



## **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**CLAIMANT**

**AND**

**RESPONDENT**

Mr Anthony Banton

Cats Protection Trustee Limited

---

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

---

Held at: BRISTOL

On Tuesday, the 20<sup>th</sup> February 2018,  
Wednesday, the 21<sup>st</sup> February 2018  
and Thursday, the 22<sup>nd</sup> February 2018

Employment Judge: Mr D. Harris

Members: Ms S. Maidment  
Ms S. Pendle

Representation:

For the Claimant: Ms Fiona Stevens (lay representative)  
For the Respondent: Ms Catherine Rayner (counsel)

## **JUDGMENT**

- 1. The Claimant's claims of direct discrimination on the grounds of race under Section 13 of the Equality Act 2010 and victimisation under Section 27 of the Equality Act 2010 are dismissed.**

## **REASONS**

1. By his Claim Form received by the Employment Tribunal Office on the 18<sup>th</sup> April 2017, the Claimant brought claims of direction discrimination on the grounds of race under Section 13 of the Equality Act 2010 and victimisation under Section 27 of the Equality Act 2010 against his former employer, the Respondent.
2. The issues that arose in the case had been summarised by the parties in a document entitled 'Agreed List of Issues' For the purposes of this judgment, it is helpful to set out the agreed issues in full.
  - 1. Jurisdiction**
    - 1.1. Whether the claims for direct discrimination and victimisation were submitted within 3 months of the date of the discriminatory acts complained of by the Claimant.**
    - 1.2. Whether the Tribunal has jurisdiction to hear any claims relating to acts pre-dating 23 November 2016.**
  - 2. Direction Discrimination**
    - 2.1 Whether the Claimant was treated less favourably because of his race.**
      - 2.1.1. The allegations of less favourable treatment relied upon by the Claimant are that:**
        - 2.1.1.1. Mr Dunbar Watson actively sought to avoid him;**
        - 2.1.1.2. Staff members and volunteers were allowed to make statements against him; and**
        - 2.1.1.3. He was not given the same induction or training opportunities.**

- 3. Victimisation**
  - 3.1. Whether there was a protected act(s).**
    - 3.1.1. The protected acts relied upon by the Claimant are complaints to Rhian Parry on 18 and 19 October 2016 and 3 and 15 November 2016.**
  - 3.2. Whether the Claimant has been subjected to a detriment because of any such protected act(s).**
    - 3.2.1. The detriments the Claimant is alleged to have suffered are:**
      - 3.2.1.1. A refusal to resolve his concerns and complaints and not allowing him the opportunity to raise a formal complaint;**
      - 3.2.1.2. He was reprimanded over allegations against him without being given the opportunity to see the allegations;**
      - 3.2.1.3. He was not given the opportunity to comment on his probationary review form;**
      - 3.2.1.4. His performance was not taken into account when deciding whether or not to dismiss him during his probationary period; and**
      - 3.2.1.5. His dismissal.**
- 4. Remedy**
  - 4.1. If the Claimant did suffer direct race discrimination or victimisation, what award is just and equitable?**
  - 4.2. If the Claimant did suffer direct race discrimination or victimisation, has the Claimant suffered any injury to feelings?**
  - 4.3. If the Claimant has suffered injury to feelings, what award should be made in respect of these?**

3. Over the course of 2 days at the final hearing, the Tribunal heard oral evidence from the Claimant, in support of his case, and from Ms Emma Knott, Mr Watson, Mrs Rhian Timms (née Parry) and Ms Emma O'Neill on behalf of the Respondent. Submissions were heard on the third day.

4. In addition to hearing oral evidence from the above-named witnesses, the Tribunal also read and considered an agreed 141-page hearing bundle.

## The Factual Background

5. The Respondent is a feline welfare charity. It raises funds by way of direct donations and from a number of charity shops that it runs across the country. Items that are donated by members of the public are sold in the charity shops. On the 30<sup>th</sup> September 2016, the Respondent opened a new shop in Henleaze, which is a northern suburb of the city of Bristol.
  
6. Prior to the opening of the new shop, the Respondent set about the task of recruiting members of staff to run the shop. There were two roles, in particular, that needed to be filled: namely, Shop Manager and Assistant Shop Manager. The Claimant had previously, unsuccessfully, applied for these roles at another shop belonging to the Respondent. Mrs Rhian Timms (née Parry), who had interviewed him, felt that he would be suitable for the Assistant Shop Manager role at Henleaze, which was offered to him. There is no suggestion by the Claimant that the interview or recruitment process was discriminatory in any way.
  
7. The Respondent intended the Claimant to start work on the 22<sup>nd</sup> September 2016 but there was some confusion over the relaying of that information to the Claimant. He did not start on the 22<sup>nd</sup> September 2016 but made telephone contact with the Respondent's headquarters in Haywards Heath on the 23<sup>rd</sup> September 2016 after receiving in the post a written contract of employment, which stipulated the start date as the 22<sup>nd</sup> September 2016. Following the telephone discussion on the 23<sup>rd</sup> September 2016, a new start date of the 26<sup>th</sup> September 2016 was agreed.
  
8. The Claimant's contract of employment provided that his normal hours of work were 21 hours per week. Those hours of work were spread over 3 days and it was the Claimant's understanding that for one day per week he would be working alongside the Shop Manager. The contract also provided that the first 6 months of the Claimant's employment would be treated as a probationary period.

