Case Number: 2202107/2014

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms C Walters		**Avanta Enterprises Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 18-19 September 2018**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr D Kendall**
Ms S Plummer

On hearing the Claimant in person and Mr C MacNaughton, solicitor, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Claimant's complaints of direct racial discrimination are not well-founded.
(2) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The Respondents provide welfare to work and training services under contracts with central government.

2 The Claimant, who is 31 years of age and describes herself as black and of African-Caribbean descent, was continuously employed by the Respondents as a full-time Job Coach from 21 May 2013 until 6 June 2014, when her resignation took effect. Her core responsibility in that role was to assist unemployed recipients of welfare benefits to secure paid employment.

3 By her claim form presented on 15 July 2014, the Claimant brought a range of claims including complaints of direct racial discrimination and victimisation. All claims were resisted.

4 By a judgment sent to the parties on 31 March 2015 Employment Judge ('EJ') Wade struck out all claims, those for racial discrimination and victimisation on the ground that they had no reasonable prospect of success.

5 The Claimant was permitted to challenge the striking-out of the racial discrimination and victimisation claims before the Employment Appeal Tribunal ('EAT') and the matter came before Slade J sitting alone in that court on 10 October 2017. By a judgment handed down on 21 December 2017 she allowed the appeal in relation to racial discrimination but dismissed the appeal on victimisation. The former claim was remitted to the Employment Tribunal ('ET').

6 At a Preliminary Hearing (Case Management) on 23 February 2018, attended by the Claimant in person and a solicitor for the Respondents, EJ Pearl noted that the parties were agreed that the claims for direct racial discrimination were founded on three alleged detriments, as follows:

(1) Being 'targeted' through a performance improvement plan ('the PIP'), initiated in April 2014;
(2) Being subjected to disciplinary action in relation to attendance (commenced in April or May 2014);
(3) Being 'over-supervised' under the PIP (April to May 2014).

7 EJ Pearl also ruled that a proposed claim for unfair (constructive) dismissal could not proceed as no such claim had been pleaded. There was no appeal against that adjudication. Accordingly, the only matters for determination by the ET on remittal were the three complaints of direct racial discrimination just referred to.

8 The case came before us for final hearing on 18 September this year with four sitting days allocated. The Claimant appeared in person and the Respondents were represented by Mr Chris MacNaughton, solicitor. The evidence and argument on liability went at a healthy pace and, with the agreement of the parties, we reserved judgment on the morning of day two. Our private deliberations occupied the remainder of that day.

The Legal Framework

9 The 2010 Act protects employees and applicants for employment from discrimination based on a number of 'protected characteristics'. These include race (s9).

10 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her

comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

11 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

12 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he/she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

13 The 2010 Act, by s136, provides:

> **(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.**

14 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as

our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

The Remittal

15 It is now necessary to return to the judgment of the EAT. The unusual way in which the discrimination claims are put was explored by Slade J in her judgment. She held that the ET had failed to analyse the pleaded claim correctly and that, properly understood, the Claimant's complaint was that Ms Choudhury had (in December 2013) called her a 'coconut' or Bounty Bar (a slur against a person of colour on the basis that he/she is brown on the outside but white on the inside - we will use the 'coconut' tag as a shorthand for both alleged insults) and that her (Ms Choudhury's) attitude caused her to treat her differently from an employee who behaved "stereotypically consistently" with his/her race or ethnic origin. The EJ's error was failing to consider the arguable contention that a hypothetical white comparator in like circumstances would have been treated more favourably.[1]

