

JB1



# THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms M Gonzalez**

**v Lush Retail Limited**

**Heard at:** London Central

**On:** 27 – 29 September 2017

**Before:** Employment Judge Palca

**Members:** Ms J Clark  
Mr S Ferns

**Representation:**

**Claimant:** Mr T Perry, Counsel

**Respondent:** Mr G Self, Counsel

## JUDGMENT

**The unanimous Judgment of the Tribunal is as follows:**

The Claimant's claims that she was subject to less favourable treatment on the ground of her race, and was victimised, fail.

## REASONS

### Parties

1. This claim is brought by Ms Mercedes Gonzalez whose employment with the Respondent began on 28 July 2016 when she was engaged by the Respondent with a view to her becoming a specialist therapist in their Oxford Street spa. Her employment ended on 9 September 2016. She filed her ET1 on 5 January 2017. The Response was filed on 24 March 2017.

### Issues

2. A Preliminary Hearing took place on 27 April 2017 which identified the issues in the case. These were slightly modified by the time of the hearing. In essence, the Claimant brings two claims, of direct discrimination on the ground of race and of victimisation. The protected characteristic on which the Claimant relies is race, and specifically colour. The Claimant claims that she was directly discriminated against by being treated less favourably in the following areas:-
- (a) The failure to provide her with the same level of support and guidance as her white colleagues while she was on the residential spa therapist training course beginning on 28 July 2016 in Poole.
  - (b) The failure to provide the Claimant with the same number of opportunities as her white colleagues for practicing the spa treatments on the trainers and obtaining the resulting feedback whilst on the training course.
  - (c) The failure to provide the Claimant with the same leeway on the training course assessments as her white colleagues, including the failure to allow the Claimant to delay and/or skip assessments.
  - (d) The failure of the trainers on the training course to offer the additional one to one training that was offered to her white colleagues.
  - (e) Holding the Claimant's performance on the training course to a higher standard than her white colleagues.
  - (f) The provision of feedback to the Claimant and Ms Aminat Oladipo, who is also non-white, by Ms Alanda Colegate and Ms Nikki Camms separately from the white colleagues on 12 August 2016.
  - (g) Removing the Claimant from the training course in Poole on 12 August 2016 after only two weeks of the planned seven weeks.
  - (h) The disregard for the consequences for the Claimant's living arrangements when she was removed from the training course and the dismissive way in which Ms Colegate and Ms Camms responded to the Claimant's concerns about the same on 12 August 2016.
  - (i) On the Claimant's return to the Respondent's Oxford Street branch on 16 August 2016, the provision of only thirty two hours of training per week to the Claimant instead of the forty hours per week on the training course.
  - (j) The provision of training to the Claimant at the Oxford Street branch by Ms Hannah Gorman, an inexperienced and unqualified trainer who had other duties to which she needed to attend.

- (k) The requirement that the Claimant work on the shop floor of the Oxford Street branch when she should have been given training as a spa therapist.
- (l) Requiring the Claimant to take a practice examination on 30 August 2016 to determine whether she had successfully passed the probationary period when she had been provided with inadequate training.
- (m) Making the decision to dismiss the Claimant without giving her the opportunity to retake the practice examination.

**[Note: item (h) as set out in the notes of the Preliminary Hearing was withdrawn]**

- 3. The comparators relied upon by the Claimant are Ms Olivia Lee (White British) and Ms Charlotte Robins (White British), and a hypothetical comparator.
- 4. The Tribunal must also consider whether or not the Respondent has victimised the Claimant. The Claimant relies upon her letter of 26 August 2016 as the protected act. The acts of victimisation are:-
  - (i) Items 2 (h to m) above, insofar as they relate to events postdating the protected act; together with:-
  - (ii) The failure to respond to, investigate or address the Claimant's grievance dated 26 August 2016 adequately or at all;
  - (iii) Dismissing the Claimant on 2 September 2016.

The Tribunal is also required to consider whether or not the ACAS Code was followed, and if so whether there should be any uplift.

- 5. Issues relating to compensation were left, if necessary, for a further hearing.

## **Evidence**

- 6. The Claimant gave evidence, as did Ms Olivia Lee. Evidence was given on behalf of the Respondent by Nikki Camms, the Respondent's Spa Training Manager based in Poole, Alanda Colegate, a Spa Trainer based in Poole, Terri Bebb, the Respondent's Spa Support Global and Elise McKenna, a Spa Trainer based in Poole. The Respondent had supplied witness statements from Hannah Gorman (Senior Therapist at the Respondent's Oxford Street branch) and Lydia Mawle (at the material time People Support Manager at the Respondent), both of which statements were agreed by the Claimant. All witnesses produced witness statements, which were taken as read by the Tribunal. There was an agreed bundle of documents.