9. On the 26<sup>th</sup> September 2016 the Claimant turned up for work at the new shop at 8.30 in the morning. Unfortunately, there was no-one there to let him in and so he decided to wait. He left phone messages with the Respondent and sent an email at 10.11am asking for someone to get in touch with him. At approximately 10.45am, the person appointed as Shop Manager, Mr Karl Dunbar Watson, turned up and invited the Claimant into the shop. That was the first time that the two men had met each other. They sat down in the shop and chatted about themselves and their backgrounds. The Claimant told Mr Watson that he had 5 years' experience of working in the charity shop sector. Mr Watson informed the Claimant that, whilst he had retail experience, he was new to the charity sector.
  
10. The Claimant spent the day on the 26<sup>th</sup> September 2016 involving himself in the preparations for the opening of the shop on the 30<sup>th</sup> September 2016. In the afternoon he was told by Mr Watson that he need not come into work the following day, which the Claimant thought was odd given the amount of work to do before the shop opened. He returned to work on the 28<sup>th</sup> September 2016 and was introduced to the Manager of the Respondent's shop in Honiton. The Claimant was told that a number of people had tried to look him up on social media websites, in advance of meeting him, which he was offended by. Later on that day, the Claimant was present in the shop when an Indian lady knocked on the shop window and was let in by Mr Watson. She asked when the shop was opening and whether she could volunteer to work on the till. There was a dispute between the Claimant as to how she was dealt with. The Claimant's case was that Mr Watson informed her that the shop had a sufficient number of volunteers, which shocked the Claimant. Mr Watson's evidence was that he did not turn her away but told her that volunteers would be expected to do a bit of everything in the shop and not just work on the till.
  
11. On the 30<sup>th</sup> September 2016 the Claimant arrived at work at 8am, which was the time he'd been given by Mr Watson. It was the opening day of the shop. The Claimant was embarrassed to find that he was the last person to arrive and he was very aware that he was the only black person present.

12. On the Claimant's evidence, a little later that day he began to get the impression that Mr Watson was hostile towards him. According to the Claimant, Mr Watson was dismissive of the Claimant's suggestion that members of the public be approached on the high street. The following day, on the 1<sup>st</sup> October 2016, the Claimant recalled that Mr Watson was again dismissive of the Claimant's suggestion that a face painting activity be taken outside. In his evidence to the Tribunal, Mr Watson did not accept the allegations that he had been dismissive or rude towards the Claimant.
  
13. On the 3<sup>rd</sup> October 2016 the Claimant was expecting to undergo some training with the Manager from the Honiton shop, Emma Lou Lee. She visited the Henleaze shop that day but it was the Claimant's case that both she and Mr Watson ignored him. Mr Watson left the shop in the morning and at about 3pm Ms Lee announced that she was leaving because she did not like to drive in the dark. The Claimant said that he asked her about his training and was told that Mr Watson would go through it with him and that he, the Claimant, should look in the manual to learn how to cash up. He told the Tribunal that he struggled with the manual and had to telephone Ms Lee for help on how to cash up. Mr Watson denied the allegations that he had ignored the Claimant that day.
  
14. The Claimant gave evidence that on the 7<sup>th</sup> October 2016 a person with MS volunteered to work in the shop but was told by Mr Watson that that would not be possible. Mr Watson's account of that event was that he had taken time to explain to the prospective volunteer that if she did volunteer she would be trained and would be supported.
  
15. On the 14<sup>th</sup> October 2016, the Claimant had expected to be working with Mr Watson but was surprised to find that Mr Watson did not come into the shop that day. It was the Claimant's case that Mr Watson was deliberately avoiding him. An allegation that was disputed by Mr Watson.

16. On the 18<sup>th</sup> October 2016 the Claimant was disappointed to find that a shrink-wrapped travel diary had been opened and used by Mr Watson. The Claimant had planned to sell the diary in the shop. Mr Watson, on the other hand, thought that it would make a good work diary for the shop. The dispute over the diary was indicative of a broader dispute between the Claimant and Mr Watson over how the shop should be arranged and items put on display. It was apparent to the Tribunal that each of them had their own ideas as to how and what to display in the shop. Mr Watson's complaint was that the Claimant would re-arrange and interfere with displays that Mr Watson had put out.
  
17. On the same day that the Claimant discovered that Mr Watson had opened and used the travel diary, he also discovered that he was due to have a meeting with Mrs Timms the next day, which was a change from the agreed rota. The Claimant telephoned Mrs Timms who was on her way to the shop with a shop-fitter. The Claimant wanted to raise a number of issues with Mrs Timms concerning Mr Watson's conduct and some health and safety matters and was told by Mrs Timms to prepare a written list for discussion at the meeting the following day. The Claimant's list was to be found at page 58 in the hearing bundle.
  
18. The following day, the 19<sup>th</sup> October 2016, Mrs Timms attended the shop and met with the Claimant and Mr Watson. The only contemporaneous note of the meeting was that made by Mrs Timms (at pages 59 to 61 in the hearing bundle). It seemed to the Tribunal to be a meeting at which both the Claimant and Mr Watson were given an opportunity to ventilate their concerns about each other. The Claimant worked through his list of issues and Mr Watson said that there had been complaints by a number of volunteers about the Claimant's conduct. The subject of training for the Claimant was also raised and discussed. The Claimant recalled that Mr Watson became quite agitated during the meeting, raising his voice and swearing. That was disputed by Mrs Timms and Mr Watson. Mrs Timms described it as a constructive meeting, which ended with both men shaking hands at the end. There was no dispute as to how the meeting ended. The Claimant's evidence was that he and Mr Watson agreed to a fresh start and shook hands with each other.

