



EMPLOYMENT TRIBUNALS

Claimant: Miss S Decoteau

Respondent: Fired Earth Limited

CERTIFICATE OF CORRECTION Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Reserved Judgment sent to the parties on 24 January 2019 is corrected to show the correct spelling of:

1. Sophie Sharratt

At paragraphs 18 - line 3 paragraph 21 - line 2, paragraph 27 - line 1, paragraph 36 lines - 4, 5 and 6, paragraph 37 - line 1, paragraph 43 – line 1 and paragraph 47 – line 9.

2. Georgia Kane-Fraser

At paragraph 38 – line 2 and paragraph 39 – line 4.

3. Ms Douglass

At paragraphs 3 – line 2 and paragraph 47 – lines 3 and 9

Employment Judge Ross

Date 13 February 2019

SENT TO THE PARTIES ON

19 February 2019
FOR THE TRIBUNAL OFFICE

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



EMPLOYMENT TRIBUNALS

Claimant: Miss S Decoteau

Respondent: Fired Earth Limited

HELD AT: Manchester

ON: 3 December 2018
4 December 2018
(In Chambers)

BEFORE: Employment Judge Ross
Ms L Atkinson
Ms E Cadbury

REPRESENTATION:

Claimant: Miss J. Wilson-Theaker

Respondents: Ms M Burgess, Head of Human Resources

RESERVED JUDGMENT

It is the unanimous judgement of the Tribunal that :-

1. In the treatment of the claimant's request for annual leave, the respondent discriminated against the claimant pursuant to s13 Equality Act 2010

2. In leaving the claimant without support at Hale Barns in January 2018 the respondent discriminated against the claimant pursuant to s13 Equality Act 2010

3. By constructively dismissing the claimant the respondent discriminated against the claimant pursuant to s13 Equality Act 2010

4. The respondent did not victimise the claimant following a grievance in December, pursuant to s.27 Equality Act 2010

REASONS

1. The claimant was employed by the respondent from 13 February 2017 until she was resigned on 19 January 2018.
2. She brought claims for direct race discrimination and victimisation. The claims were clearly identified at a Case Management Hearing before Employment Judge Franey. (Bundle at p51). At the start of the hearing before us the claimant's direct race discrimination at 2b of the Case Management Order "in the failure to allow the claimant to move to the Sycamore Farm Outlet" was withdrawn". (That claim had been subject to a Deposit Order at a previous hearing in relation to the comparator).
3. We heard from the claimant. For the respondent we heard from Mr Watkins Regional Manager and Ms D Douglass an HR Manager. Ms **Douglass** is employed by AGA Range Master but supports several different businesses across the Middleby Group. The respondent is not a business with which she had been involved prior to this case.

Facts

4. We find the following facts.
5. The respondent is a home décor business selling tiles paints and wallpaper as well as bathroom furniture. The respondent employs 267 employees across 52 sites in the UK.
6. The claimant was employed by the respondent as a Sales Consultant. She was based at the respondent's showroom in Hale Barns, near Altrincham in Greater Manchester. Hale Barns is a small format store open six days per week in a newly established shopping centre where there are five other units of mixed use. The footfall in this store is very low and the annual expected turnover is circa £150,000.
7. The other unit nearby is Sycamore Farm. It is a much larger store open seven days a week with an Aga studio within it. This is a stand-alone store close to Knutsford where footfall is consistently higher. The expected annual turnover of this store is circa £500,000.
8. We find that whilst working at the Hale Barns showroom the claimant had two superiors David Hampshire and Rachel Cunliffe (page 14). We find Mr Hampshire left in June or July. We find by that stage Rachel Cunliffe was no longer employed at the Hale Barns store. We find that in early December 2017 the claimant was

working at the Hale Barns store with Sophie Sharratt, a Team Leader. In Mid November 2017 Georgia Kane-Fraser was promoted from Team Leader at Sycamore Farm to Dual Store Manager and became responsible for both Sycamore Farm and Hale Barns.

