EMPLOYMENT TRIBUNALS

Claimant: Ms A Safjanowska

Respondent: Elior UK PLC

Heard at: Manchester **On:** 6th – 10 August 2018
And 28th September 2018
(In Chambers)

Before: Employment Judge Hill
Ms M T Dowling
Dr H Vahramian

REPRESENTATION:

Claimant: Ms A Marriott, Consultant
Respondent: Mr Sellwood, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claims for race, sex and disability discrimination fail and are dismissed.

REASONS

1. The Tribunal heard both oral and written evidence. The claimant provided a written witness statement and gave oral evidence. The respondent provided written witness statements for Joanna Cooke, General Manager; Emma Lewis, HR, Gill Heath, Operations Manager, Debbie Clark, Operations Director; who all also gave oral evidence.

2. The Tribunal was provided with a bundle of documents comprising of 347 pages.

3. The claimant brought claims for race, sex and disability discrimination by way of an ET1 dated 19 October 2017. The respondent resisted the claim by way of an ET3 dated 23 November 2017.

Claims and Issues

4. The Claimant made a number of allegations of race/sex or disability discrimination. The Claimant had prepared a Scott Schedule detailing 17 allegations but within those allegations there were a number of "sub allegations". We have dealt with all allegations on the whole separately except where they appear to be linked to the same facts.

5. The legal basis for the allegations can be categorised as follows:

(a) Direct discrimination (Race and/or Sex) - Section 13 (1) of the Equality Act (Equality Act). The Claimant claims that the respondent discriminated against her in that the treated her less favourably on the grounds of her race and/or sex. The claimant relies on a hypothetical comparator.

(b) Harassment (Race and/or Sex) – Section 26 (1) of the Equality Act 2010. The Claimant claims that the respondent engaged in unwanted conduct related to her race and/or sex and the conduct had the purpose or effect of violating her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

(c) Victimisation (Race) – Section 27 of the Equality Act. The Claimant claims that the Respondent victimised her and she suffered a detriment on the grounds of her race.

(d) Failure to Make Reasonable Adjustments – Sections 20-22 and Sch 8 of the Equality Act. The Claimant claims that the Respondent failed to make reasonable adjustments.

6. The specific allegations are dealt with further in this Judgment.

7. The Respondent conceded during this hearing that the Claimant was disabled for the purposes of the Equality Act.

8. In respect of the Claimant's claim for Disability Discrimination the Tribunal and the parties agreed with the Claimant at the beginning of the hearing that the only allegation relating to failure to make reasonable adjustments was that the Respondent should have made an adjustment in order to allow the Claimant to bring someone with her to her grievance appeal who was able to speak for her and otherwise support her.

9. The Respondent resists all claims but also relies upon the section 109 of the Equality Act that it took all reasonable steps to prevent A from doing that thing or from doing anything of that description.

Findings of Relevant Facts

10. The Claimant has made 28 allegations and our findings on each of these allegations is set out below. In order to provide context to these allegations a brief overview of the Claimant's employment and chronology leading to these proceedings being issued is set out below and each allegation is then dealt with separately.

11. The Claimant is of Polish origins and although is able to speak English does have some difficulty in understanding and speaking English particularly if people are speaking fast. An Interpreter was provided during the hearing in order to assist the Claimant. The Tribunal finds that the Claimant was able to communicate with the Respondent during her employment and that there were no issues in respect of communication in respect of her language during the course of her normal day to day employment.

12. The Claimant has a mental impairment suffering from depression; anxiety; inability to sleep and has a shoulder injury. The Claimant takes anti-depressant medication; sleeping tablets and analgesia for her shoulder injury.

13. The Respondent is a contract catering and cleaning organisation that provides services for various clients at various sites including the Claimant's place of work, Waters Micromass in Wilmslow. The kitchen was a commercial kitchen that was open fronted into the restaurant.

14. The Claimant was interviewed for the role of Kitchen Porter on 12 April 2017 by Joanna Cooke, General Manager for the Respondent. The Claimant had completed an application form confirming that she was available to work between the hours of 7.00 am to 2.00 pm Monday to Friday.

15. The Claimant was informed during her interview that the job was physically demanding; that it was a noisy kitchen environment and that she would be working in a team of eight people. The Claimant worked a "two day trial" prior to starting work. The Claimant started work on 2 May 2017 and her hours of work initially were 7.00 am to 13.00 pm. The Claimant also worked on her own account as a part time hairdresser and would do this work in the afternoon.

16. At the time of the Claimant's appointment the Respondent employed; Lee Edmondson, Head Chef; Paul Cookson, Sandwich Chef (who had previously held the position of Kitchen Porter and been promoted to this new position); Dave O'Connor, Second Chef; Jessica May Gardiner, Pastry Chef; all employed in the Kitchen area. In addition the Respondent employed three Front of House staff, including Janice Clark who worked in Hospitality.

17. Prior to the Claimant starting work Paul Cookson had been employed as Kitchen Porter who started work at 7.00 am and worked full time. After the Claimant was appointed Paul Cookson worked as Sandwich Chef in the morning and took over Kitchen Porter duties when the Claimant's shifts finished.

18. The Claimant was required to wear her own clothes to work consisting of a black top and trousers, the cost of which would be reimbursed but the Respondent was responsible for Personal Protective Equipment including steel toe capped shoes, an apron and a hat. It was the Respondent's normal practice to supply

clothes for Chefs specifically 'Whites' and also to launder those items but all other staff purchased their own clothes are were reimbursed the cost if staff provided a receipt.