19. Following the meeting, Mrs Timms asked Mr Watson to provide her with the complaints about the Claimant's conduct that had been made by some of the volunteers. She was provided with the documents set out at pages 42 to 55. There were complaints from five volunteers.
  
20. On the 20<sup>th</sup> October 2016, the Claimant sent a text message to Mrs Timms in which he sought clarification as to whether it was lawful for Mr Watson to play CD music over the shop's hi-fi system. Mrs Timms replied that she had looked into the legislation and that she was happy for the music to be played. According to the Claimant, that response from Mrs Timms made him realise that he wasn't being listened to or taken seriously.
  
21. Over the following fortnight, the Claimant's concerns about Mr Watson's conduct returned. He gave evidence that Mr Watson continued to avoid him at work and made him feel unwelcome. Mr Watson disputed those allegations.
  
22. On the 2<sup>nd</sup> November 2016 Mr Watson informed the Claimant that an Assistant Area Retail Manager, Ms Emma Knott, would be attending the shop the following day to deliver some training on how to operate the till. When she arrived at the shop, there was some initial confusion concerning whether the Claimant had received induction paperwork. Ms Knott thought that the paperwork had been sent to the Claimant but he explained that that had not happened. Accordingly, Ms Knott printed off another copy of the documentation and went through it with the Claimant. There was a dispute as to the way in which this induction was handled by Ms Knott. The Claimant felt that Ms Knott did not answer his questions and rushed the induction. Ms Knott gave evidence that she always conducted the induction process in the same way and that there was no difference in what she said or did on this occasion.



23. Later that morning Mrs Timms arrived at the shop and held a meeting with the Claimant. He was of the view that this was a follow-up to the meeting that had taken place on the 19<sup>th</sup> October 2016 whereas she was of the view that it was an informal meeting to discuss the concerns and complaints that had been raised about the Claimant's conduct. Mrs Timms' record of the meeting was at pages 78 to 79 of the hearing bundle. The nature of the complaints about the Claimant were summarised in the record and the conclusion was that the Claimant should try to have a greater awareness of behaviours that may affect colleagues at work. In particular, it was urged upon the Claimant that he should avoid voicing negative opinions to volunteers about Mr Watson's abilities as Shop Manager.
24. The Claimant was shocked and distressed by the matters raised by Mrs Timms at the meeting. He felt that the complaints were unfounded and untrue. He felt that he got on well with the volunteers. He recalled that his response to Mrs Timms was to ask whether she wanted him to resign. He felt that Mrs Timms did not listen to him or take him seriously. He gave evidence that he asked Mrs Timms about training and said that he was happy to go anywhere for training.
25. In the days that followed the meeting on the 3<sup>rd</sup> November 2016, a problem developed regarding the Claimant's holiday entitlement. The Claimant submitted a holiday request to Mr Watson but Mr Watson had difficulties in processing the request. He had not yet been given access to the Respondent's online system, known as 'Pawprint', and he didn't understand how to book holidays. The end result was that the Claimant became quite frustrated with Mr Watson. He felt that he had made a simple request and that Mr Watson was making it unnecessarily complicated. On the 15<sup>th</sup> November 2016, the Claimant telephoned Mr Watson to discuss the matter further. Mr Watson was at work. There is a dispute as to what happened on the telephone. The Claimant's case is that there was a discussion with Mr Watson about his holiday request, which ended amicably. Mr Watson, however, gave a very different account. It was his evidence that the Claimant became aggressive on the telephone and raised his voice to the extent that a customer in the shop heard the Claimant's voice and made a comment about it to Mr Watson. Mr Watson told the

Tribunal that he was unsettled by the telephone call and didn't want to work with the Claimant after being spoken to in that manner.

26. Following the telephone call, both the Claimant and Mr Watson got in touch with Mrs Timms. The Claimant sent a lengthy email to Mrs Timms (pages 95 to 99 in the hearing bundle). Essentially, he was making a complaint to Mrs Timms about the difficulty he was experiencing in getting his holiday leave and booked.

27. Mr Watson first telephoned Mrs Timms and then sent her the email at pages 82 to 83 in the hearing bundle. He informed Mrs Timms that the Claimant had been extremely angry on the telephone. The email ended as follows:

**I am shocked in which the way I was spoken to, I have done everything I can to be flexible and make the rota as workable as possible.**

**Tony's manner and attitude on the phone has left me feeling shaken. I am not an aggressive person, and do not believe I deserved to be spoken to in that way. His telephone manner was threatening and aggressive, my heart is racing writing this.**

**I have had a troubled working relationship prior to this, but I now no longer want to work with him. I wish to log this as a formal complaint, and want this documented as I fear his behaviour is only getting to get more aggressive if I don't agree to his wants.**

28. Mr Watson also spoke to one of the Respondent's HR Business Partners, Mr David Cottis, about the telephone call. Mr Cottis advised Mr Watson to have a meeting with the Claimant the following day and to arrange a probation review meeting. Mr Watson followed that advice. He spoke to the Claimant on the 16<sup>th</sup> November 2016 about what had happened the previous day. According to Mr Watson, the Claimant acted as if nothing untoward had happened and denied that he had been aggressive. Mr Watson completed a written record of the meeting (pages 87 to 88 in the hearing bundle). The Claimant disputes the content of the record. At the end of the day, Mr Watson sent the Claimant a written invitation to a mid-probation review meeting (pages 85 to 86 in the hearing bundle).