9. We find that the respondent had advertised a vacancy for a Sales Consultant at the Sycamore Farm Unit from May 2017 see page 21. We find that in or around October 2017 the claimant discussed the possibility of transferring to the Sycamore Farm Showroom with Georgia Kane-Fraser and Luke Watkins. (Mr Watkins had been appointed mid October 2017 as General Manager. He was responsible for approximately eleven stores across the North of England and Wales).

10. Following that discussion, the claimant submitted an application for the vacancy at Sycamore Farm. See page 22 to 25. She never heard anything further from the respondent in relation to that application.

11. We find that the claimant was advised in her discussion with Georgia Kane-Fraser that January would be the best time to transfer and it was anticipated that a transfer would take place at that time.

12. We find the reason why the claimant wanted to transfer to Sycamore Farm was because it was a busier showroom and she considered there would be greater opportunities there.

13. We find that there was a conversation between the claimant and Sophie Sharratt some time before 28 September 2017 when Ms Sharratt told the claimant she may want to take Tuesday 2 January as a holiday as she always took 3 January off due to family circumstances. (There is no dispute the family circumstances referred to is the anniversary of the death of Ms Sharratt's father). The claimant understood this to be 3 January.

14. We find that the claimant asked Ms Sharratt on Thursday 28 September if she still wanted to take 2 January as holiday and whether she had submitted a holiday form. Ms Sharratt told her she was unsure about that date and may submit the form later.

15. We find and it is not disputed that apart from the disputed holiday the claimant had obtained authority for holidays verbally from her managers. Mr Watkins confirmed this practice. He said although officially a holiday form should be completed in reality holidays were often authorised verbally by managers.

16. We find that the claimant spoke to her manager Georgia Kane-Fraser on Thursday 7 December 2017 for permission to take Tuesday 2 January as holiday. We find Ms Kane-Fraser verbally approved the claimant's holiday and asked her to submit a holiday form. We find that Ms Kane-Fraser emailed the form to the claimant later that day and the claimant completed it and returned it the same day, see pages 10 to 12 (form sent at 15.41 and returned at 16.24).

17. There was a dispute in evidence as to who had asked first for 2 January as a holiday. We find it is implicit that the claimant had asked first. We have found that

her version of events, namely that Ms Kane-Fraser authorised her holiday is correct. If Ms Sharratt had earlier the same day or just prior to that asked for 2 January off, Ms Kane-Fraser would not have then immediately authorised the claimant and asked her to submit a form.

18. We also find there is some confusion on the part of the respondent about the leave of Ms Sharratt. The rota at page 16 of the bundle shows that Ms Sharratt (Sophie) had the 3 January approved as a holiday. The rota shows **Sophie** Sharratt as on a rota day off on 2 January (not holiday).

19. We find that if Ms Sharratt had sought approval for her holiday on 2 January it would have shown on the rota.

20. There is no dispute that in terms of holiday entitlement the respondent operates a first come first served policy.

21. There is also no dispute that the rota, see page 16 of the bundle was produced by both Ms **Sophie** Sharratt and Ms Georgia Kane-Fraser. Ms Kane-Fraser said it was the first rota she became involved with.

22. There is no dispute that both the claimant and Ms Sharratt worked five days a week. The store was closed on Sunday and they had one other rostered day off each week. That day could vary. We also find that the day during the week when one of the employees at the Hale Barnes was rostered off the working employee was often lone working.

23. There was no dispute that the respondent's Manchester showroom closed in December 2017. The rota at page 16 shows one of the Manchester employees "Heather" as listed to work in the Hale Barns showroom. Mr Watkin told us that in fact Heather was made redundant. She did not attend regularly to work at the Hale Barns showroom.

24. In fact, we find based on the evidence of Mr Watkins that the employee Heather did not, as he had hoped, attend to work as the rota suggests at page 16 at Hale Barns.