19. Prior to her employment Joanna Cooke ordered the Claimant's PPE, however, this did not arrive until after the Claimant started her employment.

20. As part of the claimant's duties she was required to operate kitchen machinery including a grease trap and industrial waste disposal unit. The Claimant was provided with training over a 3 month induction period, although the Claimant went sick prior to the end of her induction period. This training comprised of one off training courses the details of which are set out in the bundle of documents and 'on the job' training on a day to day basis.

21. Shortly after starting work the Claimant had a meeting with Joanna Cook and Lee Edmondson and was told that her working hours needed to be changed and that she would now be required to work 8.00 am – 2.00 pm; taking her lunch at 1.30. This effectively meant she finished work at 1.30 pm. The reason for this was the Respondent's previous Kitchen Porter who had been promoted to sandwich chef worked full time and still came in a 7.00 am. He worked until 1.00pm on sandwiches and then reverted to kitchen porter duties at 1.00pm. This meant the Respondent now had 5 staff coming in at the 7.00 am start time which was not required but having a cross over at lunch time was more beneficial to the Respondent.

22. During the course of her employment the Claimant was frequently asked if she would work overtime. The Claimant carried on her own business in the afternoon so always refused. The Claimant was never forced to work overtime but clearly felt under pressure because Lee Edmondson would ask her why she could not work over time when she refused. Mr Edmondson sometimes probed into her personal affairs such as asking her how much she earned doing her hairdressing business and this type of questioning became part of the grievance raised by the Claimant later and was partially upheld by the Respondent.

23. The Claimant's job was demanding and involved heavy work including lifting rubbish bags and cleaning food from a waste disposal unit and cleaning spillages. She was also required to deal with deliveries to the kitchen.

24. Part of the Claimant's role was also to clean out a grease trap. The Claimant required training to clean the grease trap and waste disposal unit and this was part of the on the job training and separate training courses were not part of an external training package.

25. The Claimant received training from the Respondent to operate the waste disposal unit but had not completed her training on the grease trap by the time she went on sick leave. This was in a large part due to the fact that the Claimant did not like these jobs and in particular the grease trap and had refused to assist in cleaning it.

26. The Kitchen area was noisy and busy. The Claimant appeared to settle in and would see her General Manger, Joanna Cooke regularly. Lee Edmondson was the Claimant's direct manager and during the course of her employment made several comments to her which the Claimant found offensive. These remarks were

part of the grievance made by the Claimant and found to be racially offensive by the Respondent. This part of her grievance was upheld.

27. It was common practice for food left over from the morning serving to be eaten by the staff. The Claimant was allowed to do this along with other staff. However, on occasions where the food in question could be used at a later serving it was put aside and staff were not allowed to eat that food.

28. The Claimant alleged that various events/incidents took place throughout her employment (detailed below) that culminated with her leaving work on 22 June 2017 and remaining on sick leave until the present date. The Claimant is still employed by the Respondent.

29. On 22 June the Claimant was asked by Lee Edmondson to clean the grease trap. The Claimant refused to do it and left her place of work. This was a job that the Claimant did not like and did not want to do. She was contacted by Joanna Cooke via text to see what had happened. The Claimant indicated that she was very upset and that she was not prepared to return to work unless the Joanna confirmed that she would not be asked to do it again. The Claimant confirmed that the reason she had left work was because she was not prepared to risk her health.

30. During this text exchange the Claimant also indicated that she intended resigning. As a result the Respondent placed an advert on 24 June for a Kitchen Porter. Once it was realised that the Claimant would not be resigning this advert was removed.

31. The Claimant was asked to attend a meeting with Joanna Cooke on 26 June by text and also, by way of text message, had said that she would be in work on 26 June. The Claimant did not attend work and she was sent an unauthorised absence letter. This letter was not in accordance with the Respondent's sickness procedure but once the Claimant's husband telephone to say she was sick no further action was taken by the Respondent.

32. The Claimant raised a grievance on 29 June 2017 alleging bullying and harassment, race discrimination, sex discrimination and breaches of Health and Safety Regulations. The Claimant also alleged that she raised verbal complaints to Joanna Cook in May/June 2017.

33. The Claimant attended a grievance meeting on 26 July 2017 and was accompanied by Ms Marriott. Her grievance was investigated by Gill Heath, Operations Manager, who interviewed; Janice Clarke; Tommaso Gainni; Paul Cookson and Joanna Cooke. The Respondent was unable to interview Lee Edmondson or Dave O'Connor because by the time of the investigation both had left the Respondent's employment for unrelated reasons.

34. The Claimant was informed of the grievance outcome on 9 August 2017 in which the Respondent partly upheld some of her grievances. In particular the Respondent found that Lee Edmondson had made racial comments. The Claimant appealed the grievance and was invited to attend a grievance appeal meeting on 8 September 2018.

35. The Claimant did not attend this meeting due to ill health. The events surrounding this and subsequent meetings and discussions with the Respondent regarding the Claimant's health and welfare and detailed in the finding of facts in respect of the Claimant's allegations below.

36. The Claimant remains on sick leave.

Specific Allegations and Submissions and Findings

Change of Working Hours

37. The Claimant alleged that Lee Edmondson took her to one side and told her that he was changing her hours to 8.00 am to 1.30 pm without any consultation or discussion. The Claimant stated that school traffic meant that arriving at work for 8.00 am caused her problems and that she was late on several occasions and the reprimanded by Lee. The Claimant alleges that this was direct race discrimination.

