Case Number: 2207084/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms R Latif		**Hair Waxperts UK Ltd**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 29 OCTOBER 2018

Introduction

1 The Respondents are the corporate vehicle for a beauty treatments business trading on the King's Road in Chelsea which employs and at all relevant times employed no more than eight people in the UK. Two directors of the company (perhaps the only two) are Mrs Susan Cusack and Ms Marjorie Cusack, her daughter. Mrs Cusack spends much of her time in Dublin, where she runs a similar business.

2 The Claimant, who is 52 years of age and describes herself as a woman of colour, joined the Respondents in April 2015 as a full-time receptionist. She was promoted to the role of Studio Manager in September 2016 (a prior promotion to that position having been temporarily reversed). In the capacity of Studio Manager she continued to be responsible for providing receptionist services but also took on a number of additional, administrative duties. The employment ended on 27 March 2017 (with payment in lieu of notice) on the stated ground of redundancy.

3 By a claim form presented on 26 July 2018, the Claimant brought complaints of race-related harassment and direct race discrimination.

4 At a Preliminary Hearing on 8 March 2018, attended by the Claimant in person and counsel for the Respondents, Employment Judge Neal identified the claims as consisting of one complaint of direct race discrimination based on the dismissal and one complaint of direct race discrimination, alternatively race-related harassment, based on the allegation that, at a meeting on 27 March 2017, she was "blocked" from making an exit. A further complaint was struck out as having no reasonable prospect of success.

5 The case came before us on 24 October 2018 for final hearing, with three days allowed. The Claimant appeared in person and the Respondents were represented by Ms Cusack. Having completed the evidence and submissions on liability by the end of day one we adjourned for private deliberations to the

afternoon of day two. On the morning of day two, we were supplied with a copy email from the Claimant, seeking to re-open the evidence and adduce a fresh document. We were not persuaded that it was appropriate to permit her to do so. Naturally, we had heard nothing from the Respondents' side on the question and would not be in a position to do so unless we elected to adjourn our deliberations pending argument at two o'clock. That course would have been likely to make it impossible for us to complete the hearing on day two. We were satisfied that to allow more than two days to resolve the straightforward issues in the case would not be proportionate. Moreover, the parties had had clear case management directions and the Claimant had had ample opportunity to bring forward ahead of the hearing the documents on which she wished to rely. Employment Tribunals exist to deliver swift, practical, economical justice in employment disputes. Case management directions are given in order to further that objective and permitting parties to deviate from the clear instructions given to them is liable to undermine it. We also bore in mind the fact that in this case both parties were in the same position of being without legal representation: there was not an uneven playing field which called for a more sympathetic treatment being extended to the Claimant.

6 On the afternoon of day two we gave an oral decision dismissing the claims.

7 The Claimant sent an email to the Tribunal on 9 November 2018 asking for written reasons for our decision. Unfortunately, owing to an administrative oversight, that message was not referred to the Employment Judge until 12 December, which explains the delay in complying with the request.

The Legal Framework

8 The 2010 Act protects employees and applicants for employment from discrimination based on a number of 'protected characteristics'. These include race, which includes colour.

9 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.

10 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.

11 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(4) The relevant protected characteristics are –**
> **…**
> **race**

12 In *R (Equal Opportunities Commission)-v-Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the definition of harassment under the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011) at paras 7.9 to 7.11 deals with the 'related to' link in the 2010 Act, s26. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

13 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the conduct must be shown to have been unwanted. Some claims will fail on the Tribunal's finding that the claimant was a willing participant in the activity complained of.

14 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

15 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

16 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 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.

17 Employees are protected against harassment by the 2010 Act, s40(1).

18 The 2010 Act, s212(1) includes this:

> **"detriment" does not, subject to … [not applicable] include conduct which amounts to harassment …**

The logic of this provision is that, in any case where a claimant asserts direct discrimination in the form of detrimental treatment and harassment in respect of the same act or event, the Tribunal must consider the harassment claim first.

19 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.**

20 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.

Oral Evidence and Documents

21 We heard oral evidence from the Claimant and, on behalf of the Respondents, Mrs Cusack and Ms Cusack, both already mentioned. All witnesses gave evidence by means of written statements.

22 In addition to the testimony of witnesses we read the documents to which we were referred in the slim agreed bundle of documents.

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.