25. We find that on 8 December Sophie Sharratt confirmed to the claimant that after speaking to Georgia on Thursday 7, Georgia would work at the Hale Barns showroom on Tuesday 2 January as Sophie had requested the day off.

26. We find that on Tuesday 12 December Georgia completed the January rota with Sophie marked as "off" with the claimant marked as "in" on Tuesday 2 January despite her prior approval of the claimant's holiday request and a suggestion that Georgia would cover.

27. We find that the rota on page 16 for January only shows **Sophie** Sharratt to be working up to 9 January 2018. We find this is because Ms Sharratt had given a month's notice that she was leaving the respondent on 12 December 2018.

28. We find on 12 December 2018 the claimant was shocked to find that she had been placed as “in” on the rota when her holiday leave for 2 January had previously been approved.

29. We find that the claimant objected verbally to Georgia Kane-Fraser who informed her that she would ask other team members at Sycamore Farm if they could cover the Hale Barns showroom on 2 January.

30. We find on 20 December the claimant had a telephone conversation and asked Ms Kane-Fraser if she had managed to arrange cover for the showroom and highlighted that due to her verbal confirmation on Thursday 7 December the claimant had already made plans and would be unable to work. We find Ms Kane-Fraser told the claimant that she had not obtained cover. She informed the claimant she would need to attend and could not take leave. She told the claimant that she will update her manager Mr Watkins.

31. We find later that day, having spoken to Mr Watkins, Ms Kane-Fraser told the claimant that she could either take 2nd January as an unpaid day off or she could work.

32. We find the following day 21 December 2017 the claimant sent a grievance about her holiday on 2 January to Lisa Cadd at the respondent’s HR, see pages 13 to 14. There was no dispute that the same day Maxine Burgess advised the claimant that her request for leave on 2 January had been granted, see page 13. The way this was resolved was by the showroom at Hale Barns being closed on 2 January 2018.

33. We find that on 27 December the claimant opened another rota which appeared to show her working on 2 January. She contacted Mr Watkins to ask him if that rota overruled the conversation and the decision about annual leave being granted, see page 17.

34. Mr Watkins responded promptly stating he was having difficulty opening the Excel document which contained the rota but he suspected it probably showed the claimant working on 2 January. He stated, “my initial thoughts are that it is an oversight on Georgia’s part as I did discuss the changes with her after speaking with Maxine and yourself”. He asked the claimant to leave it with him. There is no dispute that the claimant did take 2 January as annual leave.

35. Mr Watkins also informed the claimant that Ms Kane-Fraser would contact her to “clear the air”. In cross examination Mr Watkins confirmed that he had suggested this. There is no dispute that such a meeting never took place. We find there was a team meeting on 4 January at Hale Barns. In attendance were the claimant, Sophie Sharratt, Mr Watkins and Georgia Kane-Fraser.

36. We find that there was routine discussion of targets etc at that meeting. However, we also find that at that meeting Mr Watkins indicated to the team that Ms Sharratt was no longer leaving the business: “I met with the teams on 4 January and at that meeting I raised the prospect that **Sophie** wasn’t going to leave because I wanted her to stay. I said at that point I didn’t know in what capacity **Sophie** would

be working". We find between 7 and 9 January that **Sophie** Sharratt formally retracted her resignation, see emails page 27 to 29.

37. We find on 9 January 2018 **Sophie** Sharratt transferred to Sycamore Farm showroom and from that date onwards the claimant worked usually alone at Hale Barns. We find that the claimant herself resigned on 19 January 2018 giving notice to the 16 February 2018- see page 30. Her resignation was accepted on 22 January. The claimant became unfit for work by reason of stress at work on 5 February 2018. She did not return to work after that date.

38. We find that on 13 January 2018 there was a meeting which we find took place at Sycamore Farm where Georgia Kane-**Fraser**, Ms Sharratt and Mr Watkins were in attendance. Mr Watkins did not dispute that at that meeting they discussed the development of Hale Barns showroom. The claimant was not invited.