38. The Respondent stated that her contract of employment allowed for her hours to be changed and that there was a meeting between the Claimant and Joanna Cooke and Lee Edmondson to discuss the change. In addition the Respondent stated that the reason for the change is that after the Claimant started it had become apparent that there was a business need to change her hours because Paul Cookson who had previously carried out the role of Kitchen Porter worked from 7.00 am albeit on Sandwich duties but that the kitchen did not need an additional person at 7.00 am.

39. The Tribunal finds that the Respondent had a genuine reason to change the Claimant's hours of work and that this was discussed with the Claimant prior to the change. During the Claimant's grievance investigation she herself confirmed that she had a meeting with Joanna and Lee (page 96 bundle). The Claimant had stated in her application that she was available during those hours. The Tribunal finds that the Claimant has not set out facts from which we could decide that discrimination had occurred and in any event the Respondent's explanation as to why they changed the hours is reasonable and credible.

Forcing the Claimant to Work Overtime

40. The Claimant alleged that she was 'forced' to work overtime and that this was direct race discrimination. Further during cross examination the Claimant alleged that she was punished by Lee if she refused to work overtime. This allegation was not pursued in submissions

41. The Respondent stated that this was not true and that there is no evidence to support this.

42. The Tribunal finds that the Respondent operated a voluntary overtime policy and that the Claimant was asked several times to work overtime which she refused to do. The Claimant provided no evidence that she had in fact worked overtime. This allegation was very closely linked to the next allegation and it appears that the Claimant was regularly asked to do overtime and questioned on why she could not do but that she was never forced. The Tribunal finds that there was no evidence to

support her claim that she was punished by Lee and this had never been raised previously either in her grievance or witness statement.

Asking Personal Questions

43. The Claimant claims that Lee Edmondson would ask her personal questions if she refused to do overtime. Those questions would relate to why she could not stay later and questions around her hairdressing business including how much she earned from that business. The Claimant alleged that this was direct race and sex discrimination and harassment.

44. The Respondent accepted that the claimant was asked questions about why she could not work overtime and that Lee did go further and ask questions about her income. The Claimant raised this in her grievance and this was upheld by Gill Heath. The Respondent acknowledged that the Claimant should not have to justify why she could not work overtime.

45. The Tribunal finds that the Claimant was asked questions around why she could not work overtime and around her hairdressing business but does not find that the reason she was asked these questions was on the basis of her race or gender. The Tribunal finds that Lee may have been intrusive to ask why she could not stay and that asking questions around her business may be considered personal but that on the evidence before it this did not amount to direct discrimination.

Not receiving training to operate machinery - Being forced to remove crockery/cutlery from the waste disposal unit - Being forced to empty the grease trap machine

46. The Claimant alleged that she was not provided with training in order to operate the grease trap or the waste disposal unit and this was an act of direct race discrimination. The claimant claimed that using the waste disposal unit was dangerous and that she would have to put her hands into the unit to remove broken crockery and or cutlery. The Claimant alleged in her witness statement that she did not know how to isolate the electricity or stop the machine and that she was fearful that the machine would start while she was working on it.

47. The Claimant further alleged that she was forced to clean the grease trap machine and that it was foul smelling and hazardous because it would leak every 2 to 3 days. She said that it made her feel sick. The Claimant stated that she had to clean the spillages.

48. The Respondent stated that these jobs were an integral part of the Kitchen Porter role and that the Claimant was undergoing induction training where she would be shown how to do all tasks. The Respondent accepted that the Claimant had told Joanna Cooke that she did not like the grease trap but that she had been told that it was part of her job. The Respondent also stated that the Claimant never actually cleaned the grease trap because she refused to do it so never receive induction on that piece of machinery. The Respondent also stated that she was shown how to use the waste disposal unit.

49. The Tribunal finds that there did not appear to be any specific training ‘courses’ on how to operate the machinery but that it did form part of her induction

and amounted to 'on the job training'. The Tribunal heard and accepted evidence that the Claimant was 'buddied' with Paul Cookson who showed how to do these jobs. It was clear to the Tribunal that the Claimant did know how to operate and isolate the electricity and the Claimant confirmed this when questioned by the panel on this point.

50. The Claimant also confirmed in evidence that she had not in fact ever emptied the grease machine and that she had refused to do it. It was apparent that this was a dirty job and the Claimant did not relish doing it. However, the Tribunal accepts that this was part and parcel of the Claimant's role including cleaning spillages. She was the only Kitchen Porter working in the morning and that whilst it would appear that colleagues would also 'pitch in' when needed primarily it was her role and that it was reasonable for the Respondent to expect her to do these tasks. The Tribunal finds that there is no evidence to support the Claimant's claim that she was treated less favourable on the grounds of her race or sex.

Being Made to Lift Heavy Bags and being forced to drag bags of rotten food to the outside bin

51. The claimant alleges that she was made to lift heavy bags of rubbish and that these were filled with rotten food and were foul smelling. The Claimant also made reference to having to carry the bags while there were men available to do this. In addition the Claimant complains that she had to take the bins outside to external bins that were too high to lift up the bags to get them in. The claimant alleged that this amounted to direct race and sex discrimination.

52. The Respondent stated that this again was part of her role and that she was not the only person who was required to take out bags of rubbish. The Respondent stated that after the issue of the bins being too high prior to the Claimant being employed, the job was a two person job so that two people could lift the bags into the outside bins and that the Claimant knew this.