16 In her judgment, Slade J made these remarks:

> **34. In order to assess whether a claim of race discrimination has a reasonable prospect of success it was necessary to start by identifying the race to which the Claimant alleged she belongs. This was identified by reference to her colour, black. In my judgment a black person who behaves as if they are white is not a member of a group capable of falling within the scope of Equality Act 2010 section 9(1). Accent, manners and behaviour which may mark out a black person as a "coconut" are learned characteristics. …**
>
> **35. The comparison required by Equality Act 2010 section 23(1) for a race discrimination claim is that "there must be no material difference between the circumstances relating to each case". As the Claimant is black in my judgment it is strongly arguable that the relevant comparator is a white employee in no materially different circumstances. It is reasonably arguable that the relevant circumstances include that the white employee speaks and behaves as a white person, which was the behaviour which led Ms Choudhury to call the Claimant a "coconut" or a "Bounty bar" and that the comparison required by section 23(1) is with such a white employee.**
>
> **36. In my judgment the EJ erred in holding in paragraph 22 that because the Claimant "alluded to" a black comparator there was no white comparator. The basis of the Claimant's claim may have been difficult to understand. However in my judgment the EJ erred in failing to identify the real complaint. It was that the Claimant was treated differently and less favourably as a black person with white behaviour. It is strongly arguable that consideration should have been given by the EJ to how a hypothetical white comparator who behaved as a white person is expected to behave as did the Claimant and who similarly was not achieving their targets would have been treated by Ms Choudhury.**
>
> **37. Ms Choudhury calling the Claimant a "coconut" was not relied upon by her as an act of race discrimination but as evidence of the reason why she carried out the acts, including putting the Claimant on a PIP, which were the subject of the race**

[1] This summary adopts almost verbatim the EAT summary immediately before the report of the judgment proper.

> **discrimination claim. … Once the basis of the claim is understood, paragraph 65 of the ET1 sets out the Claimant's complaint of less favourable treatment than such a white employee by being put on a PIP which she alleges to be:**
>
> > **"an example of direct discrimination and harassment as it puts all people that the manager believes to be a coconut at a disadvantage in that people the manager did not label as coconuts were intentionally assisted at the cost of the claimant's statistics so as to avoid anyone being on a PIP except the claimant and potentially resulting in dismissal. This violates the Equality Act 2010 ss. 13(1) …"**

17 We venture these observations. First, the EAT appears to have proceeded on a false premise of fact, namely that Ms Choudhury called the Claimant a 'coconut'. The agreed position of the parties is that she did not and twice stated that she was not saying or suggesting any such thing. It is unclear where the misunderstanding came from. We return to precisely what was said, and to the disagreement as to Ms Choudhury's true meaning and perception, in our recitation of the facts below.

18 Second, it is not clear to us whether the misunderstanding just mentioned was a decisive or important factor in the decision that the ET's striking-out order was wrong in law but in any event it is not for us at first instance level to speculate on that question. There was no further appeal and no application to the EAT for a review. We loyally accept the EAT's guidance on the law.

19 Third, we understand that guidance to be that the critical question is whether the Claimant suffered any detriment 'because of' race and that, given the way in which the case is put, and the EAT's view that 'coconuts' do not constitute a valid racial group under the 2010 Act, s9(2) and (3), the comparison required under s13(1) is between treatment applied to the Claimant and treatment which would, in like circumstances, have been applied to a white person who behaved "as a white person is expected to behave". It is true that Slade J described this reasoning as no more than "strongly arguable" but, reading the judgment as a whole, we cannot see that she left any alternative analysis open to us. (Another comparator *might* have been proposed: a white person who behaved "as a black person would have been expected to behave", but the EAT appears not to have had this point argued.[2])

20 Fourth, interesting as these points may (or may not) be, we remind ourselves that the higher courts have repeatedly counselled against ETs agonising over the

[2] This approach might have been seen as addressing the core complaint judged admissible by the EAT, namely that the Claimant was disadvantaged as a black person affecting 'white' manners, interests, lifestyle etc. Since the protected characteristic is *race* it might have been argued that the proper comparison was with a white person doing the same thing in reverse. Case-law under the Sex Discrimination Act 1975 might be seen as supporting this view. Before the introduction of statutory protection against discrimination on grounds of sexual orientation, attempts to use the prohibition against sex discrimination as a vehicle for such claims failed. The argument that C (a man) was disadvantaged because of his relationship with X (a man) whereas Y (the female heterosexual comparator) was not disadvantaged by her relationship with Z (a man) was rejected as irrelevant. The comparison was invalid. The correct comparison was with a homosexual woman: was she, or would she have been, treated in the same way as C was because of her relationship with another woman? See *Macdonald-v-Advocate General for Scotland; Pearce-v-Governing Body of Mayfield Secondary School* [2003] IRLR 512 HL.

precise attributes of the statutory comparator, at least where attacking the 'reason-why' question first may make the mental gymnastics involved unnecessary: if satisfied that the treatment complained of was 'because of' the relevant protected characteristic, the ET will naturally conclude that a hypothetical comparator would have been treated in the same way, and *vice versa*: see *eg Stockton-on-Tees Borough Council-v-Aylott* [2010] ICR 1278 CA.

