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EMPLOYMENT TRIBUNALS

Claimant: Miss Y Ngwawaira
Respondent: Sainsbury's Supermarkets Ltd
Heard at: East London Hearing Centre
On: 6-7, 12-13 December & (in chambers) 14 December 2017
Before: Employment Judge C Lewis
Members: Mr T Burrows
Mr L O'Callaghan

Representation

Claimant: In person
Respondent: Ms S McKinley (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The Claimant's claims of unfair dismissal; wrongful dismissal; race discrimination: direct race discrimination and harassment; unlawful deductions from wages, claim for unpaid wages all fail and are dismissed.
- (2) The Claimant's claim for holiday pay was conceded by the Respondent and the Claimant is entitled to the sum of £267.09 being her entitlement to her basic pay plus nightshift rate for the outstanding 29 hours holiday pay.

REASONS

The issues

1 The Claimant brought claims of direct race discrimination, harassment related to race, unfair dismissal, unpaid annual leave under the Working Time Regulations, breach of contract for dismissal without notice, and unlawful deduction from wages for unpaid wages. The issues were identified at a Preliminary Hearing on 10 July 2017 by Employment Judge Gilbert at which the Claimant was present, again representing herself, and the Respondent was represented by Mr Jolly of Counsel.

2 The allegations relied upon by the Claimant in respect of her claims for harassment and direct discrimination were the same and those are set out at paragraphs 5.1.1 to 5.1.19 of the Preliminary Hearing Summary (the claims of harassment) and 6.2.1 to 6.2.19 (the claims of direct race discrimination). The last of the matters relied upon by the Claimant in support of her claims for direct discrimination and harassment related to race was her dismissal. She contended that this was the culmination of a series of continuing acts.

3 During the hearing the Claimant withdrew the allegation at 5.1.13 and 6.2.13 that she had received threatening calls from Doris Valencia, Andy Martin and Hannah Bettinson after suspension. The allegations before us, are as follows (as renumbered):-

3.1 The Claimant is a Black African woman from Zimbabwe. She alleges that the Respondent engaged in unwanted conduct as follows:

- 3.1.1 In 2012 Michelle Palmer, the Claimant's line manager, called her an "immigrant"
- 3.1.2 Throughout her employment the Respondent failed to provide the Claimant with the correct uniform trousers, body warmer required for working in chilled areas reflective jacket and with a locker to store her personal effects despite her repeated requests for these to be provided
- 3.1.3 Early in her employment a contractor working at the store which was being refurbished called the Claimant a "black bitch". She reported this to Michelle Palmer and Dave Butler the [East Mayne] Store Manager
- 3.1.4 When Paul Mangan replaced Michelle Palmer in 2016 he continued the same treatment of the Claimant. The Claimant reported both of them to their line manager Andy Deacon saying she was not happy to be disrespected by someone who did not know her. Paul Mangan had challenged her about wearing headphones on the night shift when this was permitted in the course of his first day /night as her line manager.
- 3.1.5 Paul Mangan had discussed her immigration status publicly in front of the Bakers with Tony Baines the shift manager who is Caribbean and openly hostile to African people.
- 3.1.6 Following this the unwanted conduct intensified and she was made to work on a bailer (where rubbish is compressed for recycling and next to the chiller) for 10 hours every day for about a week.
- 3.1.7 The Claimant was not provided with a reflective jacket required when working in the warehouse and requested by her.
- 3.1.8 4 or 5 months after Paul Mangan started she was suspended in the early morning around 2 am on 28 May 2016 by Paul Mangan in the presence of Tony Baines. Paul Mangan challenged her about a Sainsbury's plastic carrier bag she had on the shop floor throughout the shift. He had

observed her purchase items, Lucozade and crisps, for which she had a signed proof of purchase and which she placed in the carrier bag along with her car keys and personal items. The Claimant had received prior permission from Ben a team leader to purchase the items. Paul Mangan did not challenge her on her first break. The Claimant had her personal belongings in the carrier bag because she had no locker. He told her she could not have it on the shop floor because she could steal or help others steal. She said "Sweetheart" I have no locker. The Claimant believed the suspension occurred at 2 am because there is no public transport at that time and was told so. She had a car and said that it was not a problem.

3.1.9 Tony Baines and Paul Mangan also said also said to the Claimant, "If you are doing medicine why are you here?"

3.1.10 Paul Mangan, from when he started at the branch, and Tony Baines called her an "angry black woman"

3.1.11 Hannah Bettinson, Human Relations, (HR) failed to pay her properly while she was suspended.

3.1.12 When she complained about not being paid properly Hannah Bettinson HR called her an "angry black woman"

3.1.13 The grievance investigation into her complaint of harassment was completed by Ollie on the same day it started.

3.1.14 The Claimant was offered locker keys by Andy Martin on 28 May 2016, after her suspension and after four years without.

3.1.15 Andy Deacon and Hannah Bettinson labelled the Claimant an "angry black woman" during the disciplinary process because she is assertive and stands up for herself.

3.1.16 In the last meeting of the procedures the Claimant attended Hannah Bettinson called her "aggressive".

3.1.17 Andy Deacon accused the Claimant of being responsible for the contractor racially abusing her.

3.1.18 Dismissing the Claimant on 25 October for gross misconduct.

4 The Claimant's case was that the conduct alleged above was related to her race and had the purpose or effect of violating her dignity, and/or creating an intimidating, hostile, degrading or humiliating or offensive environment for her (harassment) and that same conduct was less favourable treatment because of her race, in that she was treated less favourably than the Respondent would have treated comparators who were white (direct discrimination).

5 The Respondent denied discriminating against the Claimant or harassing her. It relied on the Claimant's conduct as a potentially fair reason for dismissal, namely the

Claimant's unauthorised absence from work and failure to return to work and failure to attend meetings. The Respondent denied the claims for unlawful deductions from wages and failure to pay holiday pay but during the course of the hearing accepted that she was owed some outstanding holiday pay.

Procedural matters – strike out

6 On the first day of the hearing the Respondent made submissions that the Claimant's claim had fallen to be automatically struck out as a result of an Unless Order made by Employment Judge Jones requiring the Claimant to:-

- 6.1 Send her witness statement to the Respondent by 4pm on 30 November 2017; and
- 6.2 Deliver to Mr Bradburn of the Respondent at Sainsbury's Supermarkets Ltd Legal Services, 33 Holborn, London EC1N 2HT a CD ROM or memory stick with recordings of the meetings attended by the Claimant internally at the Respondent while she was employed together with a verbatim transcript of those meetings by 3pm on Friday 1 December 2017.

7 On 5 December 2017 the Respondent applied to have the claims struck out in accordance with the Unless Order, on the basis that the Claimant had failed to comply with its terms. On the basis of the information before her Employment Judge Jones declined to strike out the Claimant's case for the reasons given in the Tribunal's letter dated 5 December 2017.

8 The Respondent renewed its application before this Tribunal on the first day of the hearing. Before us the Claimant accepted that the transcript of the CD was not only delivered late, something which Employment Judge Jones had decided was not fatal to her claim, but also accepted that the substance of the transcript was not a verbatim transcription of the recordings. The Claimant explained that she had run out of time and had simply put the recordings into a voice recognition programme: the outcome was not an intelligible, let alone verbatim, account of the recording but rather a garbled and incomprehensible document. To her credit, the Claimant accepted that this in substance failed to comply with the terms of the Unless Order. In the circumstances the Tribunal found that the Unless Order had the effect of striking out the Claimant's claim. However, the Tribunal considered that, balancing the interests of both parties, it was still possible to have a fair trial of these proceedings and given the public policy interest in hearing and determining claims involving allegations of discrimination, that it would be in the interest of justice to reinstate the Claimant's claim but that she would not be able to refer to the recordings, having failed to provide an intelligible transcript of the same.