53. The Tribunal finds that the issue relating to the external bin had been raised prior to the Claimant's employment starting and that it had been recorded in safety meeting notes on 17 March 2017. It was also raised again by Ms Gardner at a further meeting in May 2017. On both occasions it was clearly recorded that two members of staff should complete this task. During the grievance investigation Janice Clark confirmed that she had never seen the claimant doing this task on her own and the Tribunal finds that the Claimant was not *made* to lift heavy bags.

54. The Tribunal finds on the Claimant's own evidence that she was not the only person required to take the rubbish out. The claimant's next allegation is that the Respondent failed to deal with a lazy member of staff who would leave bin bags in the lift rather than dealing with them himself. The Tribunal finds no evidence that the Claimant was treated less favourably than others on the grounds of her race or sex and that this was an integral part of her role and that other also took their turn in this task but that they did this in pairs.

Respondent failing to deal with a lazy member of staff

55. The Claimant alleged that Dave O'Connor would leave bin bags in the lift and would not take them out to the external bins. The Claimant alleged that this was

discrimination on the grounds of her race by Joanna Cooke. The Claimant alleges that she told Joanna Cooke but that she took no action.

56. The Respondent said that the Claimant never reported this to Joanna Cooke and that in her own witness statement the Claimant does not say that she raised it with Joanna Cooke.

57. The Tribunal finds that the Dave O'Connor may have left bags in the lift but that there was no evidence that the Claimant was then forced to do the job. Further that even if it had been found that Dave O'Connor was lazy this would affect all staff not just the Claimant. There was no evidence this job was only left for the Claimant to do. The Tribunal accepts the Claimant's evidence that she did not complain to Joanna Cooke but did complain to Lee Edmondson about a shoulder injury she believed was caused by lifting bags.

58. There is no evidence that the Claimant raised this other than a small reference in her grievance and indeed this part of her grievance was partly upheld in that it was agreed that Dave had left the bags in the lift but not that she was forced to do it. However, there was no evidence that the Claimant was treated less favourably on the grounds of her race by having to do this herself.

Being made to carry excessive deliveries

59. The Claimant alleged that she was made to carry excessively heavy deliveries and this amounted to race and sex discrimination. This point was not pursued in submissions.

60. The Respondent stated that dealing with the deliveries was again a normal part of the Claimant's role. There was a lift available to the claimant and on an occasion when the lift was not working two colleagues were allocated to assist her.

61. The Tribunal finds that this work was a normal part of the Claimant's role. The claimant's grievance also confirmed that when the lift was not working she was assisted by colleagues. The Tribunal finds that the Claimant was not treated less favourably on the grounds of her race or sex.

Not being provided with the same uniform as others

62. The Claimant makes two allegations that firstly she was not provided with Personal Protective Equipment ie. steel toe cap shoes on her first day and that there was a delay in providing them for 9 days after her start date. She also received two aprons and a hat. The Claimant also alleged that she was not provided with the same uniform as other staff and that their uniforms were cleaned by the Respondent whereas she had to clean her own.

63. The Claimant's claims in respect of these allegations were originally on the grounds of her race and sex in her ET1. However, this was amended to race discrimination in the Scott schedule. During her evidence the claimant said that she purchased her own clothes to wear for work and that there was a delay in providing her shoes. She stated that she considered that she had been treated less favourably than others because the Respondent had purchased and laundered others clothing.

64. The Respondent stated that it was their policy to provide the steel toe cap shoes and admitted that there was a delay in providing them. The shoes, along with the aprons and hat were ordered on 27 April 2017 and were provided to the Claimant on 11 May 2017.

65. As far as the uniform was concerned the Claimant was required to purchase her own clothes, a black top and uniform and that it was their policy to allow staff to do this themselves to ensure they had comfortable clothes to work. Joanna Cooke said the Claimant was informed of this and as long as she provided receipts she would be reimbursed.

66. The Respondent said that other staff were not provided with clothing other than Chef's whites which were provided by the Respondent and laundered.

67. The Tribunal finds that the Claimant was provided with PPE and that the order for the shoes was made by Joanna Clark before the Claimant started work along with other PPE for other staff members. Whilst there was a delay in the Claimant receiving them there was no evidence that this was on the grounds of Claimant's race. The tribunal was provided with evidence that other staff members had also had problems with getting PPE and that this had been raised in a safety meeting on 21 June 2015. Therefore the Tribunal finds that the Claimant has not set out facts from which we could decide that discrimination had occurred and in any event the Respondent's explanation as to why there was a delay is reasonable and credible.

68. The Tribunal finds that the Respondent did offer to reimburse the Claimants the cost of clothing. The Claimant conceded during evidence that she believed both Joanna Cooke and Janice Clark wore their own clothing and that she could not recall Janice telling her she could be reimbursed. The Claimant also confirmed that her uniform was different to that of the Chefs and that she wore the same clothing as Paul Cookson who portered in the afternoon. The Claimant provided no evidence that the Respondent had provided clothing for other staff and when questioned on this point confirmed that she did not know if the Respondent provided uniforms to other staff but that she thought it was unusual for them not to have done so.

69. The Claimant provided no evidence that she had been treated less favourably on the grounds of her race.

Not being able to eat sausages

70. The claimant alleged that the Joanna Cooke told her she could not eat left over sausages sometime between 12 and 16 June 2018 because they were too expensive and told to choose a cheaper option. The claimant alleges this was because she had raised oral complaints of race and sex discrimination with Joanna Cooke and that this was an act of victimisation.