29. On his own account, the Claimant continued to be frustrated about the problems with booking his holiday leave and on the 17<sup>th</sup> November 2016 he sent an email to Mrs Timms setting out his position (pages 94 to 96 in the hearing bundle). One of his concerns was that Mr Watson's attempt to resolve the holiday issue, by suggesting that the Claimant take the week off for Christmas and not inform HR, amounted to unlawful conduct that put the Claimant at risk of instant dismissal. He informed Mrs Timms that he had had to speak to Mr Watson in robust terms about that suggestion.
  
30. On the 25<sup>th</sup> November 2016, the Claimant met with Mr Watson and Mrs Timms for the mid-probationary review meeting. The Claimant had been informed on the 24<sup>th</sup> November 2016 that he could bring someone to the meeting if he wished. The Claimant felt that that the short notice concerning accompaniment for the meeting was intentional. In the event, he attended the meeting on his own.
  
31. There is a dispute between the Claimant and Mrs Timms as to what was discussed at the meeting on the 25<sup>th</sup> November 2016. The Claimant's evidence was that it was a short meeting at which Mrs Timms paid scant regard to a probationary form before informing him that he was dismissed with immediate effect. Mrs Timms' evidence was that she went through the 'goals' on the 'Probation Review Form' with the Claimant (at pages 104 to 108 in the hearing bundle). Her evidence to the Tribunal was that she could only sign off the Claimant on one of the goals. She said the meeting lasted about an hour-and-a-half. On the basis of the review of the Claimant's goals on the form, Mrs Timms decided that the appropriate course of action was to dismiss him. She decided that he had failed his probationary period. She informed him that he was dismissed and gave him one week's notice. She said that approximately four days later she completed the 'Probation Review Form' based on her handwritten notes made during the meeting (pages 100 to 102 in the hearing bundle).

32. On the 2<sup>nd</sup> December 2016 a letter of dismissal was sent to the Claimant (page 109 in the hearing bundle). The reason given for the dismissal was that the Claimant's performance in the role of Assistant Shop Manager had not reached a satisfactory standard during the probationary period.
  
33. On the 6<sup>th</sup> December 2016 the Claimant appealed against the decision to dismiss him. His grounds of appeal were set out in an email (pages 110 to 112 in the hearing bundle). In summary, he felt that his overall performance had been above satisfactory and that he had been dismissed for mistakes that had been made that were outside his control.
  
34. The Claimant's appeal against his dismissal was considered by Ms Emma O'Neill. This was done primarily as a paper review but as part of the process she spoke to the Claimant by telephone on the 16<sup>th</sup> December 2016. Both the Claimant and Ms O'Neill made their own notes of the appeal. The Claimant's notes were at pages 122 to 126 in the hearing bundle and Ms O'Neill's notes were at pages 120 to 121.
  
35. Ms O'Neill informed the Claimant that the telephone call was expected to last about 20 minutes and that she was collecting information. She said that she had been provided with the Claimant's grounds of appeal and the completed 'Probation Review Form'. She also indicated that she would be speaking to some other people after the telephone call with the Claimant. During the call, Ms O'Neill realised, for the first time, that the Claimant had not been given a copy of the 'Probation Review Form' upon which she wished to question him. In his grounds of appeal, the Claimant had stated quite clearly that he had not yet received the completed 'Probation Review Form'.

36. It is clear from the Claimant's record of the telephone call, which appeared to the Tribunal to be a more detailed and accurate account of the discussion than that made by Ms O'Neill, that Ms O'Neill realised that the Claimant was at a disadvantage by reason of the fact that he had not been given a copy of the 'Probation Review Form'. It was clear to the Tribunal that Ms O'Neill had been taken by surprise by that omission on the part of the Respondent. She ended the telephone call by saying that she intended to speak to Mrs Timms before deciding whether any more information was required from the Claimant. She did not say that she would ensure that the Claimant was provided with a copy of the 'Probation Review Form' immediately.
37. It transpired that Ms O'Neill had no further questions for the Claimant and, without providing him with a copy of the 'Probation Review Form' or speaking to him again, she wrote to him on the 12<sup>th</sup> January 2017 to say that his appeal against his dismissal was dismissed. In the interim she had spoken to Mrs Timms who gave Ms O'Neill her account of the mid-probationary review meeting on the 25<sup>th</sup> November 2016.
38. On the 16<sup>th</sup> February 2017, the Claimant sent an email to the Respondent requesting the completed 'Probation Review Form' and the form was finally sent to him on that day.

#### The Respondent's Submissions

39. Ms Rayner, on behalf of the Respondent, produced a written closing statement in which she summarised the legal principles applicable to the claims of direct discrimination and victimisation (taken from *Harvey on Industrial Relations and Employment Law*). She grouped her submissions on the law (citing Sections 13 and 27 of the Equality Act 2010 and relevant case law) under the following headings:

- the difficulty of identifying a comparator;
- hypothetical comparators;
- the question of causation in direct discrimination;
- a respondent should not make assumptions that a discrimination complaint is being made or may be made;
- guidance on the correct approach to determining whether a claimant has done sufficient for the burden of proof to shift to the respondent;
- unreasonable conduct by employer
- victimisation.