Oral Evidence and Documents

21 We heard oral evidence from the Claimant and, on behalf of the Respondents, Ms Helena Choudhury, her former line manager and the person against whom the majority of her complaints are directed. Both gave evidence by means of witness statements.

22 In addition to the testimony of witnesses we read the documents to which we were referred in the single-volume main bundle of documents and a small supplemental bundle produced by the Claimant. Both parties also handed up chronologies. Finally, we had the benefit of the Claimant's opening skeleton argument and Mr MacNaughton's closing written submissions.

The Facts

23 The evidence was quite extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

The 'coconut' comment

24 The parties were in substantial agreement about the facts concerning the December 2013 incident. They are set out in the attachment to the claim form, para 14, which, so far as material reads as follows:

> **… the manager asked if the team wanted some of the chocolates she had bought … The manager then jokingly suggested that she had chosen the chocolates for everyone's personalities and threw the Claimant a Bounty and exclaimed "I wasn't trying to say you're a coconut!!" The Claimant advised that they (sic) did not take this meaning as they (sic) did not see themselves (sic) as a "coconut" but rather as exotic due to their (sic) Caribbean heritage … and two members of the team actually asked what a coconut was as they did not get the reference - the manager then went on to explain the racial slur and stressed again that she did not think the Claimant was a coconut.**

It can be seen that, contrary to the understanding of Slade J, neither party says that the manager (Ms Choudhury) called the Claimant a 'coconut' and it was common ground that she was at pains to stress that she was not implying any such thing.

25 The Claimant did not react at the time, acknowledging that the comment had not amounted to a racial slur, but subsequently claimed to have been offended by it.

26 We heard no evidence that the Claimant had ever spoken or behaved (in the workplace or anywhere else) in what was, or could be perceived as, a stereotypically 'white' fashion (in so far as that notion has any meaning at all). There was no prior or subsequent history of any similar remark being directed at the Claimant, by Ms Choudhury or anyone else. In short, no evidence was put before us to substantiate the Claimant's theory (articulated but not explained before us) that Ms Choudhury's real meaning or perception was that she *was* a 'coconut', the very opposite of what she was agreed to have said.

The PIP

27 The Respondents operate under sustained pressure from central government to place unemployed people into paid employment. Theirs is a target-driven business. Failure to meet targets places them at risk of losing their contracts as they come up for renewal. Naturally, success at the corporate level depends upon employees performing satisfactorily. The workforce is closely monitored and measured against individual targets.

28 Ms Choudhury was and is an energetic and committed manager. She does not hesitate to put pressure on her subordinates to achieve the targets set for them.

29 There was no suggestion of any unfair or unequal pressure being applied to the Claimant prior to the PIP.

30 It was not in dispute that the Claimant's performance figures for the first three months of 2014 were poor and that she fell short of her target in each. A formal performance improvement procedure was initiated in April 2014. Prior to that, Ms Choudhury had attempted to manage and improve the Claimant's performance by informal means. There was an arid debate before us as to whether this had amounted to an 'informal PIP' under the Respondents' performance management procedure. If (as the Respondents contended) it did, it failed to adhere to some of the published requirements of an 'informal' procedure.

31 Ms Choudhury's letter to the Claimant dated 7 April 2014 stated that her performance was not at a satisfactory level and that it must improve, specifically in relation to achieving targets for job starts, accuracy/quality and compliance, and attendance and timekeeping. Weekly one-to-one meetings were promised and a meeting set for 6 May 2014 to review progress.

32 It seems that in fact the promise of one-to-one meetings was overlooked (they certainly did not happen weekly) and the meeting set for 6 May 2014 did not take place. Ms Choudhury did, however, maintain close contact with the Claimant, communicating with her frequently by email to monitor progress against targets.

