**Case Number: 2201594/2018**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **and** | **Respondents** |
|---|---|---|
| **Miss T Parmar** | | **Noé Group Holdings Ltd** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**SITTING AT: London Central** **ON: 14-16 November 2018; 17 January 2019 (in chambers)**

**BEFORE: Employment Judge A M Snelson** **MEMBERS: Mr D Kendall, Mr U Hoque**

On hearing the Claimant in person and Mr M Humphreys, counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Claimant's complaints based on a comment said to have been made in July 2017 were presented out of time and are dismissed, the Tribunal having no jurisdiction to consider them.
(2) The Claimant's complaint that her dismissal was an act of victimisation is well-founded.
(3) All other claims are not well-founded and are accordingly dismissed on their merits.
(4) Pursuant to the principle in *Abbey National Plc v Chagger* [2010] ICR 397 CA, the Tribunal would limit any award of compensation in respect of loss of earnings and other monetary benefits to three months' loss.

## REASONS

### Introduction

1 The Respondents are an investment and asset management business owned and run by members of the Noé family. They were and are based in the West End of London and at all relevant times employed some 36 people in the UK.

2 The Claimant, a Hindu of Indian descent now 40 years of age, joined the Respondents on 10 July 2017 as a full-time Executive PA on an annual salary of £45,000. The employment ended on 22 November 2017 with summary dismissal, with pay in lieu of notice, on the stated ground that the relationship between her and Mr Paul Meads, Chief Operating Officer, had broken down.

3 By a claim form presented on 8 March 2018 the Claimant brought complaints under the Equality Act 2010 ('the 2010 Act'), based on her personal characteristics of race and religion or belief. All claims were resisted.

4 At a Preliminary Hearing (Case Management) on 19 July 2018, attended by the Claimant in person and a solicitor for the Respondents, Employment Judge ('EJ') Clark identified complaints of direct and indirect discrimination, harassment and victimisation resting on four matters (we have rearranged the numbering and added in brackets the jurisdictions invoked but otherwise reproduce the judge's formulation *verbatim*):

> **(1) Comments by Mr Meads in July 2017 about Indian lawyers (direct discrimination or harassment (race and/or religion or belief));**
> **(2) Comments by Mr Raphael Noé in November 2017 about Indians (as (1));**
> **(3) The restaurant which was booked for a Christmas party (direct or indirect discrimination (race and/or religion or belief));**
> **(4) The Claimant was dismissed … (direct discrimination (race and/or religion or belief) and/or victimisation).**

5 The case came before us on 14 November 2018 for final hearing, with four days allowed. The Claimant represented herself with considerable skill; the Respondents were represented by Mr M Humphreys, counsel, who conducted his case with scrupulous fairness. We heard evidence and argument on liability over days one to three but unfortunately were not able to sit on day four and so had to meet in chambers on the next mutually convenient date, 17 January 2019, to deliberate in private and arrive at our decision.

## The Legal Framework

6 The 2010 Act protects employees and applicants for employment from discrimination and harassment based on or related to a number of 'protected characteristics'. These include race and religion or belief.

7 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.

8 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.

9 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.**

10 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 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) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

11 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are set 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 or at least indifferent to it.

12 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.

13 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 [conduct] 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).

14 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
> **…**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

15 When considering whether a claimant has been subjected to a detriment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

16 In *Martin v Devonshires Solicitors* [2011] ICR 352 EAT, Underhill P (as he then was), giving judgment on behalf of the EAT, acknowledged that cases may arise in which the true reason for the detriment under consideration is not the protected act itself but some separable feature of it, such as the *manner* in which it was carried out. But the learned judge went on to sound this note of caution (para 22):

> **Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making the complaint they had say, used in temperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made safe in clear cases.**

17 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.

18 Employees are protected against harassment and victimisation by the 2010 Act, ss40(1) and 39(4) respectively.

19 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.

20 The 2010 Act, s19 defines indirect discrimination in, so far as material, these terms:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a prohibited characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

21 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.**

22 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.