40. Turning to the facts of the case, Ms Rayner submitted that the evidence did not support a finding of direct discrimination on the grounds of race or victimisation. Specifically in relation to the agreed list of issues, and in relation to direct discrimination, Ms Rayner submitted that the evidence did not support a finding that Mr Watson deliberately avoided the Claimant, that there was nothing discriminatory in the fact that a number of volunteers had complained about the Claimant's conduct and that the Claimant was not treated differently in the way that he was presented with an induction and training opportunities.

41. In relation to the claim of victimisation, the central submission was that there were no complaints alleged to have been made on the 18<sup>th</sup> or 19<sup>th</sup> October 2016 or the 3<sup>rd</sup> or 15<sup>th</sup> November 2016 that were capable of being protected acts within the meaning of Section 27 of the Equality Act 2010. In support of that submission, the Tribunal was reminded of the provisions of Section 27 of the Equality Act 2010:

**27 Victimisation**

- (1) **A person (A) victimises another person (B) if A subjects B to a detriment because-**
  - (a) **B does a protected act, or**
  - (b) **A believes that B has done, or may do, a protected act.**
- (2) **Each of the following is a protected act-**
  - (a) **bringing proceedings under this Act;**

- (b) **giving evidence or information in connection with proceedings under this Act;**
- (c) **doing any other thing for the purposes of or in connection with this Act;**
- (d) **making an allegation (whether or not express) that A or another person has contravened this Act.**

...

- (5) **The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

42. In relation to the time limit issue, Ms Rayner submitted that time started running for the Claimant on the 26<sup>th</sup> November 2016 and that, taking account of ACAS conciliation, any act relied upon by the Claimant before the 23<sup>rd</sup> November 2016 is out of time. Ms Rayner acknowledged that the Tribunal has a discretion to extend time but submitted that the discretion should not be exercised in the Claimant's favour on the facts of the case. Ms Rayner also submitted that it did not appear that the Claimant was presenting his case on the basis of a continuing course of conduct before and after the 23<sup>rd</sup> November 2016.

### The Claimant's Submissions

43. Ms Stevens, on behalf of the Claimant, submitted that the claim had been brought in time. She argued that there was a continuing course of conduct in that the Claimant had been directly discriminated against on the grounds of race throughout his employment with the Respondent. She also relied on the delay in notifying the Claimant of the outcome of his appeal and the fact that he was not sent a copy of the 'Probation Review Form' until the 16<sup>th</sup> February 2017.

44. In relation to the claim of direct discrimination, Ms Stevens submitted that direct discrimination had taken place by Mr Watson and Mrs Timms. Both made it clear that they did not want him working in the Respondent's shop. They were unfriendly, rude and negative towards him and created a negative image of him amongst the volunteers that worked in the shop. Ms

Stevens submitted that the volunteers who had complained about the Claimant were all friends of Mr Watson and that the Claimant had never been allowed to apologise to them. Ms Stevens further submitted that the Claimant had not been given proper training opportunities despite his willingness to undergo training. Her central submission was that there was an animus on the part of Mr Watson and Mrs Timms that was only explicable by reference to the Claimant's race.

45. In relation to the victimisation claim, Ms Stevens pointed to the Claimant's complaints about the treatment of the Indian lady and his complaints on the 3<sup>rd</sup> November 2016, which were ignored. She submitted that Mr Watson chose volunteers to work in the shop based on their colour and ability. She submitted that the Claimant had complained about Mr Watson's discriminatory treatment of volunteers but those complaints had been turned against him. Furthermore, it was submitted that the Claimant had not been given sufficient information about the complaints made against him in order for him to defend himself properly. Ms Stevens also relied upon the fact that Mrs Timms had not completed the 'Probation Report Form' until after the meeting on the 25<sup>th</sup> November 2016 and, therefore, after the dismissal. His ability to appeal against his dismissal was hampered by the delay in providing him with a copy of the completed 'Probation Report Form. All of these matters, Ms Stevens submitted, point to discrimination and victimisation of the Claimant on the ground of his race.

### The Tribunal's Findings

46. The Tribunal made the following findings were made:
  - 46.1 The Claimant was employed by the Respondent as an Assistant Shop Manager in the Respondent's charity shop in Henleaze, Bristol from the 26<sup>th</sup> September 2016 until the date of his dismissal on the 25<sup>th</sup> November 2016.