9 The Claimant was given until 10am on 7 December to apply to set aside the strike out and she duly applied on 6 December in writing confirming that she wished to progress with the evidence that had already been provided, that is, without the transcripts or the recordings.

The evidence before the Tribunal

10 The Tribunal was provided with a bundle of documents by the Respondent and some further documents by the Claimant, most of which were in the bundle, some additional documents were added to the bundle on the first day before the start of the evidence. The Tribunal had been provided with written statements from the Claimant and from the Respondent's witnesses who were Andrew Martin, Deputy Manager at Sainsbury's East Mayne store; Kevin Bayles, Deputy Store Manager of East Mayne store; Anthony Bain, Department Manager on the nightshift at East Mayne store; Paul Mangan, Department Manager on the nightshift at East Mayne store; Hannah Bettinson, who at the relevant time was an HR manager covering East Mayne, Canvey Island and Chafford Hundred stores. The Tribunal read the statements and on the second day of the hearing proceeded to hear evidence from the witnesses.

Findings of fact

11 The Tribunal made the following findings of fact, so far as they are relevant to the issues before the parties. The Tribunal have not made findings on every disputed matter where it was not necessary to do so in order to decide the issues before it. [Page numbers referred to are the page numbers at the top of the pages in the bundle, rather than those at the bottom of the page]

12 The Claimant started working for the Sainsbury's Supermarket in East Mayne on
13 September 2012, initially in a temporary position which later became permanent, and was employed there until her dismissal on 25 October 2016. The Claimant worked the nightshift two nights a week, which fitted in around her studies.

Issue 3.1.1: In 2012 Michelle Palmer, the Claimant's line manager, called her an "immigrant"

13 The Claimant alleges that Michelle Palmer was racist and had a racist agenda against her. The Claimant alleges that Michelle Palmer called her an immigrant in front of others on the shop floor in the bakery section. The Claimant stated that Michelle Palmer came up to her and asked for her documents showing her right to work in the UK and her immigration status, telling her that "we have to check all immigrants", thereby calling her an immigrant in front of others and revealing her immigration status. The Claimant also complained that this meant that her immigration file must have been left out for others to see as it was not Michelle Palmer's job to check her immigration status, it was HR's role.

14 We were taken to a letter to the Claimant dated 20 July 2014 (p.110) from Nick Speight, Head of HR Services, headed: "Right to Work in the UK – Review Date Due in 14 days/Right to Work is due to Expire in 14 days". The document states:

"Following our previous correspondence I have not yet received any current evidence from you in support of your ongoing/future right to work in the U.K. I am writing to reinforce that it is critical for your continued employment with Sainsbury's that you can provide evidence for your continued eligibility to work in the UK."

15 We are satisfied that in July 2014 Human Resources was chasing the Claimant

for documents confirming her right to work in the UK and we find it is likely that the event occurred around that time, i.e July 2014. It was accepted that there was no HR on site at the store. The Respondent is not in a position to dispute that a request was made by Ms Palmer for the Claimant to provide copies of her immigration documents and that this was said on the shop floor. However, the Claimant's own description of the request was that Ms Palmer specifically stated that all immigrants were required to provide proof of their right to work, or immigration documents. The Respondent's position is that their request for documentation was because the Claimant was someone who had to establish the right to work and was due to her immigration status and not her race.

16 We accept that the Respondent asked the Claimant for proof of her immigration status, we find that the request was made not because she was black but because she was subject to immigration control. We also accept the Claimant's contention that this should not have been asked for in front of everyone and ought to have been done in private. The Claimant's mother complained about the Respondent's conduct at the time and, according to the Claimant's evidence, Mr Deacon invited her mother into the store for a cup of tea and apologised for the way the matter had been handled. No further complaint was made in relation to this and no grievance was raised by the Claimant at the time. The Claimant clarified in her evidence that this allegation was in relation to Michelle Palmer alone and she was not alleging that either Tony Bain or Paul Mangan was present [Issue 3.1.5].

Issue 3.1.2 Failure to provide correct uniform (and 3.1.7)

17 The Claimant complained that the Respondent failed to provide her with trousers or a body warmer, reflective jacket and also a locker. The Claimant accepted that trousers were provided to her but they were too short; she is 6ft 1" and she did not fit the uniform trousers provided; her mum bought her some trousers that were long enough. There is no evidence that she raised the issue of the trousers with anyone as a complaint or that the failure to provide her with trousers that fit was because of her race. The Claimant claims that she asked Michelle Palmer for a body warmer and was not given one. She was later given a fleece by Mr D Howe who removed his own fleece and gave it to her when she complained that she was cold. Mr Bain remembered seeing the Claimant with a body warmer, which he described as a "gilet" i.e. a sleeveless jacket. Body warmers were left hanging outside the freezers to be put on before entering the freezer. There was simply no evidence that the Claimant had ever asked Mr Bain or Mr Mangan for a body warmer and been refused one. We accept Mr Bain's evidence that a lot of colleagues wore their own jumpers on the night shift after the store was shut to customers, he recalled that the Claimant would wear her own jumper, as did others.

Issue 3.1.2 - Failure to provide a locker

18 The Respondent accepts that the Claimant was not provided with a locker until after her suspension in May 2016. The Claimant raised not having a locker as part of her grievance (and her explanation for having a bag on the shop floor) and Mr Martin provided her with a key to a locker at her grievance hearing on 21 June 2016. The Respondent accepted that whilst there was no policy on the allocation of lockers, they were usually allocated on induction; there were not fewer lockers than employees but

sometimes colleagues left without returning the key to the locker and this could cause problems until arrangements could be made to break into the locker and replace the locks. It was accepted that colleagues should be provided with a locker.

19 There is no evidence that the Claimant had raised with Mr Mangan or Mr Bain, or indeed anyone else, the fact that she did not have a locker until the night of her suspension in May 2016. The Claimant accepted in cross-examination that her colleague Derek, who was black Ghanaian, did have a locker. There is no evidence that she asked anyone other than Michelle Palmer, who left in April 2015, for a locker.

Issue 3.1.3 – being called a “black bitch” by a contractor

20 On 31 May 2014 when the Claimant became involved in an incident with a contractor. The Claimant alleges the contractor bumped into her and then failed to apologise and that when she remonstrated with him he called her a “black bitch”, following which she complained to her manager. The Claimant’s complaint focussed on what took place after the incident rather than the incident itself. The Claimant was subsequently suspended on 31 May 2014 by Dave Butler for ‘gross misconduct, gross insubordination’, for her behaviour and demeanour which was described as aggressive, abusive and threatening to a contractor working at the store.

21 The Respondent interviewed a number of staff who were working that evening including Marc Bailey (see p.65. 116 and 117 of the bundle), and Mandy Vint (p.121), and statements were provided by the contractors who alleged the Claimant called them “bastards” and “fucking racist bastards”. Mr Bailey heard the Claimant call the contractor a “cunt”. As stated, the Claimant alleged that they had made racist remarks to her.

22 The manager on duty provided a statement to the effect that the agency worker had complained to him about being sworn at and when he went to speak to the Claimant about the incident she responded loudly that she thought he was going to talk about the guy calling her a black bitch, that she then spotted the agency guy and walked over to him and put her hands in his face and was shouting ‘he is a racist bastard’ and ‘cunt’ in his face. The contractor responded by shouting back.

