



EMPLOYMENT TRIBUNALS

Claimant: Ms K Dean
Respondent: Tamp 'n' Swirl Ltd
Heard at: Leeds **On:** 9, 10, 11 January 2019
Before: Employment Judge Davies
Ms N Downey
Mr M Elwen

Representation

Claimant: In person
Respondent: Mrs S Cakali (solicitor)

JUDGMENT having been sent to the parties on 11 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

- 1.1 These are claims of direct race discrimination, harassment related to race and victimisation brought by the Claimant, Ms K Dean, against her former employer Tamp 'n' Swirl Ltd. The Claimant has represented herself with ability and the Respondent has been represented by Mrs Cakali, solicitor.
- 1.2 The Tribunal was presented with an agreed file of documents. We admitted a further document in evidence on the second day of the hearing. It was a copy of some handwritten notes to which the Claimant had referred in her witness statement, but which had not been disclosed. The Claimant said that these notes were made on the day of her dismissal. They were plainly relevant. The Claimant is unrepresented. The Respondent had made no application for disclosure of the notes, despite receiving the Claimant's witness statement in November. The notes were, if accepted, capable of supporting the Claimant's case. That would have been so if they had been disclosed in a timely fashion. The Tribunal was concerned with whether any unfairness or prejudice would arise from admitting them in evidence at this late stage. We decided that it would not. It was therefore in the interests of justice to admit the notes.
- 1.3 The Tribunal heard evidence from the Claimant on her own behalf. For the Respondent we heard from Mrs K Rawling, Area Manager; Mrs V Reece, Accounts Officer; and Mr S Patel, Managing Director.

Issues

- 2.1 The issues were as set out in the case management order by Employment Judge Wedderspoon on 29 August 2018.

Findings of fact

- 3.1 The Respondent company operates 11 Costa Coffee franchises in Yorkshire, including one at Greengates, Shipley. Its Head Office happens to be above that store. It has approximately 100 staff, around 88% of whom are white. The Managing Director is Mr Patel. The Area Manager is Mrs Rawling. The store manager at Greengates is Ms Pullen. Mrs Reece, the Accounts Officer, was based in the head office.
- 3.2 The Claimant worked as a barista at the Greengates store in 2016 but left to pursue an opportunity as a dancer. She re-joined in August 2017. Although she applied to a different store on that occasion, her former manager at Greengates found out about her application and contacted her to offer her a place at the Greengates store. She was a valued member of staff, trusted with opening and closing the store. No issue had ever been raised about her conduct or performance. On the contrary she received extremely positive feedback from Ms Pullen and Mrs Rawling.
- 3.3 The Claimant's contract was for five hours per week, but she regularly exceeded that. Alongside her work for the Respondent, the Claimant also worked as a self-employed dance teacher. In March 2018 the Claimant realised that she was on the wrong tax code. She was paying basic rate tax on all her earnings from the Respondent without the benefit of her personal allowance. This had arisen because she had incorrectly ticked a box when she re-joined the Respondent indicating that she had other employment, when in fact her other work was self-employment.
- 3.4 It was the Claimant's father who realised she was on the wrong tax code. He prompted her to telephone the local tax office and having done so she went to speak to Mrs Reece. That led to a series of conversations between them, culminating in what has been referred to as an altercation on 23 March 2018, about which the Tribunal heard evidence. The Claimant's version of events and that of Mrs Reece were different. In general terms, the Tribunal preferred the Claimant's version of events for the following reasons.
- 3.4.1 The Claimant set out a detailed account in her claim form and witness statement. Her oral evidence was clear and consistent. There were one or two matters to which her witness statement did not refer, for example an occasion when she contacted the local tax office and then passed the phone to Mrs Reece to speak to them directly. However, she immediately accepted in cross-examination that this had taken place and was able straightaway to explain where in the chronology that conversation fell. In her witness statement the Claimant accepted that on 23 March 2018 she had raised her own voice, though she said that this was in response to Mrs Reece raising hers. The Claimant accepted that she had been upset and emotional during a number of the conversations. She said that she was frustrated because she was repeatedly being told one thing by the tax office and another by Mrs Reece. She was caught in the middle.
- 3.4.2 In her witness statement, Mrs Reece did not suggest that she had acted at all inappropriately. She accused the Claimant of behaving rudely,

patronisingly and aggressively. In her oral evidence her position moved in certain respects and the Tribunal considered that in general it was a shift towards the Claimant's account. For example: (1) In her witness statement Mrs Reece said that on one occasion the Claimant had come up to the office holding a mobile phone, told her that she had someone from HMRC on the phone and asked her to speak with him. Because she wanted to assist the Claimant she agreed to do so. In cross-examination, she eventually accepted that it had been her suggestion that the Claimant call HMRC and ask them to speak directly to her. (2) In her witness statement the Claimant said that Mrs Reece had told her that the tax office was "lying" to her. Mrs Reece did not refer to that in her witness statement and indeed it was put to the Claimant in cross-examination that this had not been said. However, in her own cross-examination Mrs Reece accepted that she had told the Claimant that the tax office were lying to her. (3) In her witness statement the Claimant said that after 23 March 2018 she did her best to work professionally with Mrs Reece, carrying on as if nothing negative had taken place. She said that she tried to ask about Mrs Reece's then forthcoming wedding but was ignored, that Mrs Reece ignored her when she said hello and made her a coffee and that she felt Mrs Reece was being deliberately rude and antagonistic towards her. It became clear from Mrs Reece's oral evidence that she had agreed with Mrs Rawling that she would keep her conversations with the Claimant to "good morning" and "goodbye" and that she did so. She described sending her colleague down to get the coffees. It seemed to the Tribunal that after 23 March 2018 Mrs Reece had indeed acted broadly as the Claimant described.