24 The Claimant relied upon the experience of Ms Amara Macmillan, described by both sides as 'Afro-Caribbean', who was employed by the Respondents as a receptionist between about July 2016 and February 2017. It was the Claimant's case that Ms Macmillan's employment was terminated because of her race. The Respondents strongly denied that allegation, maintaining that she had been dismissed because of unsatisfactory performance.

25 In her claim form, the Claimant alleged that in a conversation in January 2017 Ms Cusack commented that Ms Macmillan did not "fit in", suggested that sales were dropping because she was on reception and, when further questioned, said,

> **I don't think the clients here like blacks on reception. We have to get rid of her.**

Ms Cusack was further alleged to have said, in answer to a question from the Claimant as to whether she too would be got rid of,

> **Don't be silly. You are different. You are the Manager.**

And, in answer to the challenge, "you can't just get rid of her!"

> **Oh yes we can. We can blame the drop in sales and say we cannot afford to keep her**.

26 The witnesses for the Respondents denied that any such comment was made.

27 The Claimant made no formal complaint about the alleged remarks and there is no documentary record substantiating them.

28 The Claimant also relied on a conversation said to have happened shortly afterwards between her and Mrs Cusack in which, she said, she had referred to the earlier (alleged) remarks of Ms Cusack and Mrs Cusack responded,

> **Oh don't worry, you are safe, but they are very racist around here.**

29 Mrs Cusack denied that any such conversation had taken place and told us that she had not been in the United Kingdom between mid-December 2016 and March 2017.

30 We were shown an email of 9 January 2017 from the Claimant to Ms Cusack which includes this:

> **We both agree that Amara is not a suitable fit for us. My idea is that we cut at least one wage for 3 months and see how things go. We can find better than Amara can't we …**

31 The dismissal of Ms Macmillan was effected by the Claimant personally.

32 Evidence was given on behalf of the Respondents that Ms Macmillan was seen as providing unsatisfactory service. In particular, it was said that she did not appear to be interested in her work or engaged in the business.

33 In emails exchanged in early January 2017 the Claimant and Ms Cusack commented to the effect that staff costs were much too high relative to current sales. Points were also shared on proposed arrangements for therapists to carry out some reception work.

34 Having given the matter anxious consideration, we reject the Claimant's evidence concerning the alleged conversations about Ms Macmillan. It seems to us that her account is very hard to reconcile with the absence of any documentary record and with the evidence which we have seen in the form of contemporary emails between her and Ms Cusack. In addition, having heard from Mrs Cusack

and Ms Cusack, it seems to us unlikely that those two conspicuously shrewd individuals, even if they had held the sentiments attributed to them, would have passed the extraordinarily indiscreet comments which the Claimant alleged.

35 The Claimant also relied on an alleged failure by both of the directors to respond to her repeated concerns about the allegedly defective performance of a particular therapist, who was described without challenge as Caucasian. It is an uncontroversial fact that no formal step was taken in relation to that individual's performance. But we accept the objection on behalf of the Respondents that the Claimant's case here is greatly exaggerated. We do not accept her evidence that that the therapist was the subject of a litany of complaints from customers. Rather, we find that in fact there was only one complaint and that the therapist was spoken to about it. In our view the directors had no reason to regard the therapist's performance as a cause for significant concern.

36 The Claimant's employment was ended without warning at a meeting on 27 March 2017. Those present were the Claimant, Mrs Cusack and Ms Cusack. The meeting took place in the confined space of the small office at the Respondents' premises. Mrs Cusack sat at the head of the table with her back to the door. The Claimant and Ms Cusack sat to her right and left, facing each other. The encounter was not a comfortable one. As soon as she understood the general purpose of the meeting, namely to explain a decision to terminate her employment on the stated ground of redundancy, the Claimant reacted angrily. She shouted and was abusive. She called both the other women "fucking racist bitches" and said that the treatment which she was receiving was the same as had been meted out to Ms Macmillan. Mrs Cusack told us that the Claimant's behaviour was such that she considered calling the police. Early in the meeting the Claimant got up saying that she was going to get a witness (she named one of the therapists). At this, Mrs Cusack got up and, raising her voice, told her to get herself under control. In getting to her feet, we think it probable that she obstructed the Claimant's path to the door. It seems that the Claimant then resumed her seat but soon afterwards got up again to leave the meeting and, on this occasion, there is no suggestion that anything was done to prevent her from doing so.