23 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). (Now, under the Early Conciliation provisions, the period may be further extended, but those provisions do not affect the analysis in this case.) The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

24 The *'Polkey'* principle, which, in unfair dismissal cases, requires the Tribunal to discount any compensatory award to reflect a finding that, were it not for the unfair dismissal, the employee would, or might, have been lawfully dismissed when he or she was dismissed or within a definable period thereafter, operates in the realm of discrimination law: *Abbey National Plc v Chagger* [2010] ICR 397 CA. It is for the employer to justify any such discount.

**Oral Evidence and Documents**

25 We heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Paul Meads (already mentioned), Chief Operating Officer, Mr Barnaby Jenkins, General Counsel, Ms Joelle Whayman, Executive PA, and Mr

Raphael Noé (already mentioned), partner[1]. All gave evidence by means of witness statements.

26 Besides the testimony of witnesses we read the documents to which we were referred in the single-volume bundle of documents. In addition we were supplied with copies of two pages from a notebook produced late by the Respondents. The late disclosure necessitated the re-calling of the Claimant and one of the Respondents' witnesses. The Claimant produced a one-page manuscript note consisting largely of comments on the new documents. We also had the benefit of a chronology, a cast list, Mr Humphreys's opening note and closing submissions and the Claimant's closing submissions.

**The Facts**

27 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.

28 When the Claimant joined the Respondents, she brought with her a lot of relevant experience. She demonstrated from the outset that she was a capable performer. On the other hand, it also became apparent at an early stage that her manner in dealing with those around her and with external businesses and agencies was sometimes abrupt and even abrasive. Her constant criticism reduced a temporary receptionist to tears on at least one occasion. In addition, she was not perceived as a team player and had a tendency to avoid tasks which she did not see as being part of "her job". This was not in keeping with the Respondents' ethos. They ran a small operation and, if and when a need arose, all members of staff were expected to "muck in". These negative traits were viewed by the Respondents (most notably in the person of Mr Meads) as grounds for concern. For them fostering a happy and cooperative atmosphere in the office and preserving good relations with suppliers and other business partners were high priorities.

29 On 10 July 2017, the day on which the Claimant's employment began, Mr Meads passed a comment disparaging "*the* Indian lawyers" (our emphasis). The gist of what he said was that they were a law unto themselves. Contrary to the Claimant's pleaded case (in which the definite article is omitted), the remark was not directed at "Indian lawyers" in general, and we find that it was perfectly plain from the context that he was referring to the team of lawyers in India whom the Respondents had been consulting in relation to a particular transaction then under negotiation. The Claimant did not mistake the comment as a general judgement on Indian lawyers (much less on Indian people in general) and well understood that it was a reference to the particular lawyers with whom Mr Meads was dealing. She was not offended to any significant extent and her claim based on the comment, brought months after the event, is, in our judgment, tactical.

[1] Mr Noé is one of the members of Noé Group LLP, which owns the Respondents.

30 On or about 25 September 2017 the Claimant's three-month probation period (due to expire on 10 October) was extended to 31 October. Making this finding we resolve a fiercely contested factual issue in favour of the Respondents. We are satisfied that Mr Meads was, as he told us, troubled by certain aspects of the Claimant's performance, most notably her manner in dealing with colleagues and external business partners. We were shown evidence corroborating that concern including one email provided (much more recently) by a supplier to illustrate his comment about the Claimant's abruptness. He produced it as a "typical example" of communications sent by her, which he described as "not exactly friendly". We do not need to reproduce it. It was curt to the point of rudeness and it is no surprise at all that the recipient judged it so. The documentary evidence also corroborates the Respondents' case (a) that there was a meeting and (b) that the probation was extended (the Claimant denied both propositions). We were shown a copy of a manuscript entry in a notebook, which was produced by Mr Meads as a contemporary record of his thinking prior to his meeting with the Claimant on or about 25 September 2017. That document was, as we have mentioned, produced late and the Claimant questioned its authenticity. While regretting the late disclosure, we are satisfied that the document is genuine. The suggestion that the evidence (which was far from being essential to the Respondents' case) might have been manufactured is rejected. It would need compelling evidence to sustain such a finding. The Respondents' contemporary HR records also confirm the extended probation period.