71. During her oral evidence the Claimant stated that she had seen other staff members eating sausages on previous days who had not been prevented from eating them.

72. The Respondent stated that this never happened and that the Claimant's evidence on this point was inconsistent. They also state that this was never raised in her grievance.

73. The Tribunal finds that the Claimant was not prevented from eating sausages. Joanna Cooke's evidence on this point was clear that there was never an occasion when she told the Claimant she could not have any or that they were too expensive. The Respondent accepted that there were occasions when some food was held back to be used at another serving but that would apply to all staff. The Tribunal also finds that the Claimant did not raise verbal complaints with Joanna Cooke and therefore even if this event occurred it could not be victimisation.

Being subjected to offensive racial comments and being sworn at in Polish

74. The claimant alleged that Lee Edmondson made racially unacceptable comment to her. She stated that Lee referred to her nationality when making comments to her including; "Have you been on the Polish Marijuana you seem to be working quickly?"; "Have you been taking Polish drugs" and "Have you been on the Polish vodka?". The Claimant raised this issue in her grievance.

75. The Claimant also alleged that every morning Lee would swear at her in Polish.

76. The Respondent accepts that the Claimant raised these matters in her grievance. The Respondent carried out an investigation into these allegations and interviewed a number of witnesses. Their statements were provided to the Tribunal and they confirmed that Lee did make comments about Polish drugs and alcohol. The Respondent therefore upheld that part of her grievance and apologised. The Claimant was informed that action would have been taken against Lee but by that time he had left the company for unrelated reasons.

77. In so far as the allegations about swearing the Respondent's investigation did not provide any evidence to support this allegation and that Tommaso said when interviewed that he had heard Lee speak to the Claimant in Polish but had only heard him say "Good Morning". Further although unable to understand the content of the conversations Jessica Gardner confirmed that she had heard both the Claimant and Lee engaged in conversations but that she had not observed that the Clamant appear upset or offended. Also Joanna Cooke confirmed in her evidence and during questioning that she had observed the Claimant and Lee speaking and that the Claimant had laughed in response to Lee speaking to her.

78. The Tribunal finds that Lee did speak to the Claimant in Polish but finds no evidence that he was swearing at her. She made no complaint of this despite saying that it happened virtually every day and Tommaso had heard Lee speaking to her but said that it was only "Good Morning". The Respondent had carried out a reasonable investigation into the allegations and indeed partly upheld this part of her complaint.

Being shouted at for being too fast or too slow

79. The claimant alleged that Lee Edmondson would shout at her across the kitchen that she was too fast or too slow and that it amounts to direct race and or sex discrimination and harassment.

80. The Claimant's allegation in respect of the speed of her work appears to be linked to the Polish comments in respect of drugs and alcohol. However, she does make separate allegations.

81. The Respondent stated that it was unclear whether these were separate allegations or related to the Polish comments in respect of drugs and alcohol. Joanna Cooke gave evidence that she would often be in the kitchen and that it was a busy environment open to the restaurant area and whilst it would not be uncommon for people to raise their voices due to the noisy environment but that she never heard specific shouting at the Clamant.

82. The Tribunal finds that the working environment would be noisy and accepts that there would be occasions when somebody may shout to be heard by someone or in an attempt to get something done quickly. However, the Claimant's evidence on this point was extremely vague and she raise this as a separate issue other than in conjunction with her complaints about the Polish drugs and alcohol comments. Comments had been made to the claimant during her 4 week review meeting about speeding up but that this comment was made in a meeting with Joanna Cooke and Lee Edmondson and the Claimant does not refer to this.

83. The Tribunal finds that there is no evidence to support any separate allegation of shouting at the claimant to speed up or slow down.

Failure to address offensive comments

84. The Claimant alleged that she had informed Joanna Cooke and Janice Clarke about the comments being made by Lee Edmondson and that they took no action. The Claimant alleged as they were both managers that they should have taken action. She stated that she considered this failure to be an act of race discrimination.

85. The Respondent states that Joanna Cooke was not informed and that Janice Clarke was not a manager but a hospitality assistant and in any event she was not informed of the issues. It was accepted by the Respondent that Janice did hear the Polish drugs and Vodka comments and that when she was interviewed during the investigation she did confirm that they were said.

86. The Respondent argued that all staff had undergone diversity training and in particular Janice Clarke undertook the training on 25 April 2017 and therefore the Respondent undertook all reasonable steps to avoid discriminatory behaviour by its staff. In particular each staff member is required to confirm that they will advise their manager immediately if they ever witness discrimination, bullying and harassment.

87. The Tribunal finds that the Claimant's evidence on this point was again vague and unclear. The Claimant's oral evidence backed away from saying that she had actually told Joanna Cooke but that she had tried to tell her but she had always been too busy. Joanna Cooke evidence was that she had never been informed by the Claimant and the Tribunal finds that Joanna Cooke was not informed. The Tribunal finds that Janice had overheard the comments and when interviewed confirmed that she had heard them. However, this specific allegation was that as Managers they had failed to address the issue and that in itself was a further act of discrimination. The Tribunals finds that there was not failure by Managers to act because Managers

were not informed until the Claimant raised her grievance at which point they took steps to carry out a full investigation. Indeed the Respondent upheld this part of her grievance and confirmed that they would have taken disciplinary action against Lee Edmondson had he not left. The Respondent apologised to the Claimant.