23 The Claimant was interviewed about the incident on 20 June 2014 by Joanne Bower who was a Department Manager. The Claimant initially denied calling the contractor a “f--ing bastard” but on being told there were 4 statements from others to that effect, the Claimant changed her stance and said she knew she should not have reacted the way she did and explained that she was very ill that night. The minutes of the meeting with Jo Bower record that she told the Claimant that the company did not condone the abuse, they are a company of diversity and had zero tolerance. She told the Claimant, “What was said wasn’t right but was you right to react that way”, referring to the Claimant being “in his face with fingers and called him, racist bastard cunt”. Ms Bowers asked the Claimant how she thought she should have reacted to the racial comments, to which the Claimant responded she should have got the manager and discussed it properly. The Claimant also confirmed that her mum said she should have handled it differently. Jo Bower told the Claimant:

“You must understand that we will not accept discriminative [sic] attitude at all.

And you need to work on your anger and not let this happen. Because your behaviour turned the way it did we can't then support that."

To which the Claimant responded "True". When asked again what she would do differently she said: "See my manager and not react". Jo Bower explained that as a result of the Claimant's reaction, the matter was not just a race issue as the Respondent also had to address the insubordination issue from the Claimant and the issue of respect for fellow colleagues, which were potentially gross misconduct and the matter needed to go to a disciplinary.

24 The Claimant's description of the incident in her evidence to the tribunal was that she was told by her manager that she had to stand there and smile when she was racially abused and that she was in effect being told she had to accept racist abuse. We do not find that this is what she was told. We accept that she was asked how she would deal with the situation in the future and that the Claimant agreed the appropriate way to deal with it would be to get a manager and discuss it properly. The issue she was being disciplined for was her swearing and going over to the contractor and her reaction. There is no record in the bundle and nor could the Respondent produce any record of the outcome of the disciplinary process; at page 128 there was a note of matters for and against disciplinary; on the "for" side of the balance sheet was: "bad attitude, confronted him again, knew she should have got manager, knows she lost her temper", and on the "against" side was: "called black bitch, remorseful, sees what she had done wrong".

25 The disciplinary hearing was called for 4 August 2014 but was adjourned and no further records of the proceedings are available. There is no reference to any warning or other sanction on the Claimant's personnel file. Nor is there any record of what, if any, action was taken in respect of the contractor. Neither of the parties is able to enlighten us as to the outcome of the disciplinary investigation; it was not referred to again by anyone, including the Claimant, until the grievance appeal in August 2016 when it is referred to by Andy Deacon as an example of when the Claimant has behaved aggressively in the past.

Issue 3.1.4 Paul Mangan continuing Michelle Palmer's treatment of the Claimant

26 Michelle Palmer left the East Mayne store in April 2015 and was replaced by Tony Bain. Tony Bain started in the store by May 2015 at the latest.

27 Mr Mangan joined the East Mayne store in February 2016 and replaced David Howe not Michelle Palmer. The Claimant makes no complaint about Mr Howe. Mr Mangan had worked with Michelle Palmer at the Romford store and Mr Mangan accepted that Michelle Palmer did ring him after he had started at East Mayne store on possibly five or six occasions to find out how he was getting on. Ms Palmer did ask him about people she knew at the store and did mention the Claimant. However, we accept Mr Mangan's evidence that whatever Michelle Palmer had said, he made up his own mind about people at East Mayne, that Michelle Palmer had not influenced his views and he would not let her or others influence his views. We also accept that Michelle Palmer had not mentioned to him any incident in which she had called the Claimant an immigrant.

Issue 3.1.4 – being singled out by Mr Mangan, challenging the Claimant about wearing headphones

28 By the time that Mr Mangan started in store the Claimant was working on Tuesdays and Fridays. Mr Mangan recalled that his first day in the store was a Tuesday. Mr Mangan held a huddle at the beginning of the shift, as he did at the start of every shift, and introduced himself as the new manager. The Claimant was not present for the huddle, she thought she might have been late to work that evening. Mr Mangan then went around the store during the shift and introduced himself to the staff individually. Mr Mangan was keen to ensure some of the poor practices that had been occurring at the store were discontinued and that the store was brought back in line with business expectations. He recalled that a number of colleagues were wearing headphones, probably about 10 people. The wearing of headphones was contrary to company policy, although it had been tolerated in the past, so he asked each of the colleagues who were wearing headphones to take them out as he went around the store. This included the Claimant. He did not recall the Claimant taking any issue with the request at the time. The Claimant accepted that she knew it was company policy but she later alleged that Mr Mangan singled her out. We accept Mr Mangan's evidence that he asked everyone he saw wearing headphones to remove them, including white colleagues. The majority of the staff in the store were white, the Claimant recalled working alongside two other black staff, both male. The evidence from the Respondent was that approximately 98% of the staff were white. It follows that of the 10 colleagues asked to remove their headphones, a number of them would have been white.

29 Later in the same shift the Claimant asked to go home early. Mr Mangan recalled that he had also been asked by a white colleague if they could go home early; he was aware there had been a culture of letting staff go early but his intention was to change the culture. He refused the request of the white colleague and he also refused the Claimant's request. When he told the Claimant that she could not go home early he heard her saying loudly, "Where did we get that idiot from" as she walked away. The Claimant accepted in evidence that she did think Mr Mangan was an idiot and we find that she did say that. It is also consistent with her conduct before us.

30 The Claimant alleges that Mr Mangan was rude in his first conversation with her and asked if she knew who he was saying, "I am the new manager. So I heard you are sassy". Mr Mangan denies using the word sassy and says it is not a term that he would use or uses. We find that he did not say "So I heard you are sassy".

Issue 3.1.5 Paul Mangan discussed her immigration status publicly in front of the bakers with Tony Baines

31 During her evidence the claimant withdrew her allegation that Paul Mangan and Tony Baines discussed her immigration status in front of the Bakers and clarified that she made this complaint about Michelle Palmer only.

Issue 3.1.6 Being made to work on the bailer

32 The Claimant complained that she was made to work on the bailer constantly, that is, for the whole of her shift without a break. Mr Bain's evidence was that when he

started in the store the Claimant was predominantly working on the bailer. This was not a punishment but rather was something she chose to do. It was considered by some to be an easy job, or at least easier than stacking the shelves in the aisles, as there was often gaps between activity. The person on the bailer would wait for other colleagues to bring their cardboard to the bailer at the end of their restocking an aisle, and sometimes there would be gaps of 15 to 20 minutes in which the person on the bailer didn't having anything to do. He recalled that often the Claimant would be on the phone during this time and that he had caught her on the phone on more than one occasion. Within two weeks of his starting at the store Mr Bain changed the practice so that no one person was constantly on the bailer for any shift and that each colleague had to do their own bailing i.e. take their own cardboard and place it in the bailer. We accept his evidence.

33 The Claimant had pointed to her being required to work on the bailer as an example of a racial stereotype being applied to her. She alleged that it was assumed that she would be fast [at bailing] because she was black and tall and therefore was placed on the bailer. However, in her own evidence the Claimant explained that she thought she was good at the task because she was tall and was able to see inside the bailer which meant she could do the job more effectively.

Issue 3.1.7 – failure to provide a reflective jacket

34 The Claimant did not dispute that reflective jackets were only needed if the colleague (the term used to describe a member of staff) was working in the yard outside where lorries need to see you. She did not work in the yard. The Claimant accepted that she did not need a reflective jacket. The Claimant did allege that on occasions she was made to work in the loading bay when the managers were annoyed with her. On her own explanation that was not because of her race but to do with her conduct. We are satisfied that these complaints are historic matters which predate Mr Bain's and Mr Mangan's employment at the store.