31 In late October 2017 Mr Meads told the Claimant that the Respondents had decided to hold their Christmas party on 6 December and asked her to help organise it. The idea was to have a dinner preceded by some form of activity and followed by dancing. He explained that because some staff members were Jewish it would be necessary to select a restaurant which would permit external caterers to provide Kosher food for those who required it. The Claimant agreed to be involved. She found a restaurant and bar in Notting Hill and a separate karaoke venue but it was eventually decided that the party (30 to 35 were expected to attend) was too small for the latter location. That decision having been taken it transpired that in the meantime the restaurant and bar had been booked. The Claimant was asked to look again. She next proposed a restaurant in W1 and found two other sites on the South Bank. Meanwhile, a senior member of the company and found a cocktail-mixing venue in Shoreditch and a karaoke bar in Smithfield. The senior management decided that it would not be practicable to transport the partygoers from Shoreditch to W1 and then on to Smithfield (there was talk of a bus being hired but even so it was judged that the time spent travelling would be unacceptable). The Claimant was asked to coordinate arrangements with the cocktail-mixing venue but as a result of a complaint about her alleged rudeness she had to be replaced by a senior representative of the company. At that point she said that she did not wish to be involved in arrangements for the Christmas party any longer.

32 The Shoreditch and Smithfield locations were booked and, on 15 November, Mr Meads placed a booking (paying a deposit) for a restaurant in Threadneedle Street, having checked that it would be permissible for Kosher food to be brought in. That restaurant specialises in steaks, although it also serves meat in other forms and vegetarian options.

33 Minutes after the booking had been made and the deposit paid, the Claimant asked Mr Meads by email whether he had booked the restaurant (it is not clear how much earlier she had become aware that the Threadneedle Street site was under consideration or when she became aware that it marketed itself as a specialist steak restaurant) adding, "I'm not sure a steak restaurant is the best place for me to be going, being a Hindu." That was the first time she had mentioned to anyone in the organisation (at least anyone in a position of authority) that she was a Hindu or that she felt constrained by her religion to observe any particular dietary rule or practice.

34 Mr Meads devoted a number of hours over the evening of 15 November to searching for another restaurant capable of meeting the company's needs. At shortly before midnight he sent an email to the Claimant explaining that he had looked for a substitute restaurant in vain, pointing out that arrangements were being made for Jewish members of the party to be catered for separately and that a similar solution might be found for her. He urged her to think about it and then to speak to him on the subject.

35 On the following evening the Claimant wrote to Mr Meads in these terms:

> **I think it's really sad that I've spent so much time working on the Christmas Party and now I have been excluded. This will be the first year that I don't get to go to my company's Christmas Party**
>
> **I've explained that, as a Hindu, I can't go to a steak restaurant and I've explained why; I know they serve non-beef options.**
>
> **Your suggestion that I could attend if they could do something similar to the Kosher people is quite insensitive.**
>
> **It's disappointing that, even though I'm your PA, you didn't give my needs a second thought.**

The reference to the prior explanation was to the email of 15 November.

36 Mr Meads replied on 20 November (a weekend having intervened), pointing out, as was the fact, that he had had no idea that the Claimant was a Hindu until receipt of her email of 15 November. He strongly denied giving her needs no second thought and summarised steps he had taken to find a solution to the problem. His message ended with these remarks:

> **It's a pity that, despite me asking you to have a chat with me about this to try to find a solution, you've chosen instead to send your email below. You seem to have made up your mind that it isn't worth us speaking, and in doing so I think you've made our working relationship much more difficult. I'm not sure where we go from here.**