88. The Tribunal was provided with details of the Respondent's diversity training and staff records. It was clear to the Tribunal that the training provided by the Respondent was of a high standard and tailored to the company and meaningful. It is clear that Janice did either did not recognise that the comments were potentially racial comments or that she chose not to follow the training. Janice did not give evidence at this hearing but was open and honest during the investigation and confirmed she had heard the comments. The Respondent accepted her evidence as supportive of the Claimant's claims regarding the comments. All staff had been on the diversity training therefore we find that the Respondent had taken all reasonable steps to avoid the situation.

Respondent failed to inform the Claimant of her right to lodge a grievance

89. The Claimant alleged that the Respondent and in particular Joanna Cooke and Janice Clark failed to tell her that she could raise a grievance and that this in itself was an act of direct race discrimination.

90. The Respondent stated that there is no general duty in law for a manager to explicitly advise an employee to lodge a grievance. They also stated that in any event the Claimant had been provided with a staff handbook and that there was an entire section relating to the grievance procedure and that she raised a full grievance within 7 days of going off sick so it was unclear what detriment she suffered.

91. The Tribunal finds that the Claimant was not discriminated against by the Respondent by failing to inform her of her right to raise a grievance. The Respondent provided her with a copy of the staff handbook which she acknowledged. Her particular complaints against Joanna Cooke cannot stand because we have found that she did not make any oral complaints to Joanna Cooke. Further as Janice Clarke is not a manager and was on the same level as the Claimant we do not consider that even if the Claimant had raised concerns directly with her that it was her responsibility to tell the Claimant that she had a right to raise a grievance.

Respondent failing to take the Claimant's complaint's seriously

92. The Claimant alleged that Joanna Cooke victimised her by not taking her complaints of race and sex discrimination seriously.

93. The Respondent stated that the written grievance had not been raised at the date this allegation was alleged to have taken place and that they could not see how she could have been victimised as a result of her alleged protected disclosures if, as she is alleging, the Respondent had not taken them seriously.

94. The Tribunal has found that the Claimant did not raise oral complaints with Joanna Cooke or anyone else. Therefore we find that the Claimant had not done a protected act at the time of the alleged allegation and in any event the Claimant has not specifically set out what detriment she suffered other than a link that she had

been told she could not eat sausages that were left over. We have found that the Respondent did not treat the Claimant less favourably in respect of the sausage incident.

95. We find that once a grievance was raised with the Respondent they did take it seriously and conducted a thorough investigation.

Texting between the Claimant and Joanna Cooke on 22/23 June 2017

96. The Claimant alleged that a text exchange between herself and Joanna Cooke after she left work on 22 June 2017 was an act of victimisation.

97. The Respondent states that these were simple exchanges requesting a catch up by Joanna Clarke. The Respondent argued that as the grievance had not yet been raised that there is no protected act for the Claimant to rely upon.

98. The Tribunal finds that on 22 June the Claimant left work after being asked to clean the waste disposal and Joanna Cooke reasonably contacted the Claimant to understand what had happened. The Claimant was very clear that the reason she had left work was because she had been asked to clean the grease trap and said in another text that she would only come back to work if Joanna would confirm that Lee would not 'force' her to clean the waste disposal. She made no mention of any type of discrimination.

99. Once again as the Tribunal has found that no oral complaints were made to Joanne Cooke or protected acts we find that the exchange of texts was a reasonable conversation between the parties and there was no act of victimisation.

Advertising the Claimant's job on 24 June 2017

100. The claimant alleged that the Respondent advertised her job despite the fact that she had not resigned and this was in itself an act of victimisation.

101. The Respondent said that it accepted that it did advertise the Claimant's job on 24 June 2017 when the Claimant had not resigned. However, they argued that as the Claimant had said in her text of 22 June that she intended bringing her 'notice' in on 26 June 2017 that they were concerned that the Kitchen would be without a porter and that is the reason why they decided to put an advert out as soon as possible to avoid having a long period between the Claimant leaving and a new person started.

102. The Tribunal head evidence from Gill Heath on this point and accepted the explanation given. Gill Heath conceded in evidence that she understood that this would have been upsetting for the Claimant. The Claimant also confirmed during evidence that it had been her intention to resign but had changed her mind. The claimant has stated that this was another act of victimisation and as we have found as stated previously that at that stage there had been no verbal complaints, the grievance was not raised until the following week we find there was no protected act and that this was not an act of victimisation.

The Respondent writing to the Claimant on 26 June regarding her absence

103. The Claimant alleged that a further act of victimisation was a letter sent by the Respondent on 26 June regarding an unauthorised absence on that day.

104. The Respondent stated that the reason the letter was sent was that they had a reasonable expectation that the Claimant was due to attend work on 26 June. The Claimant had been asked to attend work on the Monday and she had stated in her text on 23 June 2017 that she would bring her notice in on Monday 26 June. The Claimant's husband telephoned the following day to say she had been ill and no further action was taken.

105. The Tribunal finds that the Respondent's normal procedure was to send letters regarding unauthorised absence, however, in this case the letter was sent a day early. Once again because we have found that at that time there were no protected acts we find that this was not an act of victimisation but that it was a administrative error on the part of the Respondent.

Rejecting the Majority of the Claimant's Grievance

106. The Claimant alleges that the fact that the Respondent rejected the majority of her grievance amounts to an act of victimisation. Further the Claimant alleged that her grievance was not investigated properly.

107. The Respondent stated that there was a comprehensive investigation and that parts of her grievance were upheld. In addition there was no evidence that the rejection of parts of her grievance was based on the fact that she had raised a grievance.