Issue 3.1.8 – the Claimant's suspension on 28 May 2016

35 On 28 May 2016 the Claimant purchased some food (crisps and a drink) at approximately 10:50 pm, 10 minutes before the store shut at 11pm. The Claimant got her receipt signed by a manager, as was required by company policy, but she was later seen by Mr Mangan with an orange Sainsbury's bag on the shop floor. The Claimant accepted that it was the Respondent's policy that no bags were allowed on the shop floor and she accepted the reason behind that policy was to prevent theft: the policy document [at page 309K] refers to keeping personal belongings in a locker.

36 The Claimant alleged that Mr Mangan challenging her in an aisle when she was walking with a black colleague was also racist stereotyping, the stereotype alleged being that black people are likely to be stealing. Mr Mangan did not accuse the Claimant of stealing, he challenged her because she had an orange Sainsbury's bag with her and reminded her of the reason for the policy that there be no bags on the shop floor. Mr Mangan saw the Claimant at about 12:15 am and explained the policy. The Claimant's claims that she responded: "Sweetheart, I have no locker". We accept Mr Mangan's account that she did not refer to her locker on the shop floor and this was something she first mentioned in the office in the presence of Mr Bain.

37 We also accept Mr Mangan's evidence that the Claimant's response was immediately combative and that as a result he responded, in the heat of the moment, by telling her that if she carried on he would suspend her. He had thought this might quieten things down. He did not threaten to dismiss the Claimant. We find that the Claimant responded with the words: "Go on and do what you like. I want you to." To which Mr Mangan responded by asking the Claimant to come to the manager's office to discuss things in private, he also asked Mr Bain, who was the other Department Manager on shift, to attend.

38 We accept Mr Mangan's evidence that on the way to the office the Claimant slammed the warehouse door and as a result of this Mr Mangan described her manner as being aggressive. We find that this was an example of aggressive behaviour. The accounts taken at the time were in the bundle [at page 162 Mr T Bain; page 163 Mr P Mangan and at page 161 Ben Hulves, who was in the next room and heard the Claimant raising her voice and shouting]. All three accounts are similar in many respects. The Claimant accepts each of the Respondent's witnesses' account of the meeting except that she denied swearing until the end of that meeting just before she walked out. The Claimant contended that the fact that she acknowledged she swore put her in a good light because it showed that she accepted responsibility for her actions. The Claimant accepted she used the phrase "An eye for an eye" which was perceived as being threatening, that she called Mr Mangan sweetheart (explaining that she did so because that was her favourite word for idiots and in her view her IQ was 10 times better than his), and that she walked out of the meeting throwing her gloves and her box cutter in the bin. We find that Mr Bain intervened to tell the Claimant not to swear shortly before the end of the meeting. We accept Mr Bain's account of the meeting. We note that the Claimant's raised voice was loud enough to be overheard by Ben Hulves in the next room.

39 When told that Mr Bain and Mr Mangan were going to have to suspend her, she accepts her reply was: "Go on then, others have tried before. Your little friend Michelle tried. You have to face the consequences". This was perceived as threatening.

40 Mr Mangan was conscious that he was about to suspend the Claimant in the middle of the night and wanted to check she would be able to get home safely. We accept that the Claimant responded to this by saying, "Don't act like you give a fuck about me, you don't care and I drive honey".

41 The Claimant did not dispute that whilst Mr Mangan was explaining the suspension process she threw her box cutter and gloves in the bin and walked out of the office and then the building. At the end of his statement written at the time [p163] Mr Mangan records the following,

"The whole time [the Claimant] seemed out of control, at times not making sense, and her facial expressions were very intimidating when she was looking at me. She continually raised her voice and came across as unruly with the sense of defiance against authority. Her conduct was totally unacceptable so it was for this reason I suspended her for insubordination against me after asking her a reasonable request."

42 The Claimant did not accept that she was suspended because of the way she behaved in that meeting. However, she stated that she encouraged Mr Mangan to fire her for standing up to him. The Claimant believed that she was always described as aggressive for standing up for herself, she compared herself to a white woman who she said would usually cry and accept what she was being told, whereas she would not and this was what did not go down well with the Respondent.

43 We find that the Claimant was suspended because of her conduct in the meeting. The Respondent considered her behaviour to be insubordinate and aggressive, her behaviour included shouting, swearing, slamming the door, threatening her managers with repercussions and insulting them.

44 The suspension letter dated 28 May 2016 [page 131] states the reason for her suspension as being: “a display of inappropriate and aggressive behaviour towards your manager Paul Mangan on 28 May 2016 ... you swore and used inappropriate language in an aggressive manner”. The Claimant was suspended on full pay and was notified of the requirement to attend all meetings.

Issue 3.1.9- allegation that Tony Bain and Paul Mangan said: “If you are doing medicine why are you here?”

45 It was not being suggested that anyone doubted or questioned that the Claimant was studying medicine, nor did the Claimant explain why this comment “If you are doing medicine why are you here?” would amount to race discrimination or harassment related to race if it had been said. It was the Claimant’s evidence that she was intellectually superior to those around her and that she had made it clear to them that this was her view. We accept Mr Mangan’s evidence that neither he nor Tony Bain said this to the Claimant. We do not find there to be any racial connotation to this remark in any event.

Issue 3.1.10 – Paul Mangan from when he started and Tony Baines called her an “angry black woman”

The Claimant clarified in her evidence that her complaint was not that Paul Mangan and Tony Bain called her an angry black woman but that they had labelled her as aggressive.

Issue 3.1.11 – Hannah Bettinson (HR), failed to pay her properly while she was suspended

46 During the Claimant’s suspension the night premium element of her pay was omitted from her wages. When the issue was identified Hannah Bettinson sent an email on 6 October apologising to the Claimant [p186A] and ensured the money owed was paid to her by 10 October 2016. Lynne Andress, Regional HR Partner, also apologised to the Claimant for this in her email dated 6 October 2016 [p 248B] the relevant part of Ms Andress’ email reads as follows:

“I can confirm there has been an error in the calculation of your night shift premium, this is because the payroll system automatically deducted this element of your pay for any shifts that you were suspended for. Suspension pay is full

pay and therefore this is an error in the payroll system, which I have raised centrally.”

47 The failure to pay the Claimant’s proper pay was not as a result of anything done by Ms Bettinson. We accept the explanation provided by Ms Bettinson in her evidence, which was also explained to the Claimant by Ms Andress in her email, it was an issue with the payroll system. We also accept Ms Bettinson’s evidence that the error had affected a number of other night shift staff in other stores.

Issue 3.1.12 When she complained about not being paid properly Hannah Bettinson HR called her an “angry black woman”

48 The Claimant also clarified that she did not allege that Hannah Bettinson called her an angry black woman when she complained about her pay but that she had overheard Ms Bettinson calling her this on her way to the meeting on 9 August.

Issue 3.1.13- the grievance investigation into the Claimant’s complaint of harassment was completed by Ollie on the same day it started

49 Ollie Harvey, a Department Manager on the day shift, held an investigatory meeting with the Claimant on 3 June 2016 in relation to the allegation of gross misconduct arising from the incident on 28 May. The Claimant provided a written statement dated 3 June, but she refused to discuss the incident without a representative, referring simply to her letter in which states she had been bullied. During this meeting the Claimant is minuted as refusing to speak in English and starting to speak in French.

50 Following that meeting Mr Harvey interviewed Paul Mangan and obtained his account. He went through the Claimant’s letter/written statement with Mr Mangan on 9 June. Mr Mangan told him that he was not aware of any bullying.

51 On 10 June 2016 Mr Harvey reconvened the disciplinary investigation meeting. He explained to the Claimant he was putting forward a case for a disciplinary based on the information before him. The Claimant alleged that he was calling her aggressive. The Claimant seemed unable to acknowledge or accept that Mr Harvey was not forming a view himself or making a decision on the disciplinary he was simply investigating the allegation. Nor was he dealing with the Claimant’s grievance.