## Facts

7. The Tribunal decided that the material facts were as follows.
8. The Claimant identifies as a Mexican American. She describes herself as being brown skinned. She has considerable experience of being a general massage therapist.
9. The Respondent is primarily a cosmetics retail company. It launched a spa service in 2009 and at the material time had seven Lush spas in the UK, including one at its Oxford Street branch. There are several other Lush spas across the world. Lush Spa's brand has a very "English" feel, with the design of these spas being inspired by English country cottages. The Claimant argued that this led to a bias towards employing white English staff. All the spa trainers were white. Lush has some 2,500 employees in the UK, about 70 of whom work as spa therapists. Of those 70, presently, 10 are non-British, 4 are black, and 5 are described as olive-skinned. The evidence was that the proportions in August/September 2016 would have been similar.
10. At the time the Claimant was working at the Oxford Street store there were three people working in the spa from ethnic minorities, the Claimant, Ms Oladipo and a Brazilian male. There were at the time 279 employees at the store, most of whom worked in the shop. There was a greater proportion of individuals from ethnic minorities who worked on the shop floor.
11. Until 2016, spa therapists had all been trained at the Respondent's headquarters in Poole, Dorset. During 2016, the Respondent decided that it would change its method of training so that, instead of two seven-week stints of intensive training at the Poole Centre, training would be conducted at the individual's workplace. A similar number of hours would be devoted to each part of the training, although it would take longer overall as during the course of the training the individuals would also work on the shop floor, which would give them product experience, as well as assisting their colleagues in the retail section. This method was being piloted in the Respondent's Liverpool spa, with the aim that it would be rolled out to all spas in due course.
12. The training altogether costs approximately £14,000 per trainee. The training process starts with the trainee learning the "Synaesthesia" technique. Three weeks is normally assigned to learning this process - the first week (32 to 48 hours) dedicated to learning the basic "Relax" routine, leading to a sign off with the trainer, the second week to completing the learning of eleven modifications of the basic technique, and the third week devoted to practice of the entire technique. At the end of the third week, trainees are assessed for their competence and signed off if they are competent. There are then four further weeks of training, including two weeks learning "the Spell" and two weeks learning the "Good Hour" technique. The Spa regards itself as a luxury brand, and expects uniformity across all its branches in the giving of the different treatments, so that a customer would have the same experience, no matter

who is giving the treatment. The Tribunal accepted that in order to pass each of the different learning sections, each trainee had to perform the techniques in a uniform way, competently. The course is clearly very intensive, intending to produce trainees performing to a very high standard.

13. The Claimant has considerable experience as a massage therapist. In approximately July 2016 she applied for a role as a spa therapist with the Respondent. She was interviewed by three individuals, during a process which included her completing various tests, and on 21 July 2016 she was offered the position, with training to commence on 28 July 2016. The offer letter was very enthusiastic about the Claimant's performance at interview.
14. The Claimant was not issued with a contract of employment before she began work.
15. Unlike several trainees, who would have worked at their store before being trained, at the start of her job the Claimant immediately began her training at Poole. There were eight people on the training course, the Claimant and two others from the Oxford Street branch, Aminat Oladipo (who identifies as black) and Olivia Lee (who identifies as white British). One of the trainees was Charlotte (Charlie) Robins (who identifies as white British), who was working from the Respondent's Bath store. There were four other trainees, all of whom were white, (three women and one man).
16. By the time of the start of the course, the Claimant's marriage was in difficulties. She had been sofa-surfing with friends. Someone had offered her a permanent house-share in London, which she had turned down on the basis that she would be attending the Respondent's Poole course for seven weeks. While she was being trained, the Claimant intended to return to London at weekends from time to time to continue giving massage treatments to clients.
17. By July 2016, there were a number of experienced trainers at Poole. The Claimant's cohort was trained by Terri Bebb, who has been training people since 2010, for the first three days. In the Claimant's contemporary feedback form, dated 9 August 2016, she describes Terri as really nice and gentle. On day four, Alanda Colegate and Gemma White took over the training of the eight people. The Claimant describes Alanda as kind of scary but she had respect for her. The course included a number of practice training sessions.
18. On Monday 8 August 2016, the Claimant was given feedback by Gemma White, in a 12 page feedback form which is detailed, relevant and specific. The Tribunal was impressed by the quality of feedback given to the Claimant. It did not see equivalent forms for other trainees. There were many positives in Ms White's feedback form and overall there were some criticisms. The overall message was positive and promising.
19. By the end of the first week, the Claimant should have passed, and been signed off on the initial Relax technique, which is part of the Synaesthesia