39. We find it surprising that the claimant was left alone to work at the Hale Barns showroom after Sophie Sharratt had transferred to Sycamore Farm. By that stage Sycamore Farm must have been well staffed because it had the addition of a Team Leader in Ms Sharratt. Despite this, Georgia Kane-**Fraser** did not visit the Hale Barns store on any additional occasions neither was any other member of staff seconded.

40. We also find there was no discussion with the claimant about the lone working at Hale Barns. There was no lone working policy. We find there was no discussion with the claimant about any advertisements for new staff at Hale Barns, nor at what level. Surprisingly there were no advertisements in the bundle and it was not clear from Mr Watkins evidence whether the respondent advertised for a Sales Consultant or a Team Leader at Hale Barns.

41. Mr Watkins told us that the Hale Barns showroom was closed when the claimant was absent on sick leave and in March 2018 they recruited a member of staff.

42. We find there were never any formal development plans for the claimant to train as a Designer. We find there was no more than a conversation with no key dates or targets between the claimant and Mr Watkins early after his appointment as Regional Manager.

43. We find that the Team Leader position at Sycamore Farm to which Sophie Sharratt was transferred was never advertised. We find therefore there was no opportunity for others within the company to apply for that position. We find there was no indication to the claimant whether or not a Team Leader position was going to be advertised for Hale Barns after Ms Sharratt had transferred to Sycamore Farm.

44. We find there was a complete lack of clarity as to how the Sycamore Farm showroom and Hale Barns showroom worked together and in particular the role of Georgia Kane-**Fraser**.

45. We find it is not clear exactly when the claimant was told that Ms Sharratt had been appointed to the Team Leader position at Sycamore Farm but we find it must have been by 9 January 2018 which was when Ms Sharratt commenced working at Sycamore Farm.

46. The claimant's resignation letter is a brief letter, see page 30, but we find the true reason for the claimant's resignation is as set out in her more detailed grievance at pages 40 to 45. (Two letters).

47. There is no dispute that the claimant did not engage with the respondent's investigation of her grievance and neither did she appeal the outcome. There is no dispute that the investigating officer Ms **Douglass** interviewed Mr Watkins and Ms Kane-Fraser. We find it is surprising she agreed she did not seek any documentation for example she did not ask for adverts in relation to jobs, nor did she look at the rotas or any request for leave. She confirmed that she had not received any training in equal opportunities and had not read the equal opportunity policy. Mr Watkin also confirmed that at the relevant time he had not received any training in equal opportunities. We also find that Ms **Douglass** did not interview **Sophie** Sharratt whom we find to be a key witness, particularly in relation to the issue about holiday on 2 January 2018.

The issues.

Dismissal.

1. Should the claimant's resignation be construed as a dismissal under section 39(7) Equality Act 2010 in that the respondent breached the implied obligation of trust and confidence by its actions as set out in paragraphs 2(a) – (c) below, and such breach was a reason for the claimant's resignation?

Direct race discrimination Section 13 Equality Act 2010

2. Are the facts such that the Tribunal could conclude that because of race the respondent treated the claimant less favourably than it treated her comparator Sophie Sharratt in any or all of the following alleged respects:
 - (a) In the treatment of the claimant's request for annual leave on 2nd January 2018
 - (b) In the failure to allow the claimant to move to the Sycamore Farm outlet;(This allegation was withdrawn.)
 - (c) In leaving the claimant isolated, ostracised and without support at Hale Barns in January 2018, and
 - (d) If dismissal is established, by dismissing the claimant?
3. If so, can the respondent nevertheless show that that it did not contravene section 13?

Victimisation Section 27 Equality Act 2010

Protected Act?

4. Was the claimant's grievance of 21st December 2017 "a protected act" under Section 27(2)(d) in that it made an allegation that a person had contravened the Act?