108. The Tribunal finds that the Respondent conducted a thorough investigation although with hindsight Gill Heath could have made further enquiries of Tommaso who was not asked the same questions as other staff. Where corroborative evidence was found supporting the Claimant's grievance specifically in relation to the Polish vodka and drugs comments, the Respondent upheld those parts. When cross examined the Claimant agreed that she considered Gill Heath had been fair. The Tribunal finds that there was no evidence put before it that Gill Heath had failed to investigate or failed to find in the Claimant's favour because the Claimant had raised a grievance. There was no act of victimisation.

109. The Tribunal accepts the Respondent's argument that the mere fact that an employer does not uphold part or all of an employee's grievance cannot be found to be an act of victimisation without evidence to support that and we find that on the Claimant's own case that she considered the grievance had been conducted fairly by Gill Heath. The fact that the Claimant did not believe that some of those interviewed during the investigation gave truthful answers does not amount to an act of victimisation by the Respondent. They have shown that they carried out a thorough and fair investigation and upheld parts of the Claimant's grievance where appropriate and had reasonable grounds for accepting the evidence of those being interview.

110. The tribunal had access to the grievance investigation materials and witnesses provided honest and open responses to the questions posed.

Failing to follow the Respondent's sickness policy and not conducting sickness reviews.

111. During the Claimant's absence the Claimant alleges that the Respondent has failed to follow their own sickness policy and did not carry out sickness reviews with her. The claimant in submissions relies upon the same facts in respect of the sending of the absence letter on 26 June 2018 and advertising the Claimant job.

112. The Respondent's position on these points is as above.

113. The Tribunal's findings on these points is above.

Failing to Inform the Claimant about Canada Life

114. The Claimant alleges that the Respondent failed to inform her about an Employee Assistance Programme it operated through Canada Life.

115. The Respondent stated that this was not the case and that the Claimant was informed several times and in any event it as not an act of victimisation.

116. The Tribunal finds that the Claimant was informed of the programme and services including counselling. The Tribunal heard witness evidence from Gill Heath and Emma Lewis that the claimant was informed by letter and at her sickness review meeting on 4 January 2018. The Tribunal was also referred to letters in the bundle at pages 101 and 120 regarding appropriate schemes for the Claimant to access whilst on sick leave.

Informing the Claimant that Canada Life was only available to assist a return to work

117. The Claimant alleges that during her sickness absence she received an email from Gill Heath informing her that the use of Canada Life was only available to staff in order to assist them in returning to work. The claimant alleged this was an act of victimisation.

118. The Respondent referred to the email at page 192 of the bundle and Gill Heath and Emma Lewis gave evidence on this point. The Respondent argued that the email gave a factual position on the services available and in particular in respect of the Claimant's shoulder injury and that it therefore cannot amount to an act of victimisation.

119. The Tribunal finds that the contents of the email are factual. The Claimant had sustained a shoulder injury and her representative had asked the Respondent if physiotherapy could be expedited through Occupation and Wellbeing via email on 6 September 2017. Gill Heath responded to this email on 4 October informing the Claimant's representative that the occupational referrals via the company were used when colleagues were on long term sick as a way of determining how the Respondent could support those colleagues back into work. The email goes on to state that whilst the OH provider can make recommendations for treatment they were not directly involved in arranging treatment.

120. It would appear that there was a misunderstanding by the Claimant and her representative that this meant that they would not refer the Claimant. As the request from the Claimant was for recommended treatment to be expedited and not a request for to be referred so that a recommendation of treatment could be made we

find that the Respondent did nothing wrong but merely explained that any referral would not assist the Claimant in expediting any treatment that had already been recommended.

Failing to allow a companion with speaking rights to support the Claimant at her appeal.

121. The claimant alleges that she requested that the Respondent make reasonable adjustments and allow her to bring someone with her, specifically her representative, who could speak on her behalf.

122. The Respondent said that they in accordance with their grievance procedures offered the Claimant her legal right to be accompanied by a colleague or trade union representative and that they did allow her to be accompanied by her representative at both her grievance hearing and the appeal hearing. The Respondent says that this was a reasonable adjustment and was in response to a request by the Claimant's representative.

123. The Tribunal finds that the respondent did make a reasonable adjustment not only in allowing the Claimant to be accompanied by her representative but also allowing her representative to communicate directly with the Respondent via email and letter. The actual appeal hearing never actually took place due to the Claimant's ill health and the respondent dealt directly with the Claimant's representative throughout.

124. It was very unclear during this hearing whether the Claimant's actual concern was not being provided with an interpreter. During submissions the Claimant's representative stated that the Respondent did not consider the impact on her mental health and give consideration to an interpreter. This allegation was discussed at the beginning of the hearing and clarified with the Claimant's representative that she was referring to speaking rights of the companion.

125. The Tribunal finds that the Claimant had the support of her representative throughout the process and Ms Marriott was never prevented from taking part or communicating with the Respondent and speaking 'on behalf' of the Claimant. She was allowed to attend the meetings but it was reasonable for the Respondent to speak directly to their employee when conducting the investigation.

The Law

126. Equality Act 2010

S 13 Direct discrimination (Race and Sex):

(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.

S 26 Harassment (Sex and Race):

(1) A person (a) harasses another person (B) if A engages in unwanted conducted related to a protected characteristic and the conduct had the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

S 27 Victimisation:
A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do, a protected act. Protected acts include

S20 Duty to Make Reasonable Adjustments:

(a) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(b) The duty comprises the following three requirements.