process. However, by 10 August 2016, the trainers had issues with the performance of the Claimant and three other trainees. They were Charlie Robins, Olivia Lee and Aminat Oladipo. Charlie Robins was perceived by the trainers to be struggling particularly badly. She was therefore given extra coaching. In particular, she was given “talker training” treatments – in other words the trainee would practice her technique on the trainer, who instead of remaining silent throughout the process, would give comments on performance during the session. No other trainee received these additional supports. The Claimant felt that she was given fewer training sessions than other people on the course. The Tribunal accepted the evidence of Alanda Colegate that, apart from Charlie Robins’ extra coaching, each trainee was given two training sessions. The Tribunal also accepted that the extra treatment given to Charlie Robins was because she was so far behind the others she needed to catch up. This evidence seemed plausible - the Tribunal took note of the fact that when a cohort of eight people is being taught, those who are slower hold up the training of those who are on target.

20. So far as Olivia Lee was concerned, she was also regarded as a poor performer. She had two training assessments during the course of the first two weeks at Poole, and regarded the second assessment as being particularly harsh. The Tribunal however accepted the evidence on behalf of the Respondent that the trainers recognised that Ms Lee had potential.
21. Because of the poor performance of a number of the members of class, client practice sessions during the course of the second week of the training were cancelled, and the two trainers, Ms Colegate and Ms White, went through the whole Relax routine again as a technique session. The cancellation indicates to the Tribunal that there were genuine concerns about the performance of four of the trainees.
22. On Friday 12 August, the underperformers were given fresh training assessments. The Claimant was assessed by Alanda Colegate, who also assessed Olivia Lee. Charlie Robins and Aminat Oladipo performed treatments on other staff members. The Tribunal has seen the completed feedback form which Ms Colegate prepared for the Claimant. Ms Colegate’s feedback of the Claimant was varied. There were some positives, for example that the Claimant was calm and welcoming. There were however a number of criticisms, chiefly that the Claimant was at times too firm and at other times not firm enough, so that her pressure was imbalanced, and that she was at times too quick and needed to slow down. Ms Colegate came to the opinion that it would be more difficult to bring the Claimant up to speed to pass the Relax section of the training than to bring up Olivia Lee. The Tribunal accepted that this was Ms Colegate’s genuine view.
23. The Synaesthesia spa treatment is 80 minutes long and is accompanied by specially commissioned music which guides the therapist to perform various different actions. Therefore, if a treatment is given too fast it has two consequences, first that it is out of synch with the music and therefore affects

the general experience, and second the treatment may fall short of customers' expectation to be treated for the full amount of time the session takes.

24. The training manager, Nikki Camms, had been informed by the trainers on about 10 August that four individuals were underperforming. One of them, Charlie Robins, worked out of the Bath spa store. Mrs Camms informed the managers of the store that she would have an additional assessment towards the end of that week and, if insufficient progress had been made, her probationary period would be reviewed – in other words, her employment would be terminated. This letter was relied upon by the Claimant as evidence that Ms Camms wanted to terminate the employment of the Claimant as well. However, the Tribunal did not interpret it in that way. They believed it was specific to Ms Robins.
25. Ms Camms also spoke to the Spa Shop Manager at Oxford Street, Claire Constantine (who is also the daughter of the Respondent's CEO) expressing her concerns about the three Oxford St trainees. Ms Constantine said that she was keen to replicate the onsite spa trainee model being piloted in Liverpool at her Oxford Street branch.
26. Following the 12<sup>th</sup> August assessments, Ms Colegate had a further conversation with Ms Constantine. During the course of that conversation it became apparent that there were potentially two training places at the Oxford Street branch. Ms Colegate took the view that of the three underperforming Oxford Street trainees, Olivia Lee showed the most promise. They agreed that the Claimant and Ms Oladipo would return to Oxford Street, but that Ms Lee, as the stronger performer, would remain in Poole. The Tribunal has examined such feedback forms as were before it in relation to the trainees. While on paper the feedback about Olivia Lee is worse than that about the Claimant, the Tribunal nevertheless accepted the evidence of the trainers at Poole, particularly Ms Colegate that they genuinely believed that Ms Lee was more likely to perform better than the other two trainees. This is borne out by the fact that subsequently Ms Lee passed a Relax session, at the second attempt, and that, although she was not required to pass the final Synaesthesia sign off, she passed the next training session, the Spell, at first attempt. Ms Lee's training was transferred to Oxford Street on 4 September (following the cessation of the Claimant's training there). She failed her final training session, the Good Hour, and remained in employment with the Respondent at its Oxford Street branch until 28 December 2016 when her employment was terminated.
27. Trainees on the Respondent's course were told that it was often easier for relative novices to learn the Lush way of working, as they did not have years of experience conducting treatments in their own fashion. The Tribunal believed that Ms Colegate's evidence was persuasive when she said that although Ms Lee had a number of areas where her performance was inadequate, she felt that they could be corrected easily, whereas the Claimant's failings were more ingrained. Her criticism of Ms Lee was more in relation to attitude than ability.