52 On 15 June 2016 the Claimant brought a grievance [page 194] alleging bullying and harassment by Paul Mangan. As a result the disciplinary investigation was suspended while Mr Martin, the Deputy Store Manager, investigated the grievance. Mr Martin went through the Claimant’s grievance letter and identified six incidents, or complaints, and an overarching complaint of race discrimination.

53 Mr Martin held a meeting with the Claimant on 21 June 2016, the notes are headed “Conciliation” [page 199] but we find it was a meeting investigating the Claimant’s grievance. He went through with the Claimant the six complaints he had identified and the complaint of race discrimination, which was based on the Claimant being labelled as aggressive.

Issue 3.1.14 The Claimant was offered locker keys by Andy Martin on 28 May 2016, after suspension and after four years without.

54 Mr Martin offered the Claimant a locker key at the meeting on 21 June 2016. In his evidence he explained that he saw it was part of her grievance and thought he should resolve that if he could, so he provided her with a locker key. The Claimant complained there was no use in him doing that seeing as she was suspended in any event. No other complaint was made by the Claimant about Mr Martin.

55 Mr Martin met with Mr Mangan and went through the allegations and complaints raised by the Claimant. After his meeting with Mr Mangan Mr Martin then had a second meeting with the Claimant on 19 July to go over his findings. His impression of that meeting was that the Claimant broadly accepted his findings and his conclusions. He recalled that she initially said she would sit down with Paul Mangan, although the Claimant denied this in evidence before us.

56 Mr Martin believed that the Claimant accepted that Mr Mangan's account of events in relation to the headphones made sense. Mr Martin accepted that the holidays could have been managed better in the past but told the Claimant that Mr Mangan was trying to resolve that. He also asked for any dates of holiday she wanted for August, the Claimant provided these and Mr Martin approved them. Mr Martin explained the issue with her shift pattern and confirmed that her contractual hours now correctly reflected her working pattern.

57 In respect of the delay in, or failure to hold a return to work meeting, he told the Claimant that Paul Mangan had explained that he believed he had been acting in her interests and ensuring she was paid on time. Mr Martin told the Claimant he wanted her to sit down with Mr Mangan and discuss these issues directly, which she indicated to him she was willing to do 'if Mr Mangan was going to be nice'. Mr Martin confirmed that he was not going to uphold the grievance and explained the Claimant's right of appeal to her. At the end of the meeting the Claimant indicated that her main issue was being called aggressive and she told him that she needed to protect herself. He understood this to be in relation to the disciplinary matter which was still outstanding and which was not a matter that he had to decide. The Claimant subsequently appealed his findings, she alleged Mr Martin was not impartial and was using intimidation tactics, this allegation came as a complete surprise to Mr Martin.

Issue 3.1.15 – Andy Deacon and Hannah Bettinson labelled [the Claimant] an “angry black woman” during the disciplinary process because she is assertive and stand[s] up for herself

58 The Claimant's grievance appeal was dealt with by Mr Andy Deacon who invited her to a meeting under the Fair Treatment policy on 9 August together with Hannah Bettinson of HR. We did not hear from Mr Deacon as he no longer works for the Respondent. The Claimant alleges that Andy Deacon and Hannah Bettinson called the Claimant an 'angry black woman'. The Claimant stated in evidence that as she was walking along the corridor towards the meeting room she heard Mr Deacon talking about her to Hannah Bettinson, saying that she was 'an angry black woman'.

59 Ms Bettinson's recalled that the meeting was due to be held at 2 o'clock but that

the Claimant was late; Ms Bettinson went to look for the Claimant in the canteen but she was not there. Ms Bettinson returned to the canteen at 2:15, found the Claimant in the canteen and walked with her back down the corridor to the office where the meeting was to be held. She did not call the Claimant an angry black woman and nor did Mr Deacon. Nor was it possible for the Claimant to hear her and Mr Deacon discuss her on the way to the meeting as she, Ms Bettinson, had escorted the Claimant to the meeting. We accept Ms Bettinson's account.

Issue 3.1.16 – in the last meeting of the procedures the Claimant attended Hannah Bettinson called her “aggressive”

60 Ms Bettinson described the meeting as not being particularly fruitful. The Claimant was unwilling to present her case or to allow Ms Bettinson and Mr Deacon to go through the points she had raised in her appeal letter. The Claimant seemed very frustrated throughout the meeting and Ms Bettinson describes her as becoming increasingly aggressive and even shouting at certain points. The Claimant seemed unable to listen and talked over both Ms Bettinson and Mr Deacon. The Claimant started to raise her voice and call the company racist even before Mr Deacon had the opportunity to go through the Claimant's appeal letter. Ms Bettinson recalled that there was a short adjournment to photocopy the grievance document so they could give the Claimant a copy of it and that after the adjournment, when asked for examples of how Mr Mangan was racist, the Claimant began shouting again. There was another break after Mr Deacon told the Claimant that she was being aggressive to him and Ms Bettinson. The Claimant was told that they would not continue the meeting if she continued to shout at them to which the Claimant replied that she was going to court and was ready for it. Ms Bettinson and Mr Deacon again reconvened the meeting after the break try to go through the grievance again. This was the last meeting that the Claimant attended.

61 We find Ms Bettinson's evidence to be credible and are satisfied her account of what took place is accurate. The Claimant was suspended for her conduct in that meeting, including mimicking Mr Deacon. Initially this was added to the disciplinary as a further allegation of misconduct but when it came before Mr Bain he decided to only consider the first disciplinary charge

62 It was put to the Claimant in cross-examination that her behaviour at the meeting on 9 August could be fairly described as aggressive, to which the Claimant answered: “Yes because I'd heard them call me an angry black woman on the way to the meeting”. The Claimant stated that her attitude had changed by the time she got to the meeting and that this was why she had behaved aggressively. We accept Ms Bettinson's account of how the Claimant conducted herself in that meeting. We find that Ms Bettinson's evidence is consistent with the notes taken at the time and with the contemporaneous documents; her description of the Claimant's conduct at the meeting is also consistent with how the Claimant conducted herself in the Tribunal.

Issue 3.1.17 - Andy Deacon accused the Claimant of being responsible for the contractor racially abusing her

63 During the meeting on 9 August Mr Deacon said to the Claimant that she had no respect for managers [page 233]. When the Claimant asked who he means, he

responds: “me, Adam Border, contractor, Andy Martin you treat us all the same way-aggressively”. We do not find that was an accusation that the Claimant was responsible for the contractor’s racial abuse.

Issue 3.1.18 - Dismissing the Claimant for gross misconduct

64 On 6 September 2016 Kevin Bayles wrote to the Claimant inviting her to attend a disciplinary meeting on 16 September. He informed her that following consideration of the case it had been decided to remove her suspension and to carry the case forward as conduct and not gross misconduct. She was also informed that she was expected to attend work on her next shift which was Friday 9 September 2016.

65 Andy Deacon invited the Claimant to attend a reconvened appeal meeting on 13 September under the Fair Treatment policy. The Claimant responded on 9 September alleging discrimination. On 11 September 2016 she also complained to Stella Collinson, the Regional Manager, about Andy Deacon and Hannah Bettinson. On 12 September 2016, the Respondent responded to the Claimant in respect of her complaint against Andy Deacon.

66 On 23 September 2016, the Claimant was invited to a meeting to take place on 30 September in respect of her grievance about racial harassment and her Fair Treatment complaint. The Claimant did not attend that meeting.