Detriment

5. If so, are the facts such that the Tribunal could conclude that the respondent subjected the claimant to a detriment because of that protected act in any or all of the following alleged respondents:

- (a) In the failure to allow the claimant to move to the Sycamore Farm outlet;
- (b) In leaving the claimant isolated, ostracised and without support at Hale Barns in January 2018, and
- (c) If dismissal is established, by dismissing the claimant?

The Law

48. We refer to s13 and s 27 Equality Act 2010. S.136 Equality Act is relevant. It concerns to the shifting burden of proof. Section 23 Equality Act 2010 is relevant in relation to a comparator.

49. We remind ourselves of the principles in Igen Limited & others v Wong [2005] IRLR 258; Laing v Manchester City Council & others [2006] IRLR 748; Madarassy v Normura International PLC [2007] IRLR 246.

50. We also reminded ourselves that motive is not necessary for a finding of direct discrimination and also that we must consider the actions of the alleged discriminator, reminding ourselves that discrimination can be unconscious. See Nagarajan London Regional Transport 1999 ICR 877

Applying the law to the facts

51. We turn to the claimant's claim of direct discrimination.

52. We considered the first allegation.

53. Are there facts such that the Tribunal could conclude that because of race the respondent treated the claimant less favourably than it treated her comparator Sophie Sharratt in the treatment of the claimant's request for annual leave on 2 January 2018?

54. We rely on our finding of fact that the claimant followed company procedure in requesting annual leave on 2 January 2018 from her line manager Georgia Kane-

Fraser and that request was granted. Ms Kane-Fraser then required the claimant to submit a written form and then despite having granted the request later noted the claimant as being in work on 2 January on the rota. When the claimant raised an objection to the withdrawal of the permission for her holiday on 2 January, she was told by Area Manager Luke Watkins that she could either work or have the leave unpaid. She was finally told by HR that the store would close and her leave request would be honoured. However, as late as 27 December Ms Kane-Fraser had issued another rota showing the claimant at work and the claimant was still seeking reassurance from Mr Watkins that the decision to grant her leave on 2 January still stood.

55. In its findings of fact, the Tribunal notes that the comparator Sophie Sharratt sought and was granted leave for 3 January 2018. The position with regard to Ms Sharratt's request for the 2 January was different. The 2 January was shown as a non-working day (not annual leave) for Ms Sharratt on the rota of 12 December 2018 completed by Ms Sharratt and Ms Kane-Fraser. We find that when this matter was investigated by Ms Douglass that this distinction between annual leave and non-working day was not appreciated. At the investigation stage there was reference to "lieu day" for Sophie Sharratt

56. Accordingly, the Tribunal finds given this factual scenario Ms Sharratt is not an appropriate comparator because she was not in the same circumstances as the claimant in relation to the leave request for 2 January. The correct comparator is a hypothetical comparator as set out in the well-known case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337. We find the appropriate comparator for the meaning of s23(1) Equality Act 2010 is a hypothetical white employee who followed company procedure to request 2 January as annual leave.

57. The Tribunal is not satisfied that a hypothetical comparator would have been treated in the same way as the claimant. In reaching this finding the Tribunal has taken into account the fact the claimant had followed company procedure.

58. So far as the burden of proof is concerned, a difference in treatment and a difference in race is not sufficient, there must be "something more". The Tribunal did not hear from Ms Kane-Fraser. The Tribunal has taken note of the fact that although the respondent has an equal opportunities policy the manager Mr Watkins had not received any training in it at the relevant time and neither had the HR Officer who investigated this matter. The Tribunal notes the claimant is the only non-white employee across 11 stores managed by Mr Watkins.

59. The Tribunal was unimpressed with Mr Watkin's evidence. He told the Investigation Officer that he was not aware that the claimant had applied for a role at Sycamore Farm, see page 53. It is undisputed that she had and documentary evidence of this is in the bundle. We find it seems implausible that as recently appointed Area Manager who had been in post from mid-October 2017, that he was unaware the claimant had applied for an advertised role in a store for which he was responsible, on 23 December 2017. We have taken into account the respondent has a relatively small HR department and that it was at a meeting with himself, the

claimant and Ms Kane-Fraser where such an application was suggested to the claimant.