- 46.2 On the 28<sup>th</sup> September 2016, an Indian lady spoke to the Claimant and Mr Watson about volunteering to work on the till in the shop. The Tribunal preferred Mr Watson's account of the way in which the lady was dealt with. The Tribunal rejected the Claimant's account that Mr Watson was abrupt and dismissive towards the lady. Having had the opportunity of assessing the oral evidence of the Claimant and Mr Watson, the Tribunal found it unlikely that Mr Watson would have behaved in the way alleged by the Claimant. The Tribunal accepted Mr Watson's account that he took time to explain to the lady that a volunteer in the shop would be expected to carry out a number of tasks and would not be limited to one activity such as working on the till. The Tribunal accepted Mr Watson's evidence that the lady's race had no bearing on the way he treated her.
- 46.3 The Tribunal accepted Mr Watson's evidence that within the first week or so of the shop opening he began to receive complaints from a number of volunteers about the Claimant's behaviour towards them. The Claimant's case was not that there were no complaints but rather that Mr Watson had encouraged some of the volunteers who were his friends to make complaints about him. The Tribunal rejected the Claimant's case that there had been collusion between Mr Watson and the volunteers in making false complaints about him.
- 46.4 The Tribunal found that a prospective volunteer with MS made inquiries about working in the shop on the 7<sup>th</sup> October 2016. The Tribunal rejected the Claimant's account that Mr Watson was rude and dismissive towards this person. The Tribunal accepted Mr Watson's account that he had taken time to explain to her the nature and extent of the training that would be given to her and that efforts would be made to ensure she was comfortable working in the shop.
- 46.5 The Tribunal rejected the Claimant's case that Mr Watson deliberately avoided him at work. Though there was one day per week when the two men were supposed to be working at the same time in the shop, the Tribunal accepted Mr Watson's evidence that in the early days and weeks after the opening of the shop he attended a number of training sessions and other shops belonging to

the Respondent in the locality, which meant that he was not present in the Henleaze shop as much as might have been expected. There were no doubt occasions when the Claimant might have expected to see Mr Watson in the shop but Mr Watson's absence, the Tribunal found, was not due to a wish or desire on the part of Mr Watson to avoid the Claimant. It was clear that the first few days and weeks after the opening of the shop was a very busy period for the shop and for Mr Watson, in particular, as the Shop Manager and it was not surprising that his hours of work had not settled down to a regular pattern. The Tribunal accepted Mrs Timms' unchallenged evidence that within a few weeks of the Henleaze shop opening, Mr Watson went on a flexible leadership course, visited 3 other shops belonging to the Respondent and attended a 'volunteers champion' programme. Furthermore, in making its finding that Mr Watson did not avoid the Claimant, the Tribunal noted the contents of the text messages that passed between the two men (to be found at pages 65 to 77 in the hearing bundle). The text messages were friendly in tone and nature and did not support the Claimant's case that Mr Watson was hostile towards him.

46.6 Though his training on the till and cashing-up appeared to have been poorly organised, the Tribunal found that the Claimant did undergo an induction on the 3<sup>rd</sup> November 2016 and was offered further training at other shops, which he refused. The Tribunal found that the Claimant was offered training at other shops at the meeting with Mrs Timms on the 19<sup>th</sup> October 2016. The Tribunal found that the Claimant initially declined that offer of training because he thought that it would have meant working more than his contracted 21 hours per week. The Tribunal found that it was explained to the Claimant that the training and any visit to another shop or shops would be accommodated within his contracted hours and that he was to speak to Mr Watson if he wanted to take up the offer of further training. The Tribunal found that the Claimant did not approach Mr Watson after the meeting on the 19<sup>th</sup> October 2016 with a request for training. The Tribunal was satisfied that if the Claimant had requested training at another shop, he would have been allowed to undergo the training.

46.7 The Tribunal found that the induction undertaken by Ms Knott on the 3<sup>rd</sup> November 2016 was no different from the induction that she regularly undertook with other Assistant Shop Managers within the

Respondent's organisation. Ms Knott's evidence on that point was clear and convincing.

- 46.8 The Tribunal found that an informal meeting took place on the 19<sup>th</sup> October 2016 at which Mrs Timms took on the role of mediator between the Claimant and Mr Watson. Both men had concerns about each other that they wanted to raise with Mrs Timms. The Claimant had put his concerns in writing and he was given the opportunity of going through his list. Mr Watson's concerns related to the Claimant interfering with the shop display and the complaints raised by volunteers about the Claimant's behaviour. The Tribunal found that the meeting ended amicably, with both men shaking hands and agreeing to communicate better with each other.
- 46.9 Following the meeting on the 19<sup>th</sup> October 2016, Mrs Timms asked Mr Watson whether the complaints that had been made by volunteers about the Claimant could be reduced into writing. The written complaints that were produced were set out at pages 48 to 55 in the hearing bundle. The Tribunal accepted Mrs Timms' explanation for that request. As complaints had been made about a member of staff, she felt it important that there be a written record of the complaints in order to get a clear picture of the matters being raised.
- 46.10 The Tribunal found that Mrs Timms' response to the receipt of the written complaints about the Claimant was to arrange an informal meeting with the Claimant on the 3<sup>rd</sup> November 2016. The Tribunal found that Mrs Timms discussed the complaints with the Claimant at the meeting but she did not reveal the identity of the complainants or disclose copies of the written complaints. The Tribunal found that Mrs Timms' contemporaneous record of the meeting (at page 78 of the hearing bundle) was likely to be an accurate record. The meeting ended on a positive note with Mrs Timms encouraging the Claimant to try and have a better awareness of how his behaviours may affect his work colleagues. A target date for improvement on the part of the Claimant was fixed for the 29<sup>th</sup> November 2016.