67 On 30 September 2016, the Claimant wrote to Lynne Andress, Regional HR Partner, in respect of her complaints of discrimination and racial harassment, having previously written on 1 September 2016 to Stella Collinson. Lynne Andress engaged in email correspondence with the Claimant encouraging her to attend meetings and to attend the appeal and the Fair Treatment process as well as the meetings under the disciplinary procedure.

68 The Claimant was invited to a further meeting on 5 October about her appeal and her grievance under the Fair Treatment policy which she again failed to attend. On 5 October Mr Burke wrote to the Claimant to confirm that due to the Claimant’s failure to attend the meeting on the second attempt, or to notify of her non-attendance, the decision was taken to assume that she had withdrawn from the process and that the complaint remained rejected. That was the end of the final stage of the Fair Treatment procedure.

69 In the meantime disciplinary proceedings had been commenced in respect of the Claimant’s unauthorised absence from work. Kevin Bayles wrote to the Claimant on 12 October 2016 inviting her to attend a disciplinary meeting on 18 October. The Claimant did not attend and on 20 October Andrew Martin, who had taken over the disciplinary from Kevin Bayles, wrote to the Claimant inviting her to a disciplinary meeting on 25 October in respect of her “continued absence from work and failure to notify the company of the reason for such absence.” Andrew Martin also informed the Claimant that

“Failure to attend will result in me holding the meeting in your absence and may lead to your summary dismissal namely for gross misconduct.”

70 The Claimant failed to attend the meeting on 25 October 2016. Mr Martin adjourned the meeting for 15 minutes to allow the Claimant to attend. On reconvening Mr Martin was satisfied that the Claimant had still not attended or made any contact with the store. He concluded that the Claimant was in breach of her contract, this amounted to gross misconduct and he decided to summarily dismiss her. In his letter informing the Claimant of that decision, dated 26 October (page 191 in the bundle). Mr Martin points out that the Claimant had been sent two invitation letters to attend disciplinary meetings on 18 October and 25 October; they were sent by recorded delivery to her home. The Claimant had failed to attend both scheduled disciplinary meetings without any contact to the company to explain her reasons, that he had proceeded with the disciplinary meeting in her absence and after careful consideration had taken the decision to terminate her employment with immediate effect on the grounds that she had been absent without authorisation and had provided no reason for that absence nor kept the company notified about absence in accordance with the contractual requirement to do so. He found that amounted to gross misconduct and that she was therefore dismissed without notice. The letter also informs the Claimant of her right to appeal.

Credibility/demeanour/behaviour of witnesses

71 The Claimant told the tribunal that every time she went into the staff canteen she would get into an argument with someone, so she would take her meal on her own in the training room. She also told us, "I consider myself very educated. I sit alone in the training room". When the Claimant was asked about her use of the word "sweetheart" she readily accepted that she uses it in a derogatory way. She told us that it was her favourite word for idiots. She was sure Mr Mangan was aware when she called him sweetheart what she meant, i.e. that it meant he was an idiot. She accepted that it was not a nice description and she was not even trying to disguise her contempt for him. The Claimant also accepted that she did say, "An eye for an eye" to Mr Mangan, as some kind of threat of retaliation in response to his management of her. According to the Claimant her IQ is 10 times better than the Respondent's managers and she was sarcastic to them at times because that was appropriate when she was dealing with people who were less intelligent than she was, or "not at her level" as she put it. The Claimant also stated during her evidence a number of times: "If you disrespect me, you get it 10 times back".

72 During cross-examination the Claimant accused the Respondent's Counsel of twisting her evidence when in fact Ms McKinley was simply repeating the Claimant's own answers to her. The Claimant accused all the Respondent's witnesses of being liars and flatly denied doing or saying things that were minuted in meetings. For instance she denied ever saying that she would sit down with Mr Mangan to discuss her grievance and when taken to the minute said she must have been drunk. Another example is from the investigation meeting with Ollie Harvey on 3 June 2016: the Claimant denied that she had spoken French in the meeting, her response when asked about it in evidence, was to ask why would she do that with people whose first language was English when they did not speak any French; she did not speak French at home and the only person she spoke in French to was her boyfriend. The minute (at page 138) records that the Claimant had raised the issue of there being a language barrier, or her words in English being used to bully her. In the Claimant's written and signed document provided for the investigation (at page 134) she states, "I feel people

use English language and language technicalities to bully me since they are aware that English is my second language". The minutes of the meeting record that the Claimant refused to speak in the meeting saying: "I will not be speaking more today its not my normal language" (page 138). Mr Harvey's response is recorded in the following terms, "There is no language barrier to carry on investigating. I need nothing else except a couple more accounts". Mr Harvey asked why the Claimant will not talk to him pointing out that she had no problem speaking [the English] language. The Claimant's response was: "French is my first language" (records talks in French)". We find that the minutes are an accurate record of that meeting and that this is something that the Claimant did.

73 The Claimant accepted in evidence that she was aggressive at times, "to protect herself", but at the same time denied that she had been aggressive. When she was asked about displays of anger, for example throwing her gloves in the bin and leaving the office where Paul Mangan and Tony Bain had suspended her; or slamming doors following a meeting with Hannah Bettinson and Andy Deacon, the Claimant's response was not to deny that she had behaved in a manner that could be described as aggressive but rather to assert that the Respondent, and the Tribunal, had to understand why she had behaved in that way, namely slamming doors and storming out of rooms, as well as raising her voice above her normal speaking level.

74 During the hearing the Employment Judge had to tell the Claimant not to be rude to and about the Respondent's witnesses on a number of occasions, in particular during Mr Mangan's evidence. The Tribunal noted that the Claimant muttered uncomplimentary comments about the witnesses as they were giving evidence and she also talked over the Respondent's witnesses during their evidence.

75 The Claimant was rude to Tony Bain in her questioning of him. She told him as a black man that he did not understand race because he considered he was British and did not consider himself to be Caribbean, and because he was not African. She accused him of having said (to someone else) that he did not like Africans, something by which Mr Bain was visibly taken aback. We are satisfied that he did not make any such comment. Mr Bain gave evidence that when on one occasion he had cause to tell the Claimant not to be on the phone during work she had told him she was on the phone because a close friend had died and she needed to speak to her other friend. The Claimant was adamant in her denial of this and gave a detailed explanation about her friend and how upset she was at the suggestion she had used their death as an excuse for being on the phone. Mr Bain also gave evidence that on another occasion when he had cause to speak to the Claimant about her work and taking too many breaks, she told him that she had sickle cell and that was why she needed to have breaks. The Claimant does not have sickle cell and denied having said this to Mr Bain. We accept Mr Bain's evidence that is what she had said to him. The Claimant alleged that Mr Bain had been used by the Respondent, that he had been sent out (from the mangers' office) to deal with her because he was black. We accept Mr Bain's evidence that he was not sent out to deal with the Claimant by anyone, he dealt with her as a manager as he would any other member of staff; it was part of his role to manage the Claimant.

76 The Claimant accepted that she talked over and imitated Andy Deacon in the grievance appeal meeting. She justified doing so by saying that he was not listening to

her concerns and so she was not listening to him, she was annoyed.

77 We find that the Claimant sought to deflect blame for her actions by making allegations of race discrimination and that she was capable of being manipulative. We find that she did tell Mr Bain that she suffered from sickle cell in order to claim extra breaks. She also told him that a close friend of hers had died in order to excuse herself for being on the phone at work.

“Angry black woman”

78 The Claimant alleged that Mr Deacon called her an “angry black woman”. She also alleged that three other managers had used this phrase. We find that she was not a reliable witness, her story changed and was inconsistent and we are not able to believe her account where it is contradicted by the Respondent’s witnesses. We do not find her to be a credible witness on this point. We are satisfied that this is not a term that was used to describe the Claimant by anyone employed by the Respondent, other than the Claimant herself.