28. On 12 August, representatives from the Respondent saw Charlie Robins. They informed her that her performance was not satisfactory, that her probationary period would therefore end and her employment would terminate.
29. On the same day, Ms Camms and Ms Colegate saw the Claimant and Ms Oladipo, together. They were informed that their training at Poole would end and that they would be transferred back to Oxford Street to continue their training there. There was a dispute as to whether or not the Respondent was clear to the Claimant about the nature of her training at Oxford Street. However, the Tribunal concluded that the message given to the Claimant was clear: that she would be returning to Oxford Street; that she should report on Monday morning; and that she would be informed of her training programme at that stage. The Claimant contacted the senior therapist at London, Hannah Gorman, making it clear that she accepted that her performance was not ready for sign off. Ms Gorman had not had a conversation with Ms Constantine by this stage, and said she would be in touch with the Claimant as soon as possible.
30. On 16 August 2016, the Claimant and Ms Oladipo attended the Oxford Street store. By this stage Hannah Gorman had prepared a detailed training plan, which she noted down as they went through the week. Under the method of training, trainees spend time on the shop floor (which was of practical help and also enhanced their training as they became more familiar with the Respondent's products) as well as under the training programme. During the course of the first week, the Claimant and Ms Oladipo performed practice treatments on each other, and the basic Synaesthesia Relax treatment on Ms Gorman. By the end of the week Ms Gorman felt that the Claimant had committed the basic Synaesthesia relax routine to memory but she still needed assistance with the flow of the treatment and her stone work (by which hot stones are placed on peoples facial cheeks) needed more confidence.
31. The Claimant's case is that Hannah Gorman was an inexperienced and unqualified trainer. However, at the material time, on 10 September, the Claimant wrote a warm email to Hannah saying that she was very grateful for the lessons in technique and professionalism and extra care that she had given and that Hannah's dedication had been inspiring. This indicates that Ms Gorman set out a good training programme and that it was valued by the Claimant.
32. The following week, beginning on 22 August 2016, Elise McKenna, a spa trainer based in Poole, came up to London to train the Claimant and Ms Oladipo. The company paid for her hotel accommodation during this period. Elise had received copies of the feedback forms on the Claimant's performance, but did not read them before she began the training, so that her opinion would not be biased.
33. On about 24 or 25 August, Ms McKenna received a Synaesthesia treatment from the Claimant.



34. Meanwhile, Ms Bebb had asked the Claimant and Ms Oladipo for feedback on their spa training in Poole. Both delivered critical feedback. The Claimant stated that she had been unfairly cheated out of the full training experience at Poole and that she had been sent home not because she deserved to be but because Ms Colegate “picked her favourites based on ... maybe race, body size or appearance? She talked in class a lot about her weekend starvation diet and losing weight, it made me so uncomfortable”. Ms Bebb referred both individuals to Sonya Fansome, the appropriate person within the Respondent to deal with the feedback. The Claimant was told that the email had been passed on to Sonya who would be in contact with her next week, and was asked to let Sonya know her available dates and times. The Claimant responded to Ms Bebb with available dates and times, but not to Sonya Fansome. Ms Fansome never contacted the Claimant. The Claimant alleges that Ms Bebb deliberately did not pass on the criticisms set out in the feedback letter because she did not want the complaint to progress. Given that Ms Bebb had forwarded the complaint to the appropriate person, the Tribunal accepted Ms Bebb’s evidence that it was a genuine oversight that she had not realised that Ms Fansome had not been copied in on the Claimant’s follow up email. In addition, Ms Oladipo’s complaints were followed up by Ms Fansome, and it would be illogical to suppose that Ms Bebb deliberately did not pass on the Claimant’s complaints, while nevertheless doing so on behalf of Ms Oladipo.
35. At some point during the period when Elise was training the Claimant and Ms Oladipo, they told Ms McKenna that they had concerns about their treatment in Poole, and mentioned the term discrimination. However, she was not aware that anything had been lodged in writing, and was at no point aware of the letter sent to Ms Bebb on 26 August 2016.
36. On 26 August 2016, Ms McKenna met the Claimant. She still had concerns about the Synaesthesia routine. She told the Claimant that she had completed 4 weeks of Synaesthesia training, which was something that the Respondent expected to have been completed in total by the end of week three, but was still receiving feedback that would normally have been given to trainees in weeks 1 and 2. The Claimant was told that her treatments needed to be seamless and perfect and that they would therefore continue to focus on the basic Relax (week 1) element. Ms McKenna told the Claimant that she wanted to set her up for success by giving her as many practices as possible and so was going to book three clients in for the following day. The Claimant was also told that Ms McKenna would give her another trainer treatment session the following week, and that the day after that, Ms Bebb would come up to check her performance in a Relax sign off assessment. The Claimant was clearly told that if the Relax sign off by Ms Bebb was not up to standard, then the Respondent would have to call a probationary review with the Claimant. The position was explained very clearly and the Claimant could have been in no doubt as to the importance of her assessment sessions the following week. The Tribunal concluded that this was a reasonable message to be delivered to the Claimant in these circumstances.