33 The Claimant's results did not improve but the performance management procedure was not taken further forward before her resignation at the end of May 2014.

34 The Claimant contrasted the way in which Ms Choudhury managed her performance with her treatment of other members of the team of Job Coaches. Bradley Doyle (white British) was placed on a PIP in August 2013 and dismissed for poor performance in September of the same year. Brenda Arnott (white Scottish) underperformed and was placed on a PIP in May 2014. Ms Choudhury told us convincingly that she would have initiated the PIP earlier but for the fact that she was removed from her ordinary duties for a period of six weeks from, it seems, about late March to early May. Delroy Lammie (black Caribbean) was placed on a PIP in, it seems, early 2016, to which he responded well. He remains a member of the team and is performing well. Daniel O'Sullivan (black Caribbean) was a colleague of the Claimant's who was not put on a PIP. Ms Choudhury told us that this was because he usually achieved his targets, although some documents in the bundle appeared to show that he had some poor months in the first half of 2014. There is no evidence to suggest that any of the four exhibited characteristics of a 'coconut' or the white converse, let alone that Ms Choudhury perceived any as having such characteristics.

Disciplinary action

35 The disciplinary action was purportedly taken on the ground of excessive absences from work. The Claimant agreed that the company had been entitled to raise the subject of attendance with her.

36 On 13 March 2014 the Claimant was invited to attend an investigatory meeting to consider her attendance record over the past year (six absences and a total of nine working days). The meeting took place the following day and the medical reasons offered for the absences were explored.

37 On 15 March 2014 a letter was generated containing a "formal verbal warning" in relation to the sickness absence. This contrasts with the contemporary note prepared on behalf of the company which says nothing about any warning. The Claimant told us that she did not receive the letter.

38 Following further absences, the Claimant was invited to a further meeting. It seems that that meeting was also characterised as an investigatory meeting. The chaotic paperwork produced by the Respondents leaves us uncertain as to when this meeting took place. It is also uncertain whether or not it was followed by a further investigatory meeting. What can be stated with confidence is that, by a letter of 23 May 2017, the Claimant was advised that she had by then accumulated a total of 23 days' absence in the current year, that she was required to attend a formal disciplinary hearing to be held on Tuesday 27 May 2014, and that one possible outcome of the meeting was her dismissal.

39 The Claimant did not attend the meeting on 27 May. As we have recorded, she resigned two days thereafter. The first page of a letter addressed to the Claimant dated 27 May 2014 appears in the Claimant's bundle. It declares its purpose to be the communicate the outcome of an absence investigation meeting held on 30 April 2014. We do not know if any such meeting took place. We have been shown no letter referring to the meeting of 27 May and accordingly there is no evidence as to whether it proceeded and if so what outcome was arrived at.

40 The Respondents did not in their communications with the Claimant explain under what policy or procedure they were operating. The transition from an investigatory stage to a disciplinary stage was also not explained.

41 The Claimant did not give evidence that the Respondents had at any time dealt differently with any other employee in relation to absence management.

'Over-supervision'

42 We have already observed that Ms Choudhury was and is an energetic and committed manager. Certainly, she did not stint in her efforts to ensure that those under her management were achieving the results required of them. We have no doubt that she gave special attention to those performing below the required standard and struggling to meet their targets. Increasingly through 2014, the Claimant fell into that category.

43 The Claimant does not appear to suggest that Ms Choudhury bullied or harassed or treated her in an oppressive way. She stopped short of making that allegation and, we think, rightly so.

44 We have heard nothing pointing to any difference in Ms Choudhury's approach to the Claimant as against the way in which she managed other staff. On the evidence, we are satisfied that there was no material difference between her treatment of the Claimant and her treatment of other staff members undergoing performance management measures of any sort.