Aggression

79 The Claimant claimed that she was labelled aggressive because she was black. We reject the contention that she was labelled as aggressive based on stereotypes of aggressive black people or black women. We are satisfied that the term aggression was applied not to the Claimant generally but to her conduct on specific occasions, i.e. shouting at people, swearing at people, slamming doors; nor did the contention that she shouted at people arise from the fact she had a loud voice but rather from her raising her voice significantly above its normal level.

Further findings on Credibility

80 We found the evidence of Ms Bettinson to be entirely credible. We found that she was taking every effort to be fair and honest. We accept her evidence that she did not label the Claimant aggressive but she did think the Claimant was being very aggressive in their meeting: in her view that was nothing to do with her race but simply to do with her behaviour and we accept that description.

81 We find that the criticisms on the Claimant’s conduct were not based on racial stereotypes or false labelling of her as being aggressive. She was not called ‘an angry black woman’ by the Respondent’s employees; that was a phrase that came from her in her complaint to the Respondent in which she alleged it was a label attached to her. We are satisfied that the description of the Claimant as being aggressive was nothing to do with her race but rather to do with her outbursts of anger and based on her conduct. We accept Ms Bettinson’s assessment that the Claimant lacks insight into her own behaviour and its effect on others.

The relevant law

82 The Claimant claims direct discrimination, less favourable treatment because of her race contrary to ss 13 and 39 of the Equality Act 2010; harassment, unwanted conduct related to her race which has the purpose or effect of violating her dignity or

creating and intimidating, hostile, degrading, humiliating or offensive environment for her contrary to ss 26 and 40 of the Equality Act 2010; unfair dismissal contrary to s 94 of the Employment Rights Act 1996; wrongful dismissal (breach of contract under Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994); unlawful deductions contrary to s13 of the Employment Rights Act 1996 and failure to pay holiday pay contrary to Regs 16 and 30 of the Working Time Regulations 1998. The relevant law is helpfully set out in Ms McKinlay's written submissions and we do not propose to repeat it here.

Immigration status

83 In *Taiwo v Olaigbe and another* and *Onu v Akwivu and another*, [2016] UKSC 31 the Supreme Court ruled that less favourable treatment due to a vulnerable immigration status was not direct race discrimination. Immigration status is not a protected characteristic and cannot be equated to nationality (which is a protected characteristic).

Approach to evidence of discrimination

84 The Tribunal reminded itself of the guidance in *Qureshi v Victoria University of Manchester and another* [2001] ICR 863, EAT that the Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the Respondent has treated the Claimant less favourably because of her race; or, put in another way, the Tribunal is obliged to make findings of fact in relation to the circumstantial matters raised by the Claimant before going on to draw any inference, but it is not necessary to make a specific finding as to whether any of those matters would of itself in law amount to a discrete act of discrimination. Similarly, with allegations of harassment, we are not to separate each single act of alleged harassment and look at it in isolation but to look also at the bigger picture and any cumulative effect on the Claimant (*Driskel v Peninsula Business Services Ltd and ors* [2000] IRLR 151). If the conduct is found to have had the purpose of violating dignity, it does not matter that it did not have that effect. In deciding whether the conduct has the effect referred to in s26(1)(b) we must take each of the following into account: the perception of the Claimant; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. We bore that guidance in mind when reaching our findings of fact and drawing conclusions from those.

Burden of proof

85 We also reminded ourselves of the burden of proof provisions contained in Section 136 of the Equality Act 2010 and the guidance taken from *Barton/Igon* and subsequent cases including *Madarrassy v Nomura International Plc* [2007] IRLR 246 CA in respect of the burden of proof. In summary a two-stage process has been identified. At the first stage the Claimant has to prove on the balance of probabilities facts from which the Tribunal could conclude, including by the drawing of inferences, that discrimination has taken place. If the Claimant does so, then the burden shifts to the Respondent to prove that the treatment in question was in no sense whatsoever on the protected ground. At the first stage the onus is on the Claimant to show prima facie potentially less favourable treatment from which an inference of discrimination could properly be drawn. The second stage is to look to the Respondent to prove on the

balance of probabilities that it did not commit the unlawful act. However, this does not preclude the Tribunal from approaching the exercise, where appropriate, by asking itself the question “what is the reason for the treatment”, for example as in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 HL, considering the “reason why”.

Unfair dismissal

86 The employer must show the reason for dismissal and that it is a potentially fair reason within s98(1) and (2) of the Employment Rights Act 1996. The Tribunal has to decide whether dismissal for that reason was fair or unfair. In a case such as this where the Respondent relies on conduct, a potentially fair reason for dismissal under s98(2)(b), this consideration includes whether the Respondent had a genuine belief based on reasonable grounds, following a reasonable investigation, in the Claimant’s alleged misconduct and if so, whether dismissal was an appropriate sanction, that is whether it was within the range of reasonable responses open to a reasonable employer (the *Burchell* test). The range of reasonable responses test applies both to the decision to dismiss and to the procedure by which that decision was reached (*J Sainsbury plc v Hitt*). The Tribunal is not to substitute its own view for that of the employer but to apply the test of the range of reasonable responses open to a reasonable employer throughout.

Reason for dismissal

87 The Respondent relied on the Claimant’s unauthorised absence from work and refusal to attend meetings as the reason for her dismissal. The Respondent’s Counsel referred us to on the case of *Rochford v WNS Global Services UK Ltd & others* UKEAT/0336/14/MC in which the EAT upheld the tribunal’s finding that the refusal by an employee receiving full pay to do any work whatsoever, despite a number of warnings, in circumstances where the employee claimed he could not return to work due to ongoing discrimination, amounted to gross misconduct.

Applying findings to the issues

Issue 3.1.1 In 2012 Michelle Palmer calling the Claimant an immigrant

88 Whilst we accept that calling someone an immigrant in front of colleagues could potentially create an intimidating or hostile environment for them immigration status is not a protected characteristic under the Equality Act 2010. In so far as immigration status might arguably be related to race we are satisfied that there is no evidence upon which we could find that the remark was made with the purpose of creating an adverse environment for the Claimant, we are also satisfied that it was not reasonable for the Claimant to perceive it as having that effect in the particular circumstances. Further this incident took place in 2014 and we have found that there was no connection between Michelle Palmer’s actions and any subsequent actions by Paul Mangan or Tony Bains, It. was not part of any continuing act. The Tribunal accepts that the Respondent had a duty to ensure its employees had the right to work in the UK . We are satisfied that the Respondent did not single the Claimant out and there was no less favourable treatment because of her race. No explanation has been put forward by the Claimant as to why she did not bring the complaint within the 3 month time limit set out in the Equality Act

or why it would be just and equitable to extend time. The Tribunal does not have jurisdiction in respect of this complaint.

Issue 3.1.2 Failure to provide correct uniform

89 Based on our findings set out above this had nothing to do with the Claimant's race. There is no evidence from which we could properly conclude that this was less favourable treatment because of the Claimant's race or that it was anything to do with her race. Nor was it part of a campaign of harassment related to the Claimant's race.

3.1.3 racial abuse by a contractor

90 This complaint is also out of time. We do not find it to be part of any continuing act. The Claimant complains that she was disciplined and told she had to put up with racist abuse. Based on our findings of fact we do not find this to be a fair or accurate description of what took place. Rather, the Claimant's reaction in shouting and retaliating and swearing was considered to be inappropriate even in the face of the provocation. The Respondent was entitled to investigate her conduct and we are satisfied would have treated in the same way a white colleague who reacted in a similar way to being provoked. The Claimant was not told she had to smile and put up with racist remarks. We do not find that the Respondent subjected the Claimant to direct discrimination or harassment. No explanation has been put forward by the Claimant as to why she did not bring the complaint within the 3 month time limit set out in the Equality Act or why it would be just and equitable to extend time. The Tribunal does not have jurisdiction in respect of this complaint.