37. On 30 August 2016, Ms McKenna received a further treatment from the Claimant. She gave the Claimant detailed feedback following this treatment. There were a considerable number of areas where Ms McKenna felt the Claimant needed to improve before her formal assessment the following day. The following day, Ms Bebb came to London to receive treatment from the Claimant. She concluded that the Claimant had still not properly grasped the technique and was not ready to move on to the next level. There were a number of specific areas of concern. Ms Bebb passed her opinion on to Ms McKenna. The Tribunal noted that the nature of the concerns in late August 2016 were similar to concerns which had been raised in Poole.
38. Following this, Ms McKenna discussed the Claimant's performance with the Oxford Street Spa Manager, Claire Constantine, saying that given the amount of practice guidance and support she had been given and how far she was from being competent on the basic routine, the probation period should be ended. Ms Constantine agreed. Both women then had a meeting with the Claimant on 2 September 2016 when they explained that because the Claimant had been unsuccessful in passing her Relax sign off with Ms Bebb, the Respondent had decided to put an end to the probation period. The Claimant received the information calmly, saying that she understood the reasoning and agreed that this was the right decision. The Tribunal did not place too much weight on this since it was clear that the Claimant was generally of a calm nature and would not have wanted to have made a scene at this point. The Claimant also made the point that she would love to apply to work for Lush again as a therapist. The Claimant was given one week's notice of the termination of her employment.
39. At the same time, Ms Bebb had received basic relax treatment from Ms Oladipo, and had passed Ms Oladipo's performance. Ms Oladipo was therefore retained in employment at that stage, though she was subsequently dismissed for different reasons relating to her conduct.

## Law

### Direct Discrimination

40. Section 13 of the Equality Act 2010 (EQA) defines direct discrimination as being circumstances where "*because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Race is one of the protected characteristics, and includes colour. Section 23 of the Act states that there should be no material difference between the circumstances relating to the comparators, but if there is no actual comparator, a hypothetical comparator may be used.
41. By Section 39 EQA, it is unlawful for A to discriminate against B, in the terms of his employment or the way A affords B access to opportunities for promotion, training etc or by subjecting B to any other detriment.

### Victimisation

42. Victimization is defined at Section 27 EQA as occurring where A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.
43. Section 27 (2) defines a protected act to include, making an allegation, whether or not express, that A or another person has contravened the EQA, or doing any other thing for the purposes of or in connection with the EQA. Therefore, for a victimisation claim to succeed, the Claimant must show first that she made a protected act and second that she was subject to a detriment because of the protected act.

### **Burden of Proof**

44. Section 136 Section EQA states

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

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

45. It is therefore for the Tribunal to consider the evidence to establish whether there is sufficient material to conclude not only that the Claimant has been treated less favourably than her comparators but that on the balance of probabilities there are facts from which the Tribunal can infer that the Respondent has committed acts of race discrimination. If this is shown, it is then for the Respondent to seek to prove to the Tribunal that any unfavourable treatment was not in any sense because of the Claimant's race (colour). The standard of proof is the balance of probabilities. Inferences may be drawn from actual findings of fact.

### **Submissions**

46. The Claimant's representative, Mr Perry, argued that the Claimant's treatment during the course of her training course was so entirely at odds with the treatment of comparable white employees that a prima facie case of discrimination was made out, requiring the Respondent to give cogent evidence of an alternative explanation. However, no adequate explanation had been provided and therefore the Claimant had been discriminated against on the ground of race.
47. So far as victimisation was concerned, the Claimant was dismissed because she had made a complaint of discrimination, by email to Terri Bebb on 26 August 2016.