- 46.11 Following the informal meeting on the 3<sup>rd</sup> November 2016, a problem developed between the Claimant and Mr Watson regarding the Claimant's request for annual leave. The Tribunal found that the issue came to a head during a phone call between the Claimant and Mr Watson on the 15<sup>th</sup> November 2016. There was a fundamental dispute between the two men as to the tone of the discussion. The Claimant maintained that nothing untoward had happened whereas Mr Watson alleged that the Claimant had lost his temper and had shouted at him in an aggressive manner. The Tribunal had no difficulty in accepting Mr Watson's account of what had happened. The Tribunal accepted that Mr Watson's email to Mrs Timms shortly after the incident (at page 82 in the hearing bundle) contained an accurate account of the incident. On the basis of the Claimant's account of events, Mr Watson appeared to be giving a malicious and false account of the incident to Mrs Timms within an hour or so of the incident. The Tribunal rejected that view. The Tribunal found that the Claimant did lose his temper when speaking to Mr Watson and intimidated him. The Tribunal accepted Mr Watson's evidence that he had been shocked and upset at the way in which the Claimant spoke to him.
- 46.12 The consequence of the Claimant's unprovoked outburst on the telephone to Mr Watson was that a mid-probationary review meeting was arranged for the Claimant on the 25<sup>th</sup> November 2016. The Tribunal found that at the meeting, Mrs Timms went through a partially completed form referred to as a 'Probation Review Form' for the purposes of assessing whether the Claimant was meeting his goals as an Assistant Shop Manager in the Henleaze shop. It was just the first column in the form that had been completed at that stage, which listed the goals to be achieved. She found that only one of the goals was being met (namely, that of achieving a minimum of 3 gift-aid sign ups per shift). There was also discussion about the Claimant's conduct at the meeting. He admitted to Mrs Timms that he had hung up the telephone when speaking to Mr Watson on the 15<sup>th</sup> November 2016, which supported Mr Watson's account of that telephone call. The Claimant was given an opportunity of presenting his case on the goals identified on the 'Probation Review Form' and the allegations of misconduct and Mrs Timms made a handwritten note (at pages 100 to 102 in the hearing bundle). Some four days later, she used the handwritten note to complete the 'Probation Review Form'.

- 46.13 The Tribunal found that the Claimant was dismissed on the 25<sup>th</sup> November 2016 for performance-related reasons that were discussed with Mrs Timms at the meeting that had taken place that day.
- 46.14 The Claimant subsequently appealed the decision to dismiss him. The paperwork was reviewed and conversations took place to seek clarification, including a telephone conversation with the Claimant on the 16<sup>th</sup> December 2016, which has been summarised in paragraphs 34 to 36 above. The failure to provide the Claimant with the 'Probation Review Form' and to give him an opportunity to explain his appeal in the light of that document was far from satisfactory. On the 12<sup>th</sup> January 2017 the Claimant was sent a letter informing him that his appeal against his dismissal was dismissed.

### The Tribunal's Decision

47. The jurisdiction for the Claimant's claim of direct discrimination arose from Section 13 of the Equality Act 2010, which provides:
- 13 Direct Discrimination**
- (1) **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
- ...
- (5) **If the protected characteristic is race, less favourable treatment includes segregating B from others.**
48. The allegations of less favourable treatment relied upon by the Claimant were (i) Mr Watson deliberately avoiding him, (ii) staff members and volunteers being allowed to make statements against him and (iii) that he was not given the same induction or training opportunities as others.

49. In determining the case, the Tribunal reminded itself of the provisions of Section 136 of the Equality Act 2010, which provides:

**136 Burden of proof**

**(1) This section applies to any proceedings relating to a contravention of this Act.**

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

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

...

**(6) A reference to the court includes a reference to-**

**(a) an employment tribunal;**

...

50. The Tribunal also had regard to the synopsis of the applicable legal principles set out in Ms Rayner's written closing submissions and the authorities cited therein.

51. The Tribunal noted that no comparator for the purposes of the direct discrimination claim had been identified by the Claimant and that was, perhaps, for the obvious reason that he was the only Assistant Shop Manager in the Henleaze shop. So far as a hypothetical comparator was concerned, the Tribunal took the view that an Assistant Shop Manager in one of the Respondent's other charity shops could be viewed as a hypothetical comparator.

52. Turning to consider the allegations of less favourable treatment, the Tribunal could not identify facts from which direct discrimination on the grounds of race could be inferred. The Tribunal found as a fact that Mr Watson had not actively sought to avoid the Claimant so there was no basis for a finding that the Claimant had been treated less favourably on that ground. There was simply no evidence that supported the Claimant's assertion that Mr Watson deliberately avoided him. The evidence pointed in the other direction. The text messages showed the two men to be getting on with each other in a positive way throughout most of October and

November 2016 and when matters did reach a head on the 15<sup>th</sup> November 2016, Mr Watson was still prepared to meet with the Claimant the following day.

53. In relation to the complaints that had been made by a number of volunteers about the Claimant's behaviour, the Claimant's central allegation was that there had been collusion between Mr Watson and the volunteers in fabricating false statements. The Tribunal found that the evidence fell far short of supporting the Claimant's allegation. The Tribunal found that a number of volunteers, for different reasons, had made complaints about the Claimant's behaviour to Mr Watson, which they were subsequently asked to reduce into writing for good reason by Mrs Timms. The Tribunal found no basis for the assertion that the Claimant had been treated less favourably on the ground that a number of volunteers had been permitted to make statements against him.
  