Issue 3.1.4

91 There is no evidence of Mr Mangan continuing, as the Claimant described it, Michelle Palmer's treatment of her. In respect of the headphones Mr Mangan spoke to all colleagues, there was no less favourable treatment because of her race, no singling out of the Claimant, and no harassment- the treatment was not related to her race but because she was doing something that was in breach of company policy.

Issue 3.1.5

92 This did not take place. The Claimant withdrew the allegation that Mr Mangan discussed her immigration status with Mr Baines in front of the Bakers

Issue 3.1.6 – being made to work on the bailer

93 On the basis of the facts we have found there was no less favourable treatment on the grounds of race or harassment related to the Claimant's race.

Issue 3.1.7 – Not being provided with a reflective jacket

94 We find this did not happen.

Issue 3.1.8 – Suspension on 28 May 2016

95 The Claimant's suspension was based on her conduct. Based on our findings of fact there is no evidence of less favourable treatment because of her race or harassment related to her race.

Issue 3.1.9 – Tony Baines and Paul Mangan also said also said to the Claimant, “If you are doing medicine why are you here?”

96 This was not said by Tony Bain or Paul Mangan. Nor did either of them make any assumptions about the Claimant being black and studying medicine. Based on our findings of fact there is no evidence of less favourable treatment because of her race or harassment related to her race.

Issue 3.1.10 – being called an angry black woman by Paul Mangan and Tony Baines

97 The Claimant was not called an angry black woman. She was described as being aggressive on specific occasions based on her behaviour and conduct not based on stereotyping. There was no less favourable treatment because of her race and we are satisfied this does not amount to harassment.

Issue 3.1.11 – The failure to pay the Claimant properly whilst she was on suspension

98 We accept the evidence of Ms Bettinson that the underpayment was as a result of the payroll calculation being carried out automatically at the dayshift rate and not the nightshift rate. This affected other stores and other colleagues of different races and was nothing to do with the Claimant's race. Once the mistake was discovered it was rectified and the Claimant was paid the amount outstanding.

Issue 3.1.12 When she complained about not being paid properly Hannah Bettinson HR called her an “angry black woman”

99 This allegation was withdrawn. In any event we have found that the Claimant was not called an angry black woman by Hannah Bettinson at any time.

Issue 3.1.13 – The grievance investigation into her complaint of harassment was completed by Ollie on the same day it started

100 We have found that this did not happen.

Issue 3.1.14 The Claimant was offered locker keys by Andy Martin on 28 May 2016, after her suspension and after four years without

101 We find that the Claimant did not have a justified sense of grievance in respect of the locker. Mr Deacon sought to put it right when he became aware that she had not been issued with a locker. This was nothing to do with the Claimant's race. The provision of the key was not a detriment nor was it intended to create a hostile or otherwise adverse environment for her, nor could it reasonably have had that effect.

Issue 3.1.15 Andy Deacon and Hannah Bettinson labelled the Claimant an “angry black woman” during the disciplinary process because she is assertive and stands up for herself.

102 We have found this did not happen. Andy Deacon did not label the Claimant an angry black woman and nor did Hannah Bettinson. We find that this phrase came from the Claimant's email to Lynne Andress in which the Claimant alleged that she had been labelled as "aggressive" and used the phrase, "in other words an angry black woman".

3.1.16 In the last meeting of the procedures the Claimant attended Hannah Bettinson called her "aggressive".

103 We have not found that the Claimant was "labelled" as aggressive, which was the basis of her complaint. Ms Bettinson did not call the Claimant "aggressive" but she did state that she found her behaviour to be aggressive in that meeting. The Claimant was on occasions aggressive in her behaviour towards her managers and colleagues by raising her voice above its normal speaking level, talking over her managers, refusing to listen, swearing, being sarcastic, being rude, imitating her managers, slamming doors. We do not find that Ms Bettinson's use of the description "aggressive" about the Claimant's conduct in the meeting was because of her race or in any way related to her race, quite simply it was because she was behaving in an objectively aggressive manner.

Issue 3.1.17 Andy Deacon accused the Claimant of being responsible for the contractor racially abusing her.

104 Mr Deacon did not accuse the Claimant of being responsible for the contractor racially abusing her.

Issue 3.1.18 Dismissing the Claimant on 25 October for gross misconduct

105 The reason for the Claimant's dismissal was her failure to return to work and to attend meetings arranged to address her absence. We are not satisfied that the Claimant had a justified reason for not attending work. Mr Martin had investigated her complaints and had found them unsubstantiated and the Regional HR Partner Lynne Andress had urged her to return to work. The Claimant refused to do so. Ms Andress urged the Claimant on 7 October to attend work telling her: "we do not want you to leave the store and welcome you back on your next working day" (p.248A).

106 We are satisfied that any sense of grievance the Claimant may have had was not justified. The Claimant lacked insight into her own conduct and her disrespectful attitude to her managers which gave rise to conflict. We do not find there was any less favourable treatment. We are satisfied that there are no primary facts from which we could conclude that the Claimant had been less favourably treated because of her race. We do not find that the conduct was related to the Claimant's race nor do we find that any of the conduct had the purpose of creating a hostile environment for her, nor would it be reasonable for it to have that effect on the Claimant. We accept the Respondent's explanation they would treat anyone in the same way regardless of their race if they behaved in the way the Claimant behaved.

107 The claims for direct race discrimination and harassment fail and are dismissed.

Unfair dismissal

108 We have found that the set of circumstances in the mind of Mr Martin at the time he reached the decision to dismiss was that the Claimant was not turning up for work, nor attending at meetings despite letters requiring her to do so and warning her of the possible consequences. We are satisfied that he had reasonable grounds for his belief: it was not in dispute, and the Claimant did not turn up to the meetings that he had arranged to discuss her absence. The Respondent gave the Claimant an opportunity to attend a meeting to explain her conduct and when she failed to attend rearranged the meeting for another date, which again she did not attend. We are satisfied that the Respondent followed a fair procedure in the circumstances. The Claimant did not engage with that process and did not appeal.

109 The Claimant relied on the justification that work was a hostile environment due to alleged racism and so she could not attend. The Claimant's belief that there was a discriminatory environment does not entitle her not to attend work. See *Rochford v WNS Global Services Ltd*. She was being asked to attend to carry out her normal contractual duties and to attend disciplinary meetings and her refusal to attend or to engage was simply not justified. The Respondent was entitled to find her failure to attend was gross misconduct and we find that dismissal was within the range of reasonable responses open to it. The claim for unfair dismissal fails and is dismissed.

Wrongful dismissal

110 The Respondent's contract entitled them to require the Claimant to attend work. She refused to attend without justification and we are satisfied that she was in breach of a fundamental term of the contract. The Respondent was entitled to summarily dismiss her for gross misconduct. The claim for wrongful dismissal therefore fails and is dismissed.

Holiday pay

111 The Claimant's claim for holiday pay was conceded by the Respondent during the course of the hearing. Ms Bettinson accepted that holiday pay of 29 hours was outstanding as at the 26 October 2016 and remains outstanding. The Respondent offered to make a payment for the outstanding amount of £267.09 to the Claimant but she refused to provide them with her bank details. That amount therefore remains outstanding and is payable to the Claimant forthwith.

Employment Judge Lewis

1 March 2018