37 The Claimant's case was that the stated ground for dismissal was simply bogus. There was no significant reduction in business and no need to dispense with her services. The Respondents' case was that there was a significant weakening of the financial position of the company in the last quarter of 2016 and the first quarter of 2017. We did not receive helpful evidence from any witness on the financial state of the company at the relevant time. We were shown a profit and loss account prepared by the Respondents for the year ended 31 March 2017. It was broken into two six-month periods. The document showed slight improvement in sales in the second period (£228,779 against £203,221) but much higher expenditure in the second period (£246,339 against £165,316). The result was that a profit of £25,169 in the first period became a loss of £32,059 in the second. Another document shown to us purports to evidence falling sales figures in the months of October 2016 to February 2017 inclusive, measured against the corresponding months of the previous year. The range of the reductions was between 2.3% and 8.7%. We were not told why this document had only 10 months' figures. It may be because it was prepared for the purposes of this litigation and

accordingly provided information ending with the last complete month before the dismissal.

38 In evidence on behalf of the Respondents we were we were told that their business is cyclical in nature. A pattern over a few months does not necessarily point to a long-term trend. We have no reason to doubt that evidence.

39 The Claimant's role, unlike those of all other employees, did not generate revenue for the business. She was also paid more than revenue-generating staff. And it was evident from experience showed that it was possible for the Respondents to manage without her services, dividing the reception duties between Ms Cusack and available therapists and allocating administrative responsibilities to Ms Cusack and, when she was in London, Mrs Cusack.

40 Finally, we record the uncontroversial evidence of Ms Cusack that it was she who took the decision to dismiss the Claimant and that it was also she who took the decision to recruit a temporary, part-time receptionist, described without challenge as 'Afro-Caribbean', who worked for the Respondents for some months in the summer of 2017. We accept that evidence. The temporary receptionist was engaged some months before the Respondents could have become aware of the fact that the Claimant had brought proceedings against them alleging racial discrimination (the claim form was not served on them until October 2017).

Secondary Findings and Conclusions

41 We start with the dismissal. In our judgment the Claimant's allegation that it was motivated, or to any extent influenced, by racial discrimination is unfounded. The explanation given on behalf of the Respondents was plausible and supported by contemporary evidence. There was plainly a shared perception on the part of the directors that staff costs were much too high against current income. The Claimant was the obvious candidate for redundancy because she did not generate revenue (certainly not directly), was relatively highly paid and had duties which could be shared out between remaining staff members and the directors. The suggestion of a racial ground for the dismissal rested largely on evidence to do with Ms Macmillan which we have rejected. Moreover, the theory of discrimination was belied by Ms Cusack's appointment of a temporary Afro-Caribbean receptionist a few months later. (Not surprisingly, it was no part of the Claimant's case to attempt to differentiate racially between Ms Macmillan and the later temporary appointee and she associated herself with Ms Macmillan on the basis that both were women of colour and victims of colour-based racial discrimination.) In all the circumstances, we conclude that the dismissal was not based on, or tainted by, unlawful discrimination. We arrive at that view by the conventional route of addressing directly the 'reason-why' question, without resort to the burden of proof provisions. Had we applied those provisions, we would have reached the same conclusion, holding that the Claimant had failed to prove facts from which an inference of discrimination *could* be drawn and that in any event, even if the burden had passed to the Respondents, they had amply demonstrated that their action in dismissing her had not been materially influenced by any racial factor.

42 Turning to harassment, we conclude that this element of the Claimant's case fails for two reasons. First, Mrs Cusack's conduct, unwanted as it may have been, did not have a purpose or effect such as to meet the demanding language of the 2010 Act, s26. Her purpose was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. Her aim was only to manage the Claimant's volatile and aggressive behaviour and restore order. Nor could the effect of her action sensibly be said to have satisfied the stringent s26 test. The Claimant was not put in fear or humbled. She was met with a robust but reasonable response to her own offensive conduct. Secondly and in any event, the treatment complained of was not related in any way to the Claimant's race (or anyone else's).

43 For very similar reasons, the Claimant fares no better when the second claim is analysed as a complaint of direct discrimination rather than harassment. In the first place, we find that there was no detriment but at most an unwarranted sense of grievance. Secondly, there was no discrimination: Mrs Cusack did not act as she did 'because of' the Claimant's race and would, in like circumstances, have treated a comparator of different race (say a Caucasian) in exactly the same way.

Outcome

44 For the reasons stated, the claims, albeit sincerely held by the Claimant, fail and the proceedings are dismissed.

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EMPLOYMENT JUDGE SNELSON
3 January 2019

Judgment entered in the Register and copies sent to the parties on 4 Jan 2019

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