60. We also find Mr Watkins to be unreliable because he told the Investigation Officer that the Team Leader role at Sycamore Farm (to which Sophie Sharratt was appointed) was advertised and by the time of this Tribunal he conceded that it was never advertised.

61. For these reasons the Tribunal finds the burden of proof has shifted to the respondent.

62. We turn to consider any non-discriminatory explanation for the way the respondent treated the claimant's leave application for 2 Jan.

63. The respondent has no clear non-discriminatory explanation as to why Georgia Kane-Fraser, who did not attend the Tribunal, granted the claimant her leave request verbally in accordance with usual practice and then retracted it by issuing a rota on 12 December showing the claimant had to work. There was no clear explanation why Mr Watkins required the claimant to take the leave as unpaid or to work when her leave request had already been granted but later withdrawn by Miss Kane-Fraser.

64. Accordingly, the burden of proof having shifted to the respondent and in the absence of any satisfactory explanation from the respondent, the claimant's claim for direct race discrimination in relation to the treatment of the claimant's request for annual leave on 2 January 2018 succeeds.

65. The next allegation is "in leaving the claimant isolated, ostracised and without support at Hale Barns in January 2018".

66. The claimant was not informed clearly of what was happening at Hale Barns. The claimant had submitted an application to transfer to Sycamore Farm in November 2017. She was never informed what had happened to that application. Although we find she hoped to transfer in January 2018, as that is what she was told by Ms Kane-Fraser, we accept her evidence that she hoped it would be some time in the New Year of 2018 and therefore did not raise the matter when she received the rota showing that she was working at Hale Barns in January 2018.

67. The first time the claimant realised that the opportunity for her to move to Sycamore Farm had disappeared was at the time she discovered Sophie Sharratt was transferred to a Team Leader role at Sycamore Farm. That role of Team Leader was never advertised. We find Ms Sharratt was simply transferred into the role by Mr Watkins when he persuaded her to retract her resignation.

68. We rely on our finding that no process appears to have been adopted in relation to the application the claimant made for a position which was advertised on the respondent's website.

69. We found Mr Watkins never explained to the claimant what was happening in terms of recruitment for the Hale Barns showroom once Ms Sharratt had moved to

Sycamore Farm. We do not accept his evidence that he made it clear that there was going to be some recruitment at Hale Barnes to replace Ms Sharratt. For the reasons we have given above we have found Mr Watkins to be an unconvincing witness.

70. The claimant told us that Mr Watkins discussed her possible transfer to Sycamore Farm with her and Georgia Kane-Fraser but he denied it. We prefer her recollection. It is consistent with her application form.

71. We find that from 9 January 2018 the claimant worked alone at the store in Hale Barns until she went sick on 5 February 2018. We find that the respondent did not have a lone working policy. We find that although prior to the transfer of Ms Sharratt to Sycamore Farm the claimant had worked one day a week on her own, this is substantially different from working every day alone.

72. The Tribunal finds the claimant did not have support. We find she tried to contact Luke Watkins by telephone without luck.

73. We find that Georgia Kane-Fraser despite being a Dual Showroom Manager appears to have visited Hale Barns very infrequently. The Tribunal finds this particularly puzzling because she stated the reason for this was that she could not change the rota. (See her investigation meeting with Ms Douglass). The Tribunal finds this surprising. Normally a senior manager, particularly where another member of staff more junior to her, namely Ms Sherratt, has come to a store where the manager is based, the manager is then able to alter the rota and attend herself at the other venue. There was an implicit criticism of Ms Kane-Fraser we find by Mr Watkins where he said at page 54 "Georgia should have been working across both showrooms".