37 In the meantime, on 17 November 2017, the second incident relied upon by the Claimant for her harassment claims had occurred. Mr (Raphael) Noé made a critical remark in the office, and in the Claimant's hearing, about the management team responsible for an investment held by the Respondents. The investment company for which they worked is an Indian corporation located in India. In evidence he told us that he was unsure whether he had made any reference to

race but added that if he did it was only to identify the people to whom he was referring. We find it more likely than not that he did use the word "Indian" because his remark was about an Indian business employing, no doubt, wholly or mainly Indian nationals. We reject the Claimant's evidence that he referred to them as "crooks" but he certainly did question their integrity and honesty. He did not say or suggest, and could not reasonably have been interpreted as saying or suggesting, anything more general about Indian investment companies or their employees, much less about the Indian people as a whole. Again, we find that the Claimant understood perfectly well that Mr Noé was not disparaging Indians generally or any sub-category of Indians and that her claim based on this episode is opportunistic.

38 On the 22 November 2017 the Claimant was invited without warning to attend a meeting with Mr Jenkins, the purpose of which was not divulged. At that time Mr Meads and Mr Noé were abroad on business. She was not offered the chance to be accompanied. She attended and in short order Mr Jenkins explained that the decision had been taken to dismiss her with immediate effect and that she would be paid in lieu of her notice entitlement of one month. He referred to perceived problems with her attitude and behaviour, the extension of her probationary period, complaints from suppliers and support staff and, most recently, the exchanges relating to the Christmas party. He stated that the relationship between Mr Meads and her had broken down and that it was the view of the company that the interests of all sides would be served by terminating her employment. He rejected the suggestion that the dismissal had anything to do with the choice of restaurant for the Christmas party. He did not advise her of her right to appeal.

39 The Claimant did not purport to appeal but did pursue a grievance, which was not upheld.

## Secondary Findings and Conclusions

*Rationale for primary findings*

40 The few facts that were in dispute we have decided in the Respondents' favour. In the main, we found their witnesses more persuasive than the Claimant. She showed herself willing to stretch and distort her account of events on occasions. For example, her evidence implausibly included what were presented as *verbatim* quotations of things said a year or more earlier. And we have already mentioned the misleading pleaded case referring to "Indian lawyers" (omitting the crucial definite article, which entirely changes the sense). She is a highly articulate and intelligent person and we cannot dismiss these errors as accidental. In addition, particularly in relation to the disputed extension of the probation period, her evidence was not consistent with contemporary documents. By contrast, the Respondents' accounts on disputed points tended to be corroborated by documentary material and their witnesses seemed to us more willing than her to put their partisan interests to one side and focus on their duty to give frank and accurate evidence.

*Comments in July and November 2017*

41 As explained above, our analysis logically begins with harassment. Was the treatment complained of (in either instance) "unwanted"? We are sceptical. We have described these claims as tactical and opportunistic. At the very least, the Claimant's assertion that she was offended is, we think, substantially overstated. But that said, the word "unwanted" does not require much. We are prepared to assume (without deciding) that both comments were unwanted. Were they related to race? Manifestly, they were. We have found on balance that they included explicit references to the race of the persons referred to. Did they amount to harassment within the meaning of the 2010 Act, s26? In our judgment they clearly did not. They did not have the effect[2] of violating the Claimant's dignity and they did not create for her an environment satisfying any of the five powerful statutory adjectives employed in the section. She did not see the effect of the remarks as being such as to satisfy that language and if she had done we would have judged that perception entirely unreasonable. The comments complained of fall a very long way short of meeting the standard of gravity which is required to ground a legal complaint of harassment. Accordingly, the complaints of harassment fail.

42 Analysed by reference to direct discrimination, the requirements of which set more obstacles for the Claimant, the same result is inevitable. There are two closely-connected reasons for this. In the first place, given that, as we have found, the Claimant well understood that neither Mr Meads nor Mr Noé was disparaging Indians as a racial group and both were speaking negatively of small classes within that group for reasons that had nothing to do with race, she fails to clear even the low hurdle of establishing a 'detriment'. The reference to race was made purely to identify the objects of the remarks. In short, the conduct complained of was not offensive, she was not genuinely offended and she had no ground for feeling offended. Secondly and in any event, the actions impugned were, self-evidently, not 'because of' race. The comments were not made because the persons concerned were Indian. Nor because the Claimant was of Indian descent. And she was not less favourably treated than an imaginary comparator of different race in like circumstances would have been treated. Had she been, say, of Norwegian extraction and the lawyers been Norwegian, Mr Meads would, we have no doubt, have remarked to the effect that the Norwegian lawyers were a law unto themselves. There is, in short, no basis for a finding of racial discrimination.

