out primary facts which suggest discrimination on because of race. Some of the alleged facts did not occur at all. Even if the tribunal had shifted the burden, for instance, for an explanation of the dismissal, we are entirely satisfied by the respondents' explanations. What is more, the claimant herself made the suggestion, on a number of occasions during her employment, that the treatment about which she

complained was related to her activities as a colleague representative. She made virtually no suggestion that it related to her race.

- 90 As far as harassment related to race under Section 26 of the Equality Act 2002 is concerned, the answer to all the questions between 4.1 and 4.6 must be that the claimant cannot succeed. The only possible link there might have been between Ms Mendes' concerns about the claimant and her race is with respect to the criticism of the claimant's language. However, there is no evidence before the tribunal that those concerns had any connection to the claimant's race and we find that it had not. Rather it was a concern about over complicated language which is nothing to do with race in this case. What is more, those concerns arose only in relation to the letter to USDAW and are way out of time. The harassment complaint fails.
- 91 Turning then to victimisation under Section 27 EQA 2010, at issue 5.1, the first respondent accepts that there was a protected act because the claimant did give evidence in a sex discrimination case. The next question at 5.2 was agreed as being background only and we heard no evidence with respect to that matter. The remaining question therefore for us under issue 5.3 is whether the disciplinary process and the dismissal were influenced by or caused by the protected act. There is no evidence at all to that effect. The person who took the decision to dismiss was Mr Damalitis and he had no knowledge of the protected act. The claimant cannot hope to succeed in that claim as the only person with knowledge of the protected act was Ms Mendes and she played no part in the proceedings which led to the dismissal of the claimant.
- 92 We now consider the **breach of contract** complaints at issues 6 and 7. As far as the bonus is concerned, the contractual position is quite clear. The claimant cannot succeed in receiving any sums for bonuses if she was not employed either on 22 May 2018 or 23 May 2016 which she was not, her date of dismissal being 14 May 2016. That part of her claim must fail.
- 93 As far as holiday pay is concerned, the claimant clarified during the course of the hearing that she was seeking holiday pay for 1 day's pay which she said had accrued in the previous holiday year. Again, the contractual position is that holiday cannot be carried over. Mr Damalitis gave evidence with respect to that, the document confirmed it and it was not challenged. This part of her claim must also fail.
- 94 We turn then to the issues in relation to **unfair dismissal**.
- 95 The first question for the tribunal under issue 2.1 is whether the first respondent has shown a potentially fair reason for dismissal. The tribunal therefore has to consider which facts support the contention that the claimant was dismissed for some other substantial reason such as to justify a dismissal of an employee holding the position the claimant held. We are satisfied that that was the reason for dismissal. We appreciate that some use of the disciplinary policy and some reference to disciplinary proceedings and hearings was in some of the background documents. However, taken

as a whole, this was clearly not a standard conduct disciplinary hearing nor was it presented to the claimant as one. Indeed, in support of the first respondent's case on this, the words "*conduct*" and "*misconduct*" were not used by it. The focus of the tribunal's attention must be on what Mr Damalitis did. The thrust of the first respondent's difficulties moved from the original concern about the claimant's behaviour in representing colleagues to what she did with respect to grievances on her own behalf. This included her allegations of a conspiracy to remove her and of bad faith of a number of managers investigating matters.

- 96 Another part of the first respondent's concern was the effect on the workplace specifically what Mr Damalitis described as difficulties his managers were having in store, but a greater part of it was to do with the claimant's wider express distrust of managers at various levels working as People Managers and so on. The first respondent had formed the view that there was a breakdown in the relationship. We consider that that was sufficient reason to follow a process which eventually led to the claimant's dismissal.
- 97 Whilst considering the reason, we have considered other possible reasons either proposed by the claimant or implied in her cross-examination. She clearly believes that race was a factor but we have found nothing to support that belief. She has also suggested that the fact that she represented a substantial number of people at various internal meetings was a matter which concerned the respondent. Although there is some reference to that and to the way in which she carried that out, the tribunal cannot find that that was the main reason but that rather it was a deteriorating relationship between the claimant and managers. We find that the reason for her dismissal was some other substantial reason namely the breakdown in the relationship being the claimant and the first respondent and its various managers at various levels.
- 98 We turn then to the question of whether the dismissal was fair or unfair under issue 2.2. We first think it is wise to consider the process used by the first respondent. The tribunal accepts that this was a unique situation for the first respondent and Mr Damalitis therefore followed a procedure which had some differences to that which would be followed for a more common conduct or capability process. In the first place, the review of the claimant's 2015 files led to an investigation report which did not include input from the claimant. We can understand the claimant's concern about her lack of input at that stage. However, although it might be said to be a possible defect in the procedure, it is not sufficient to amount to unfairness on its own. The tribunal's task is to look at the overall process and to assess it then. We cannot find that what Ms Childs stated in the report was anything other than a reasonable assessment of the documents which she looked at.
- 99 We then turn to the question of the use of the disciplinary procedure as a "framework" for what happened after that investigation report was sent to Mr Damalitis. We cannot see that that caused any disadvantage to the claimant. If anything, it provided her the protection of being given the