74. We find the only team meeting to which the claimant was invited was a meeting on 4 January before Ms Sharratt moved across to Sycamore Farm. We find there was a meeting on 13 January at Sycamore Farm which Mr Watkins agreed included discussion about the future of Hale Barns. The claimant was not invited to that meeting. In attendance were Mr Watkins, Ms Kane-Fraser and Ms Sharratt.

75. We find Ms Kane-Fraser's evidence to the Investigation Officer in January "I couldn't go over as much as I would have liked as the rotas were done in advance. Now I do two or three days a week in Hale" to be surprising.

76. We find Ms Kane-Fraser is factually incorrect. When she was asked by the Investigation Officer was the claimant ever excluded for any meetings she responded, "there weren't any for her to participate in". We find this is factually incorrect because there was a meeting relevant to the claimant on 13 January which the respondent chose to hold at Sycamore Farm and not invite the claimant.

77. We find it is factually correct that the claimant was isolated and without support at Hale Barns in January 2018. We find she was a lone worker with little support from her manager Georgia Kane-Fraser who was not physically present and she not invited to a relevant meeting on 13 January.

78. The Tribunal finds ostracised is a rather strong word although the failure to invite her to the meeting on 13 January when it was about the Hale Barns store suggests an element of ostracisation.

79. The Tribunal turns to consider whether there is a “something more” to shift the burden of proof. The Tribunal relies on the fact that the claimant applied for an advertised Sales Consultant role and was never informed of the outcome of her application and no process was followed in relation to it. The Tribunal relies on the fact that when Ms Sharratt said she was leaving and the respondent discovered she did not have a job to go to the respondent placed Ms Sharratt in a Team Leader role at Sycamore Farm which had not previously been advertised and indeed was never advertised. The result of this action meant that the sales role for which the claimant had applied was simply subsumed into the Team Manager role. The Tribunal relies on this as something from which an adverse inference could be drawn together with the fact that Mr Watkins had not attended any equal opportunities training. The Tribunal reminds itself that discriminatory treatment may be unconscious.

80. The Tribunal also relies on the negative comments made by Mr Watkins to the Investigating Officer. Mr Watkins suggests that the claimant’s decision to “always go to HR first seemed odd and unhelpful in retaining a good team spirit” to be a negative comment. Firstly, there is hyperbole in the comment. At the relevant time the claimant only went once to HR i.e. to ensure a holiday which had initially been authorised was granted to her. Mr Watkins in cross examination struggled to accept that “odd and unhelpful” is a negative comment.

81. The Tribunal is troubled by his confident answer to the Investigating Officer that the Team Leader role at Sycamore Farm was “advertised on the website which can be accessed by all. We also use resource bank to advertise externally. Applications are sent directly to the manager. When Georgia moved into the manager’s position the Team Leader role would have been advertised”.

82. He conceded at the Tribunal that this was factually incorrect. The Tribunal is not satisfied by the suggestion of the Investigating Officer that the reason for this inaccuracy was that Mr Watkins did not have the relevant documentation. The Tribunal notes he said elsewhere in the same statement to the Investigating Officer “the Team Leader role at Sycamore Farm was actively being recruited for and was advertised in the usual way. Liahna had posted the role”. This is inaccurate.

83. Having found the burden of proof has shifted to the respondent the Tribunal is not satisfied the respondent has provided a non-discriminatory explanation as to why the claimant was left to lone work during January 2018 without the support of manager Georgia Kane-Fraser

84. We did not hear from Georgia Kane-Fraser so we have no explanation from her as to why she did not organise the rotas so she could attend to assist the claimant at Hale Barns nor her explanation as to why the meeting on 13 Jan was held at Sycamore Farm and the claimant not invited to it.

85. Mr Watkins was unclear in his evidence as to why the claimant was left isolated and he implicitly blamed Georgia Kane-Fraser: “Georgia should have been across two stores”. We find this is factually correct. She was a Dual Showroom Manager. In the absence of a non-discriminatory explanation we find leaving the claimant isolated and without support at Hale Barns in January 2018 was an act of direct race discrimination.