43 The complaints of harassment and direct discrimination by reference to religion or belief were rightly not pursued. They were obviously unsustainable in the absence of anything whatsoever to connect the protected characteristic to either of the two events complained of.

*Christmas party booking - direct discrimination*

44 Here we start with the protected characteristic of religion or belief. This part of the case divides into two elements. As defined in the course of case management, the claim is about the choice of restaurant. Manifestly, it must fail on our primary findings. The Respondents (in the person of Mr Meads) did not know,

[2] The Claimant's case on harassment was confined to 'effect'. She did not suggest any malign 'purpose' behind either remark.

and had no reason to know, that the Claimant was a Hindu, let alone that she observed any special dietary practices or rules related to her faith. In the circumstances, the allegation of direct discrimination because of religion or belief is doomed: to state the obvious, you cannot discriminate on the ground of a characteristic of which you are unaware. Whether or not there was a genuine detriment, there was plainly no discrimination.

45 Mr Humphreys said that, given the way in which the issues were defined at the case management hearing, the analysis ends there. Making allowances for the fact that the Claimant is without legal representation it seems to us that we should take a wider view and admit a second element, namely a complaint based on the alleged 'failure' to remedy matters once it became apparent that she felt, or at least was claiming to feel, unable to attend a dinner at the restaurant which had been selected. The necessary logic of a claim so put is that the Respondents treated her less favourably than they would have treated someone in comparable circumstances who did not share her religious characteristic. It is perfectly plain to us that this claim is doomed no less than the first element. Mr Meads made considerable efforts in a very short space of time to find an alternative restaurant but was unsuccessful. He made the suggestion that she should take a similar approach to the Jewish diners, of making use of the offer of external catering. He also stated that he was open to other ideas. None was forthcoming. In the circumstances, it was necessary, and certainly reasonable, to leave the arrangements as they stood. To have done otherwise would have prejudiced the Respondents, who had a business to run, and put at risk the prospect of an enjoyable Christmas celebration for the other staff members. If the Claimant is genuinely aggrieved that the restaurant booking was retained, her sense of grievance, which seems to us to reflect a notably egocentric mentality, is, we think, plainly unjustified. There was no detriment. Further, there was in any event no discrimination. If the facts of the case had been replicated in a comparable case affecting someone of different faith (say a strictly observant Muslim who revealed at the eleventh hour that he could not attend a specialist lobster restaurant), or no faith (say a vegetarian who belatedly raised an objection to a restaurant whose menu was dominated by meat dishes) the idea that the company would have done more to accommodate such an employee than was done for the Claimant, or that Mr Meads's alleged 'failure' to make yet more efforts to accommodate her was 'because of' her Hindu faith, seems to us obviously fanciful.

46 Thus far we have examined this part of the case only by reference to direct discrimination on grounds of religion or belief. A parallel claim for direct race discrimination is before us and, although we do not recall the Claimant pursuing it with any enthusiasm, it was not withdrawn. We have no hesitation in dismissing it. As to the first element (making the booking), there was no possible reason for Mr Meads to suppose or suspect that the restaurant would not be to the Claimant's liking. In the circumstances, it is obvious that (a) he did not make the booking to disadvantage her and (b) the fact that she was of Indian descent played no part in his conscious or unconscious decision-making. Nor is there any basis for a race-based claim in respect of the second element (the 'failure' to cancel and re-book elsewhere). That amounted to no detriment (see above) and in any event was plainly nothing to do with the Claimant's race.