48. So far as direct discrimination is concerned, Charlotte Robins, a white trainee, had been provided with one to one feedback, and the Respondent's explanation that this was the most effective way for treating struggling individuals was inconsistent with the Respondent's assertions that the training was easier for those without massage experience because they would not have to unlearn other techniques. The Claimant's representative also relied upon the fact that Olivia Lee, who he said had been given worse feedback than the Claimant, had remained in Poole for longer, and had been allowed to fail two exams without negative consequences, because in essence her profile, being thin, young and white, fitted the Respondent's aesthetic. The Claimant was treated less favourably because she received less support than others, less training and was dismissed at an earlier stage in the process than comparators.
49. On the burden of proof, Mr Perry drew attention to *Madarassy v Nomura International plc* [2007] ICR 867, CA, showing that, in order to shift the burden of proof, something more than showing a difference in protected characteristic and difference in treatment was needed. He noted, however, that the barrier can be quite low [*Hussain v Vision Security Limited* EAT 00439/10]. Relying on paragraph 15.32 of the Employment Statutory Code of Practice issued by the Equality and Human Rights Commission, Mr Perry argued that (a) the difference in treatment, (b) the fact that the Claimant's feedback was more positive than others and (c) that it was clear that Lush Spa's focus on Englishness was producing, the evidence showed, a disproportionate number of white spa therapists, were sufficient to shift the burden of proof.
50. So far as victimisation was concerned, Mr Perry argued that the Claimant's email of 26 August 2016 was clearly a protected act, and that Terri Bebb's actions following receipt of it, which led to the failure to consider the grievance and to the Claimant's dismissal, were a result of the letter which included allegations of race discrimination.
51. The Respondent produced written submissions. In essence, its representative, Mr Self, argued that the Respondent's guiding principle was to act as a meritocracy, requiring the highest, consistent standards. The Claimant had never met those standards, despite being given ample opportunity to do so. She could not be compared either to Charlotte Robins or to Olivia Lee. So far as Ms Robins was concerned, she was performing much worse than the Claimant - it was for this reason alone that she was given additional coaching - and subsequently she was treated less favourably by the Respondent because she was dismissed without having the opportunity to return to her store. Ms Lee was genuinely perceived as having greater potential, which was justified because she had passed the initial Relax training at the end of the third week of her course, and the Spell training at first attempt.
52. So far as race discrimination claim was concerned, Mr Self argued that there was insufficient evidence before the Tribunal to shift the burden of proof, but even if that were not the case, the Respondent had amply demonstrated that its treatment of the Claimant was because of her capability, and not because of her colour.

53. On victimisation, Mr Self questioned whether or not the Claimant's letter of 26 August amounted to a protected act, but said that even if it did, any detrimental treatment to the Claimant was caused by her perceived lack of capability, and not because she had made that protected act.
54. If the Tribunal found against the Respondent, Mr Self conceded that the ACAS Code on discipline and grievances had not been followed.

## Conclusion

55. The Tribunal made the following findings in relation to each of the alleged acts of less favourable treatment or detriment:-

(a) *The failure to provide the Claimant with the same level of support and guidance as her white colleagues while she was on the residential spa therapist training course in Poole.*

The Tribunal concluded that the Claimant was given the same level of guidance as all her white colleagues save Charlotte Robins. Extra treatment was given to Charlotte Robins, the Tribunal was satisfied, because she was very considerably underperforming, to a much worse degree of any of the other trainees. The Tribunal saw no inconsistency between this account of events and the fact that the Respondent had alleged that it was often better to have had no massage experience, as then one would have to unlearn techniques – just because this is typically the case does not mean that it is always the case.

(b) *The failure to provide the Claimant with the same number of opportunities as her white colleagues for practising the spa treatments on the trainers and obtaining the resulting feedback whilst on the training course.*

The Tribunal found no evidence to support this allegation.

(c) *The failure to provide the Claimant with the same leeway on the training course assessments as her white colleagues, including the failure to allow the Claimant to delay and/or skip assessments.*

Olivia Lee was given more leeway on training course assessments than the Claimant and was allowed to skip her final assessment on the Synaesthesia treatment. No similar leeway was given to other white colleagues. The Tribunal accepted the Respondent's explanation for the treatment of Ms Lee, namely that the trainers genuinely believed that she had potential to be a good spa therapist.

(d) *The failure of the trainers on the training course to offer the additional one to one training that was offered to her white colleagues.*

This relies upon the same evidence as in point (a). The only person to receive extra training was Ms Robins. The Tribunal accepted that the Claimant received no extra training, not because she was black, but because she was not performing as badly as Ms Robins.

*(e) Holding the Claimant's performance on the training course to a higher standard than her white colleagues.*

There was no evidence before the Tribunal that this was the case.

*(f) The provision of feedback to the Claimant and Ms Aminat Oladipo, who is also non-white, by Ms Alanda Colegate and Ms Nikki Camms separately from the white colleagues on 12 August 2016.*

The two were dealt with together, and separately from their colleagues, because their training was to be changed in the same way. Ms Robins and Ms Lee were dealt with separately because they were subject to unique arrangements.

*(g) Removing the Claimant from the training course in Poole on 12 August 2016 after only two weeks of the planned seven weeks.*

The Respondent changed the arrangements of all four trainees whom they believed were under performing. The Claimant, Ms Oladipo and Charlotte Robins (white British) were removed from the training course on 12 August 2016. Ms Robins' employment was terminated- thus she was treated less favourably than the Claimant. The Claimant and Ms Oladipo were to continue their training at Oxford Street. Ms Lee's training reverted to the Oxford Street store on 4 September.