Allegation d, if dismissal is established by dismissing the claimant?

86. We must ask ourselves has the respondent breached the implied obligation of trust and confidence by its actions at 2a and c. We find it is inevitable that actions of direct discrimination amount to a breach of the implied duty of trust and confidence. We turn to the next question what was the reason for the claimant leaving? Although the claimant’s resignation letter on 19 January does not specifically mention discrimination we accept the claimant’s evidence that the real reason she left was because of the discriminatory treatment of her by the respondent and that is clearly set out in the detailed letters of grievance she submitted after her employment ended, see pages 40 to 45 of the bundle. Accordingly, we find the claimant was constructively dismissed and her constructive dismissal was an act of race discrimination.

87. We turn to the claimant’s claim for victimisation. The first question is: was the claimant’s grievance of the 21 December 2017 a “protected act under Section 27(2)(d) in that it made an allegation that a person had contravened the Act?”.

88. We find that the claimant’s grievance of 21 December 2017 was not a protected act. Nowhere in the grievance does the claimant refer to discrimination. She deals with the factual scenario and then states I feel I am being treated “less favourably than Sophie Sharratt who has verbally requested to take Tuesday 2nd January 2018 as a day off”. She talks about the mishandling of the situation and then says that the situation is “unequal and unfair”. There is no other evidence anywhere contemporaneously to suggest that the claimant intended her letter of grievance of 20 December to be a complaint about race discrimination.

89. The claimant is an intelligent young woman. According to her CV a degree in Fine Art from the University of London. She is articulate. Though we accept she is not a lawyer we find if she wished to complain of race discrimination in her letter of grievance she could have clearly articulated it to the respondent. We find it is not possible for the respondent to glean from that letter that it is a complaint of race discrimination.

90. The grievance was sent on 20 December to the respondent’s HR department to a person called Lisa Cadd. We did not hear from Ms Cadd. We find that the grievance was resolved the same day by Ms Burgess. Ms Burgess did attend the Tribunal but as a representative and not as a witness and we did not hear evidence from her. Although we heard evidence that the claimant was the only black employee in the staff for whom Mr Watkins was responsible, we did not hear any evidence that the respondent’s HR managers namely Lisa Gadd and Maxine

Burgess who received or acted on the grievance letter of 21 December 2017 knew of the claimant's race.

91. Accordingly, given that it is not apparent from the face of the letter or from the context nor is there evidence that within the meaning of Section 27(1)(b) the respondent believed the claimant had done or may do a protected act, the claim for victimisation fails at this stage.

92. For the sake of completeness, we have gone on to consider the issue of detriment. In terms of allegations B and C we find both of those matters are detriments relying on our findings above. So far as allegation A is concerned we find the failure to allow the claimant to move to the Sycamore Farm outlet would have amounted to a detriment. We rely on the claimant's evidence that the Sycamore Farm showroom was a more vibrant outlet where there are greater opportunities to make sales and for training. This was supported by the evidence of the respondent that there was a much higher turnover at the Sycamore Farm outlet. The Tribunal does not accept the respondent's evidence that there was no detriment to the claimant because there were opportunities for her at the Hale Barns showroom to become a designer whereas there was already a designer in place at the Sycamore Farm outlet. The Tribunal is not satisfied there were any opportunities in reality for the claimant at the Hale Barns showroom as a Designer. We find there was no more than a brief discussion with Mr Watkins on one occasion about potential development and it was no more than that, a discussion about possibilities. We are not satisfied there were any real opportunities for the claimant at Hale Barns which was a very quiet store.

93. However as we have stated above the claim for victimisation fails because there was no protected act.

94. The case will proceed to a remedy hearing on 5 February 2019 at 9.45 am for 10.00 am at Alexandra House, 14 – 22 The Parsonage, Manchester, M3 2JA.

Employment Judge Ross

Date 18 January 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.24 January 2019

FOR THE TRIBUNAL OFFICE

[JE]