information the first respondent had before it, the chance to give her side of the story, to be represented and so on. It is perhaps a little unfortunate that Mr Damalitis did not say explicitly that the disciplinary procedure was being used as a framework. The tribunal can appreciate that the claimant, who was used to dealing with processes and procedures for colleagues employed by the first respondent, might find it a little confusing. Indeed, it did lead to her asking a great many questions about the process. The tribunal find that that did not prevent her from dealing with the substance of the investigation report which, for reasons known only to the claimant, she failed to do.

- 100 The problem for the claimant is that although she was entitled to raise these issues of process, she never really moved beyond that point. What is more, having seen the investigation report and the issues which it raised, she then proceeded to behave in similar ways during the progress of the consideration of the investigation report. She raised issues about the notetaker, Ms Lay and, with even less substance, about Mr Damalitis and this led to a delay in the process rather than allowing a proper analysis of whether the relationship had broken down. The tribunal cannot see, in any of the fairly extensive correspondence, that the claimant actually engaged with that point. What is more, she had a good opportunity to do that when she was sent the long list of questions; she has given no explanation as to her failure to answer those questions which would have given her an opportunity to put her point of view clearly before the respondent. She was clearly able to write and did so at length to the people involved and to more senior managers.
- 101 Finally, with respect to the meeting that Mr Damalitis was arranging, we should say that we did have some concerns that the final meeting was held in the claimant's absence. Looking at her difficulty with attending, the tribunal accepts that she was anxious for the same representative to attend with her. However, we balance that with what Mr Damalitis felt which is that he had given the claimant a number of opportunities to attend. The claimant herself could attend and could, if she had wanted to, sought representation elsewhere.
- 102 We look therefore lastly at the appeal. The claimant put in a long appeal document with twenty four points. She had a long appeal meeting and expressed satisfaction with what was considered there. We take everything in the round and whilst we have identified some matters which we think might amount to procedural flaws, they are not sufficient to render the dismissal procedurally unfair.
- 103 On balance, the first respondent did a thorough consideration of the information, gave the claimant a number of opportunities to comment and to express a view as to whether she also believed the relationship had broken down which she singularly failed to address. Given the thoroughness of the appeal and the many opportunities the claimant had to engage with the first respondent, we have found that, overall, there was no procedural unfairness.

- 104 We now consider finally whether dismissal was outside the range of reasonable responses under issue 2.3. Whilst this is not a matter which either representative concentrated on, it seems to us wise to consider this in the circumstances of a case like this where the employee was at the level of customer assistant. This is particularly so given that the first respondent has relied for guidance on the Perkin case which involved a very senior manager of an NHS Trust. In this case, this is a large employer with thousands of people at the claimant's level. It is a very different situation to the Perkin situation in that the difficulties that it had with the claimant were not such as to affect the overall running of the business to any significant degree.
- 105 We consider whether it was fair or unfair for the first respondent to dismiss this employee in all the circumstances which includes consideration of the position that she held. We have come to the view that we cannot say that this dismissal was outside the range of reasonable responses of an employer, even of this size and administrative resources. This is particularly the case because of the claimant's failure to engage with the first respondent and its managers. She says that she did engage in that she was writing letters to Ms Hart and others during the process but that is not engagement at a level with the concerns raised by the first respondent. She did not say, for instance, that she believed the relationship had not broken down. If she had shown some inclination to listen to the view of the first respondent with respect to that and consider how to perhaps do things rather differently with respect to her own issues, she may well have found the first respondent were prepared to listen to her. In all the circumstances of this case, whilst we might not have made the same decision, we cannot say it is outside the range of reasonable responses.
- 106 For all these reasons the claimant's complaints fail and the claim is dismissed. We wish to express our thanks for the thoughtful way in which the respondents' representative, all the witnesses and the claimant and those assisting her conducted themselves during this hearing. It was of significant benefit to the tribunal.

Employment Judge Manley

Date: 8 June 2017.....

Sent to the parties on:

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For the Tribunal Office