54. The remaining allegation of less favourable treatment was that the Claimant had not been given the same induction or training opportunities. The findings of fact in relation to that allegation was that Ms Knott had given the Claimant the same induction that she gave every Assistant Shop Manager and that though the training opportunities appeared to have been poorly organised, there was no basis for concluding or inferring that the Claimant was treated less favourably in relation to training opportunities. The fact that there was some poor organisation on the part of the Respondent was evidenced by the delay in providing the Claimant with access to the Respondent's online service referred to as 'Pawprint'. The Claimant contended that this was indicative of racial discrimination on the part of the Respondent towards him. The evidence showed, however, that Mr Watson had experienced exactly the same delay in accessing the service. It was an example of a lack of organisation on the part of the Respondent and not an example of the Claimant being treated less favourably on the grounds of his race. Specifically in relation to training, the Tribunal found that there was some initial confusion as to whether training for the Claimant would be absorbed within his contracted hours or be in additional to his contracted hours but that confusion was cleared up by Mrs Timms at the meeting on the 19<sup>th</sup> October 2016. There was no basis for a finding of fact that the Claimant had been refused training

opportunities. The evidence indicated that he had been offered training opportunities but had declined to take them up.

55. Turning to the victimisation claim under Section 27 of the Equality Act 2010, the fundamental problem for the Claimant was identifying any or any potential protected acts within the meaning of Section 27(2) of the 2010 Act. The specific allegation was that the Claimant had made allegations on the 18<sup>th</sup> and 19<sup>th</sup> October 2016 and the 3<sup>rd</sup> and 15<sup>th</sup> November 2016 to the effect that Mr Watson had contravened the Act.
  
56. On the evidence it heard and read, the Tribunal was satisfied that no express or implied allegations had been made by the Claimant to any person employed by the Respondent prior to instituting his claim of race discrimination. The Tribunal noted that the Claimant's list of issues that he wished to raise with Mrs Timms on the 19<sup>th</sup> October 2016 (at page 58 in the hearing bundle) referred to the incidents concerning a prospective volunteer with MS and the Indian lady. The Tribunal was satisfied, however, that no allegations of mistreatment by Mr Watson of the volunteers had been alleged by the Claimant at the meeting on the 19<sup>th</sup> October 2016. The Tribunal was satisfied that had such concerns been raised by the Claimant at the meeting on the 19<sup>th</sup> October 2016, Mrs Timms would have recorded them in her note and would have discussed them. As far as the other dates were concerned, namely the 18<sup>th</sup> October, the 3<sup>rd</sup> November and the 15<sup>th</sup> November 2016, there was no evidence whatsoever that allegations, express or implied, had been made by the Claimant that any person had contravened the Equality Act 2010.
  
57. It followed, in the judgment of the Tribunal, that the Claimant's claim of victimisation could not succeed in view of the lack of evidence that the Claimant had done a protected act.



58. The Tribunal also found that the Claimant had not been subjected to detriments as had been alleged as part of the victimisation claim. In relation to the allegations of detriment, the Tribunal made the following findings:

58.1 The Tribunal found that there was no refusal on the part of the Respondent to resolve concerns and complaints raised by the Claimant and that he had been given an opportunity to raise such concerns with Mr Watson and also with Mrs Timms on the 19<sup>th</sup> October 2016 and the 3<sup>rd</sup> November 2016.

58.2 The Tribunal found that there was no occasion when the Claimant had been reprimanded about allegations made against him without the allegations being put to him. The fact that the Claimant was not given physical copies of the documents in which allegations had been made against him was not, in the judgment of the Tribunal, a detriment given that he had been informed about the content of the allegations.

58.3 The Tribunal found that Mrs Timms had given the Claimant an opportunity to comment on matters relating to his 'Probationary Review Form' at the meeting on the 25<sup>th</sup> November 2016.

58.4 The Tribunal found that the Claimant's performance was taken into account by Mrs Timms in her decision to dismiss him during his probationary period. Indeed the reason for his dismissal, as found by the Tribunal, was poor performance in his role as Assistant Shop Manager in the Henleaze shop.

59. Lastly, the Tribunal considered whether the Claimant's claims of direct discrimination and victimisation had been brought in time. The Tribunal found that on the Claimant's case there was a course of conduct on the part of the Respondent, giving rise to the claims of direct discrimination and victimisation, that commenced prior to the 23<sup>rd</sup> November 2016 and continued up to the 16<sup>th</sup> February 2017. Even if the Tribunal were wrong

about that, the Tribunal would have had no hesitation in exercising its discretion to extend time to bring the proceedings (to the date on which they were brought) given the Respondent's inexcusable delay in sending the Claimant the completed 'Probation Review Form'. The document had been in the possession of the Respondent since the 29<sup>th</sup> November 2016 or thereabouts and had been requested by the Claimant when he lodged his grounds of appeal against the decision to dismiss him on the 6<sup>th</sup> December 2016. The fact that it took the Respondent until the 16<sup>th</sup> February 2017, well after the Claimant's appeal against his dismissal had been concluded, to disclose the 'Probation Review Form' to him was reprehensible and, by itself, would have justified, bearing in mind the relevance of the form to the proceedings, the exercise of the discretion to extend time to bring the proceedings.

60. The claim shall now be listed with a time estimate of 2 hours to hear any argument on costs arising from this judgment unless the parties confirm in writing to the Employment Tribunal Office, prior to the listing of the hearing, that such a hearing is not required.

**Employment Judge David Harris**

Dated: 28<sup>th</sup> March 2018

Judgment entered in Register  
and copies sent to parties on

.....

.....

for Secretary of the Tribunals