*Christmas party booking – indirect discrimination*

47 What was the relevant 'provision, criterion or practice' ('PCP')? We agree with Mr Humphreys that the formulation adopted at the case management stage does not sit easily with the scheme of s19(1) and (2). The 'one-off' choice of the steak restaurant was not of itself a PCP, which must be in the nature of a rule or standard applied uniformly, 'across the board'. But, he submitted, it may be seen as the result of the application of a PCP along the lines of –

> **… choosing the most appropriate restaurant, making all reasonable accommodations it could to include all employees.**

Sensibly, he raised no procedural challenge to the Tribunal treating the Claimant's case as if it had been framed in this way. We would favour a slightly looser PCP because we are not sure that the evidence establishes a policy or practice of insisting on the best or making every reasonable accommodation. Our version is:

> **… so far as reasonably practicable, selecting for office functions convenient and suitable venues likely to be acceptable to all employees.**

48 Did the PCP put persons with whom the Claimant shared her relevant personal characteristics at a particular disadvantage when compared with those who did not (s19(2)(b))? The question answers itself: it is plain and obvious that there is no arguable basis for alleging disadvantage for Hindus or persons of Indian descent (or any other group) resulting from the Respondents applying the PCP (or any similar formulation of it).

49 Equally obviously, the PCP caused no disadvantage to the Claimant individually (s19(2)(c)). It was a benign policy. The alleged disadvantage resulted not from the application of the policy but from the fact that the Respondents were (reasonably) ignorant of the Claimant's alleged inability to dine in a 'specialist' steak restaurant and when they were made aware of her objection, it was not practicable to cancel the booking and select another location.

50 Moreover, the PCP was in any event a proportionate means of achieving a legitimate aim (s19(2)(d)). That aim was to hold enjoyable, well-attended staff functions for the benefit of employees and the organisation as a whole.

51 In the circumstances the indirect discrimination claim is clearly untenable.

*Dismissal – direct discrimination*

52 There is nothing in the direct discrimination claims based on the dismissal. Quite simply, the evidence discloses no basis for a theory that the Claimant's race or her Hindu faith played any part in the decision to terminate her employment.

*Dismissal – victimisation*

53 Was there a 'protected act'? In our judgment the email of 16 November did amount to a protected act, but that of 15 November did not. We reject the submission of Mr Humphreys which sought to treat them as having equal legal

significance, his contention being that the decision to dismiss was because of the aggressive tone and unreasonable content of the later message and not because of the fact *per se* that the Claimant had done the protected acts (if such they were).[3] The earlier email was, in our view, not within the scope of the 2010 Act, s27(2)(b) or (d). It merely conveyed an inquiry as to whether the restaurant had been booked and a preference for something other than a steak restaurant. It did not say that the choice of a steak restaurant would exclude her on account of her faith. By contrast, the email of 16 November said in terms that the choice of restaurant had done exactly that. We think it fair to interpret it as implicitly alleging a breach of the 2010 Act (s27(2)(d)). If not, it amounts to an implicit assertion of the right not to be discriminated against under that Act and, as such, falls within the loose language of s27(2)(b).

54 It was plain from the frank evidence of Mr Meads that the email of 16 November precipitated the dismissal. On any view, it was at least *one* material reason for the decision to end the relationship. Mr Humphreys could not argue otherwise. That was not fatal to the Respondents' case. They were left with the defence that the dismissal was based not upon the content of the email of 16 November but upon its style and tone. We have reminded ourselves of the guidance of the EAT in the *Devonshires Solicitors* case, cited above. In our judgment this is not one of those cases (which, we suspect, arise quite rarely) in which there is room for a safe distinction between the message and the manner in which it is conveyed. We accept that the Claimant's quite unreasonable assertion that Mr Meads had not given her needs a second thought must have caused him particular offence and annoyance, but we are satisfied that the main impetus behind the decision to dismiss was the broader fact that she was again manifesting her tendency towards confrontational and divisive behaviour, now with the added, inflammatory and, to his mind, preposterous implication of unlawful discrimination, and he judged that there was every prospect that she would continue in a similar vein if retained. He saw her as having been responsible for discord and ill-feeling within the office over a sustained period, broken only by the brief improvement after the conversation of 25 September. And he and his senior colleagues understood that she had not yet accrued employment protection rights and so could safely be dismissed. These were the reasons for dismissal. The protected act was a significant element. No bad faith defence (under s27(3)) is pursued. Accordingly, the victimisation claim succeeds.