Secondary Findings and Conclusions

45 We start with the PIP. As the Claimant herself accepted, her performance in the early months of 2014 was poor and warranted managerial intervention. Her real grievance was that the process followed was unfair to her. We accept that the Respondents were unclear about whether they were operating the performance management procedure (informally) or simply providing managerial support to attempt to improve her results. That was not ideal management. Employers have a responsibility to be clear with employees about performance management action and its status. The Claimant also complained that in certain respects she suffered disadvantage once the formal stage was underway. She alleged that she ought to have been credited with the successes of a particular colleague. We did not fully understand her point here and in any event agreed with Ms Choudhury that to do as she proposed would have been unfair to the colleague. The Claimant also said that allowances should have been made for the fact that her working time was taken up with duties over and above the core responsibility of placing individuals into paid employment. Specifically, she said that she had responsibilities as Vacancy Coordinator, but she accepted in evidence that an adjustment was made involving those duties being shared between her and a number of colleagues. Overall, we accept that the Claimant genuinely believes that there was a degree of unfairness about the PIP process, but we find that in its fundamentals it was proper. The simple fact is that she missed her targets by a wide margin in the first four months of 2014 and, at the time of her resignation on 29 May, had no prospect

of achieving that month's target either. We are not persuaded that in the instigation or operation of the PIP, she suffered any actionable detriment. If she is aggrieved, she does not have a substantial ground for that sentiment.

46 Even if we had found a detriment, the claim based on the PIP would have failed because we are satisfied that the discrimination alleged against Ms Choudhury is entirely unsubstantiated. We are clear that she did not say, suggest or imply in December 2013 that the Claimant was a 'coconut' and that she never had any such perception of her. The efforts to manage her performance were, we find, wholly unrelated to the 'coconut' controversy. Ms Choudhury did not treat her as she did because of any innate racial characteristic or any behavioural characteristic. Addressing, as the EAT requires, the question whether a hypothetical white comparator "behaving like a white person" but otherwise in the same circumstances as the Claimant would have been treated as she was, we are in no doubt that he or she would. We reject the novel foundation on which this claim rests because having heard from Ms Choudhury, we are satisfied that it has no basis in fact. The 'comparator' cases relied upon lend no support to the Claimant's case. And if the EAT had set up a different comparison, with a white comparator "behaving like a black person", our answer would, for the same reasons, have been identical.

47 Turning to the disciplinary action, we say at once that if our task was to decide whether it was competently managed the Claimant's position would be unassailable. The procedural shortcomings which we have sketched above speak for themselves. But the Respondents' competence is not the issue. The first question is whether the Claimant suffered any actionable detriment. We have some doubts as to whether the want of clarity on the part of the Respondents in their communications with her were sufficient to constitute a detriment. The fundamental case which was being raised was clear: the absence level had risen to a point at which it needed to be addressed. She was made aware of her absence record and given an opportunity to address it in meetings. On the other hand, the law does not set a high standard to qualify for a detriment. It is arguable that the deficiencies in the process were sufficient to cross that threshold. But in our judgment, no purpose is served by agonising over that narrow point. Whether or not there was a detriment, there was no unlawful discrimination. The reasoning in our last paragraph applies equally here.

48 The third allegation, of 'over-supervision' fails first and foremost on our primary finding that here the Claimant raises nothing about which reasonable complaint can be made. There was no detriment. And in any event, for the reasons stated in our last two paragraphs, the claim is untenable because there was no unlawful discrimination.

49 In line with the guidance of Lord Hope in the *Hewage* case, we have reached our conclusion without recourse to the burden of proof provisions. Had we felt the need to apply them, we would have found that the burden was not passed to the Respondents and that if it was, it was amply discharged.

Result and Postscript

50 For the reasons stated, despite the skilful, moderate and courteous case presented by the Claimant, her claims are dismissed

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51 We would not wish to leave this case without observing that, if they have not already done so, the Respondents would do well to learn some lessons from this dispute. It serves no purpose to publish carefully considered procedures if they are ignored in practice. Any employer adopting a procedure should follow it. This is not to advocate employers becoming possessed by their procedures. But good practice and ordinary fairness requires clarity and consistency. That is every employee's right.

_____

EMPLOYMENT JUDGE SNELSON
24 Sep. 18

Judgment entered in the Register and copies sent to the parties on 24 Sep. 18

..... for Office of the Tribunals