*(h) The disregard for the consequences for the Claimant's living arrangements when she was removed from the training course, and the dismissive way in which Ms Colegate and Ms Camms responded to the Claimant's concerns about the same on 12 August 2016.*

The Tribunal accepted that Ms Colegate and Ms Camms had genuinely not anticipated that the Claimant would have nowhere to live in London – and there was no reason why they should: the Claimant's job application form had set out an address in London and the training was only to last 7 weeks. When they learnt about the Claimant's lack of accommodation, while they may have been brusque as a result of their surprise, the Tribunal felt that the Respondent's staff acted appropriately by giving the Claimant an opportunity to sort out the position, and by offering her accommodation in Poole over the following weekend – an offer which the Claimant did not take up because she was returning to London for the weekend in any event, and had therefore presumably organised her living accommodation for that weekend in advance. The Tribunal did not believe that a hypothetical comparator would have been

treated any differently – the treatment was due to surprise at the Claimant's lack of accommodation, and not her colour.

- (i) *On the Claimant's return to the Respondent's Oxford Street branch on 16 August 2016, the provision of only 32 hours training per week to the Claimant instead of the 40 hours per week on the training course.*

The number of hours during which the Claimant was trained during the week of 16 August 2016 was lower than she would have received had she remained at Poole. The reason for this was because she was being trained in Oxford Street under the new training programme, which was still in pilot stage, of being trained as a spa therapist alongside working on the shop floor. Olivia Lee when she returned to the Oxford Street branch two weeks later, would have received a similar training programme. The reason therefore, related to the Claimant's performance and the reason why she had been moved from the Poole training course to Oxford Street, and did not relate to her colour.

- (j) *The provision of training to the Claimant at the Oxford Street branch by Ms Hannah Gorman, an inexperienced and unqualified trainer who had other duties to which she needed to attend.*

Hannah Gordon was not a designated trainer. She did however produce a training course that appears to have been of high quality, and which the Claimant clearly appreciated. The reason why Hannah Gorman was allocated to training the Claimant during the first week was because of the decision, referred to above, to move the Claimant from Poole to the Oxford Street branch, and had nothing to do with the Claimant's colour. Hannah had been the senior therapist at the Oxford Street branch and was therefore presumed to be very proficient. The following week a designated trainer, Elise McKenna, took over the training of the Claimant.

- (k) *The requirement that the Claimant worked on the shop floor of the Oxford Street branch when she should have been given training as a spa therapist.*

This was again a consequence of the move of the Claimant to the Oxford Street branch under the new training regime. The same number of hours, but over a longer period, would have been allowed in relation to each training under that programme. Again, the reason for this is because of the move, and nothing to do with the Claimant's colour.

- (l) *Requiring the Claimant to take a practice examination on 30 August 2016 to determine whether she had successfully passed the probationary period when she had been provided with inadequate training.*

The Tribunal did not find this to be the case. The Claimant had been in training for five weeks, two of which were full time, and three of which including some period when she was working on the shop floor. The assessment

examination she was given on 30 August was similar to those which most trainees would take at the end of their first or second weeks of the training. The Tribunal therefore believed that the Claimant had received adequate training up to 30 August to enable her to take the examination.

*(m) Making the decision to dismiss the Claimant without giving her the opportunity to retake the practice examination.*

For the reasons set out in (l), the Tribunal consider that this was reasonable, and related to the Claimant's capability.

56. The next issue for the Tribunal to determine is whether or not the Claimant's email to Ms Bebb of 26 August 2016 amounted to a protected act. For the purposes of these proceedings, the relevant protected act might be making an allegation (whether or not express) that the Respondent or another person has contravened the EQA. In the Claimant's memorandum of 26 August, she refers to having been unfairly treated, and specifically questions whether the cause of that treatment might be, among other things, race. The Tribunal therefore believes that the memorandum falls within the definition of a protected act set out in Section 27 EQA.

57. In addition to items (h) to (n) above, insofar as they were carried out after 26 August 2016, the Claimant relies upon the following acts of detriment in support of her victimisation claim:-

*(n) Following the Claimant's email to Ms Terri Bebb on 26 August 2016, the failure to respond to, investigate or address the Claimant's grievance, adequately or at all.*

The grievance was not dealt with. The Tribunal was satisfied that this was an oversight, not a deliberate act, particularly in light of the fact that a similar grievance submitted on the same day by Ms Oladipo was responded to and investigated by the Respondent.

*(p) Dismissing the Claimant on 2 September 2016.*

The Tribunal concluded that the dismissal of the Claimant was an inevitable conclusion from the previous sequence of events, and was on the ground of capability. In five weeks, the Claimant had not achieved the standards expected of trainees at the latest by the end of their second week.