*Time*

55 We agree with Mr Humphreys that the complaints about the remark of Mr Meads made in July 2017 were presented out of time and the Tribunal has no jurisdiction to consider them. The comment was a 'one-off' incident: there is no question it being linked to other events to amount to 'conduct extending over a period' (s123(3)(a)). And the Claimant gave no evidence and advanced no case to justify the Tribunal exercising its discretion to apply a more generous limitation period than the primary three-month period. In any event, it would be idle to extend time to bring within the jurisdiction a claim which we have found to be without merit in any event.

[3] As we understood him, Mr Humphreys did not formally concede that the emails constituted protected acts, but he did submit (para 50) that the real issue was 'causation'.

*Chagger*

56 Although the victimisation claim has succeeded, it bears a modest value. The relevant detriment (dismissal) occasioned limited loss to the Claimant because we are satisfied that, had she not been dismissed when she was, her employment would have ended no later than three months after the date of dismissal without liability attaching to the Respondents. Accordingly, any compensation for loss of earnings would be limited to that period. Unfortunately, we think that she would not have been prepared to modify her behaviour and would have continued to be seen by Mr Meads and his senior colleagues as having a harmful effect on the atmosphere in the office and the morale of those around her (not least Mr Meads himself). We base this assessment on her evidence before us and the impression we were able to form of her. She refused to acknowledge that her conduct had caused any difficulty or that Mr Meads had spoken to her on 25 September (or on any other date) about her behaviour or manner. We are not qualified to judge whether she has subconsciously blotted out memories of events she would rather not recall, but we can say, with regret, that she struck us as severely lacking in self-awareness and constitutionally resistant to criticism. We are satisfied that these characteristics would have become all the more evident as time passed and, had she not left of her own volition, the Respondents would have decided in short order that her strengths were outweighed by her negative traits and that they could not afford to retain her any longer. A dismissal (on notice) on those grounds in late February 2018 would not have amounted to an act of discrimination or victimisation and she would not have accrued the right to complain of unfair dismissal.

**Outcome and Postscript**

57 For the reasons stated, the victimisation claim alone succeeds. We arrive at this result without reference to the burden of proof provisions, being well-equipped to reach conclusions on the evidence. Had we applied those provisions the outcome would have been the same.

58 Any compensation for loss of earnings and other benefits would be limited to three months' loss.

59 The claim form included what may have been intended as a money claim based on an alleged right to a bonus. No such claim was identified by EJ Clark as being pursued and the Claimant did not argue otherwise before us. We have little doubt that she was right since it seems that she was dismissed before any theoretical entitlement to a bonus could have arisen.

60 We hope that the parties will enter into discussions without delay to resolve the narrow remedies issues which remain. The Tribunal will allow them 28 days from the date on which this judgment is sent out. If it does not receive news by then that terms have been agreed, steps will be taken to list a remedies hearing with one day allowed (although a half day is likely to be ample). It may be convenient to set up a telephone hearing to agree listing arrangements and simple directions.

61 We would not wish to leave this case without observing that the parties would do well to learn lessons from this unfortunate dispute. The Claimant should reflect on how her career might benefit from an improvement in her style and manner of communication in the workplace. For their part, the Respondents' witnesses gave troubling evidence about the very limited extent to which their staff and managers are made aware of their obligations under the equality legislation. They should give urgent consideration to the obvious need to improve practices and in particular training regimes in order to heighten awareness across management and the workforce generally.

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EMPLOYMENT JUDGE SNELSON
4 January 2019

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

**..... for Office of the Tribunals**