(i) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(ii) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(iii) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

127. A claim of failure to make reasonable adjustments requires a Tribunal to consider a number of questions. Firstly, it must identify the provision/s, criterion/s or practice/s and/or a physical feature of premises occupied by the Claimant's employer, which is in issue. Secondly, it should consider who the non-disabled comparators are. Thirdly, it needs to identify the nature and extent of the disadvantage the Claimant has suffered or will suffer in comparison with the comparators. Only then can the Tribunal go on to judge whether any proposed adjustment is reasonable (Environment Agency v Rowan [2008] ICR 218).

128. If the duty to make reasonable adjustments arises it does not require an employer to make every adjustment that could conceivably be made, only those that are reasonable. Reasonableness is a matter for the Tribunal to assess objectively; accordingly, the mere fact that the employer considers its approach to be reasonable does not make it so (Smith v Churchills Stairlifts Plc [2006] IRLR 41). An adjustment is unlikely to be reasonable if it will not address the employee's disadvantage.

<u>Burden of Proof</u>

129. The burden of proof under the Equality Act is set out in Section 136 of the 2010 Act and provides:

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

(ii) 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.

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

130. A Claimant is therefore required to prove facts consistent with their claim: that is facts, which, in the absence of an adequate explanation, could lead a tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences that it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof shifts to the Respondent to prove that it did not commit the unlawful act in question (**Igen v Wong [2005] IRLR 258**). The Respondents' explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic.

131. We have borne this two-stage test in mind when deciding the Claimant's claims. We have not however separated out our findings under the two stages in the conclusions. We have reminded ourselves that detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims.

132. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see **Anya v University of Oxford [2001] IRLR 377**). We have considered the guidance given by Elias J on this in the case of **Law Society v Bahl [2003] IRLR 640** (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (**Madarassy v Nomura International plc [2007] IRLR 246**). 33 A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

133. The primary question for the Tribunal to ask is: why did the Respondent treat the Claimant in this way? The fact that a claimant has been treated less favourable than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is something more from which the tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic. **Madarassy v Nomura International plc [2007] IRLR 246 [CA]**.

Vicarious Liability

134. S 109 of the Equality Act provides that 'anything done by a person (A) in the course of A's employment must be treated as also done by the employer and that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. It does not matter whether that thing is done with the employer's or principal's knowledge or approval, but it is a defence for B to show that B took all reasonable steps to prevent A from doing that thing or from doing anything of that description.

Conclusions

135. The findings and reasons for those finding for each allegation is set out above. In considering our findings we have considered the evidence before us including written and oral evidence and the documentation provided by the parties.

136. The claimant made a significant number of complaints. During her evidence it was apparent that she intensely disliked her job and it was not similar to other jobs she had had before in this type of area. She was disgusted and appalled at having to move rotten food and clean the waste disposal unit and grease machine. It appears that these were her main concerns and it is clear when she left work on 22 June that the only reason she did so was because she had been asked to clean the grease trap.

137. It is clear that the Claimant was subject to racial comments being made to her by Lee Edmondson and this was upheld by the Respondent. However, the Tribunal accepts the Respondent's defence that it took all reasonable steps to prevent this and indeed we were impressed by the bespoke nature of the training programme and that it was seen as an important part of their training programme. The Tribunal had no doubt that the Respondent was sorry for what had happened to the Claimant and that they would have taken disciplinary action against Mr Edmondson had he still been employed.

138. The Respondent took all the allegations made by the Claimant seriously and conducted a thorough investigation. The Tribunal found the Respondent's witnesses to be credible and straightforward.

139. We found in the majority of the allegations that the Claimant did not set out facts from which we could conclude that the Respondent had contravened the Equality Act as pleaded. Where we found that there were facts from which we could conclude the Respondent provided an adequate explanation. Many of the claimant's claim for victimisation relied upon a finding that the Claimant had made a protected disclosure specifically made oral complaints and as we found that no such complaint/s were made these claims fails.

140. We found that the Claimant's evidence was vague and at time not credible. Her accounts between ET1, witness statement, Scott Schedule and cross examination were inconsistent. A striking example is that she has maintained that she was 'forced' to clean the grease trap but eventually conceded in evidence that she had never in fact cleaned it; another such example is that she said she had made oral complaints to Joanna Cooke and after several questions from the panel

conceded that she had tied to raise a complaint but Joanna was always busy so had not.

141. The claimant was reluctant to concede any discrepancies in her evidence particularly around dates and the timing of events even when the evidence was clear that she had made mistakes.

142. In contrast the Tribunal was impressed with the Respondent's willingness to acknowledge mistakes. We were impressed with Joanna Cooke's evidence and that she clear and open. We found in general that the Respondent's witnesses were credible and reliable and that they had tried to accommodate the Claimant during the grievance and sickness process.

143. The Tribunal was also impressed with the Respondents diversity training and how they approached the grievance. We accepted their evidence that they would have disciplined Lee Edmondson and noted that they had offered an apology. On the basis that the diversity training was not a tick box exercise and that they had taken the time to ensure it was appropriate for their business we consider that they did take all reasonable steps to ensure that this type of situation did not occur. Lee Edmondson was not named as an individual Respondent and therefore we cannot make any finding against him.

144. We find that the claims made by the claimant do not amount to direct discrimination, victimisation or otherwise for the purposes of the Equality Act 2010.

Employment Judge Hill

Date 24 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7th November 2018

FOR THE TRIBUNAL OFFICE

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