### **Burden of Proof**

58. The Claimant relied upon the difference in treatment between the Claimant and white colleagues, given the comparative feedback they had received, as being sufficient to shift the burden of proof. She relied upon the fact that the Lush Spa promotes English characteristics, and is therefore consciously or



unconsciously producing a disproportionate number of white spa therapists. The Tribunal has noted various occasions when the Claimant was treated less favourably than actual or hypothetical white colleagues (notably as set out in paragraphs 55 (a), (c), (d), (f), (g), (i) (j), (k), (l) and (m)). The Tribunal struggled in considering whether or not the English country cottage branding of the Lush Spa was sufficient, matched with these facts, to shift the burden of proof. On balance, they decided that it may be.

59. The next stage for the Tribunal to consider is whether, on the balance of probabilities, the less favourable treatment found as fact above was in no sense whatsoever on the protected ground. The Tribunal found that this was the case. The treatment of the Claimant, in every aspect, related to her performance and capability, and not in any sense to her colour. In addition to the findings set out in paragraph 55 above, the Tribunal, in coming to this conclusion, bore the following facts in mind:

- (i) the very thorough training and feedback which had been given to the Claimant, indicating consistently that her performance was below the expected standard;
- (ii) the Claimant and Ms Oladipo were recruited to the Oxford Street branch in the first place, and received a very positive interview – it is unlikely that the Claimant would have been appointed to the Oxford Street Spa, by its manager who was also the daughter of the Respondent's founder, if the Respondent had no intention of ultimately passing her for training;
- (iii) there is no commercial rationale to dismiss trainees on the ground of anything other than poor performance: each trainee costs £14,000 to train, and it is clearly not in the trainers' interests, either personally or for the company, to set trainees up to fail.
- (iv) the trainers demonstrably worked hard to train the individuals to the appropriate standards;
- (v) the person who was treated less favourably than the Claimant, Charlotte Robins was white;
- (vi) when the Claimant expressed concern about her accommodation such help as could be given to her was offered;
- (vii) at Oxford Street the nature of the Claimant's training (if not the time allowed) was of the same nature as that given in Poole - part of the reason for the change in hours was to allow Oxford Street to test out the new proposed training programme which has now been rolled out across all the Respondent's Spa sites;

- (viii) the Claimant's appreciation of the quality of her training at Oxford Street, expressed in an email to Hannah Gorman;
- (ix) four different individuals assessed the Claimant's performance, none of whom apparently had any reason to assess her negatively, whether on the ground of her colour or for any other reason; and
- (x) when the Claimant made her complaint on 26 August, it was directed towards Ms Colegate, Ms Camms and Ms White, none of whom took any part in the decision to dismiss the Claimant.

60. The Claimant's claim that she was treated less favourably on the ground of her race therefore fails.

### **Victimisation**

61. The Tribunal has found that the Claimant made a protected act. It must therefore consider, on a balance of probabilities, whether the Claimant was treated to her detriment as a result. Insofar as the matters set out at paragraphs 55 (h) to (m) are concerned, the Tribunal has set out above its judgement that the actions were taken as a direct result of the Claimant's performance. The Tribunal did not therefore believe that any detriment was caused to any degree by the Claimant's grievance. In addition, the Tribunal found that the Respondent's failure to pursue the grievance was the result of genuine oversight, and not any deliberate act. This is reinforced by the fact that Ms Oladipo's similar complaint was taken forward and dealt with. The Tribunal also found that Ms Bebb, in maintaining her criticism of the Claimant's performance and failing to pass her on 30 August, was making a genuine assessment of the Claimant's abilities, and that this was not a decision based upon the fact that the Claimant had submitted a grievance. The Tribunal is supported in this view by the fact that Ms Bebb's criticism of the Claimant's performance is similar to previous criticisms, not least that given by Ms McKenna the previous day. The decision to dismiss the Claimant, which was perhaps the consequence of Ms Bebb's appraisal, was not in fact taken by Ms Bebb. There is no evidence as to whether or not Ms Constantine was aware of the fact that the Claimant had lodged a grievance against the company. The Tribunal has accepted that Ms McKenna was aware in general terms of the Claimant's concerns, but was not aware of the letter of 26 August. Nevertheless, the Tribunal concluded that the reason for the dismissal of the Claimant was overwhelmingly because she had failed to reach the required "Relax" training standard after five weeks training, while most trainees reached the relevant standard within weeks one or two. The ground was therefore capability, and had nothing to do with the fact that the Claimant may or may not have made a grievance relating to her treatment on the ground of race.

62. The Claimant's claim that she was victimised therefore fails.

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Employment Judge Palca  
24 October 2017