- 3.4.3 During her oral evidence Mrs Reece was at times heated. Her tone of voice was higher, she spoke forcefully to the Claimant, at times seeming to stare extremely assertively at her. When the Claimant, quite properly, was putting to her a series of comments she alleged Mrs Reece had made, Mrs Reece plainly became frustrated. At points she sighed or argued. On occasions during the cross-examination by the Claimant, both Mrs Reece and the Claimant interrupted one another. Mrs Reece accepted that this had been the way the conversations about the Claimant's tax had been conducted.
- 3.4.4 This was essentially a discussion about the Claimant's tax code. The Claimant was being told by the tax office that this could be changed using an online system. A document would be sent to the Respondent using that system and this would enable the tax code to be changed by Mrs Reece. Mrs Reece said that she could not do it this way and needed a hard copy form P9 sending to her. When the Claimant went back to the tax office, they insisted that it could be done that way. Over the course of two or three weeks the Claimant raised this a number of times with Mrs Reece. However, it was clear from her oral evidence that Mrs Reece took this personally. She repeatedly referred to being upset or frustrated that the Claimant would not "take my word for it." She said that she just wanted to the Claimant to "believe" her. The Claimant was not taking her word and that was "very, very upsetting." On 23 March 2018 Claimant referred to a colleague whose tax code had been changed and asked why hers could not be changed. She also referred to the fact that her father's company did change tax codes online. Mrs Reece said that she was insinuating that Mrs Reece was lying. Mrs Reece said in her witness statement that she therefore attempted to show the Claimant the P9 form she had used for her colleague but the

Claimant refused to look at it. The Claimant's evidence was that she told Mrs Reece she did not need to show this to her as she did not have to prove anything to her. In her oral evidence Mrs Reece accepted that she insisted on showing the Claimant the paperwork. She said that it was the proof that she had not done anything wrong. The Claimant was insinuating that she was lying and that is why she wanted to show her "so much" and "so badly", the proof that she was not lying. All of this suggested to the Tribunal that Mrs Reece's response to the Claimant's repeated (and at times emotional) questioning was itself emotional and forceful.

3.4.5 The issue with the Claimant's tax code was in fact resolved by 29 March 2018 at the latest, because the Claimant received a tax refund in her pay on that date. It was resolved because after Mrs Reece had spoken directly to the tax office they sent a P9 form through. In her oral evidence Mrs Reece said that after 23 March 2018 (and after he returned from a trip overseas) she told Mr Patel that she did not want to open any brown envelopes and asked him to do so. He rang her when the Claimant's P9 form arrived and brought it in. She applied the tax code. She had not told the Claimant the issue had been resolved. She was asked why and she said that she was "afraid". She said that she did not want the Claimant to think that she was lying and she was too afraid to say anything. She was asked what she was afraid of and she said that she did not know. The Tribunal found it difficult to understand why Mrs Reece would not simply have told the Claimant that the issue that had been causing such concern to her had now been resolved.

3.4.5 Mrs Rawling described what she subsequently saw on CCTV (with no audio). That footage showed that someone from another store was present in the back room when Mrs Reece and the Claimant were speaking. After Mrs Reece left the room, that person stood up and hugged the Claimant.

3.5 That is the context in which the Tribunal has to resolve a stark conflict in the evidence about particular comments alleged to have been made by Mrs Reece on 23 March 2018. The Claimant said that during the course of their discussion Mrs Reece said to her, "Sort the problem out yourself... I want nothing more to do with you... That's the problem with you English – don't want to do anything for yourselves" and also, "Who are you challenging me on how to do my job. I would never receive this abuse back home from my people." Mrs Reece vehemently denied making these comments. She explained that she is married to an English man and has English family. This was very embarrassing. Her entire working life has been in the UK. She would never make such comments to the Claimant or anybody. However, on a balance of probabilities, the Tribunal prefers the Claimant's evidence. As indicated, in general terms the picture painted by the oral evidence was broadly much more consistent with the Claimant's description. It is clear that Mrs Reece was frustrated, heated and felt that her integrity was being attacked. The Tribunal finds that in the heat of the moment she did make the comments the Claimant alleges. The Tribunal acknowledged that Mrs Reece may genuinely think that she did not do so but we were satisfied that she did.

3.6 In reaching that view, the Tribunal also took into account the handwritten notes made by the Claimant's father on the day of her dismissal, 20 April 2018. The Tribunal accepted the Claimant's evidence about how these notes came to be written: after she had been dismissed her father suggested that she should make some notes, they discussed events between them, he physically made the notes

but they were her words. The notes included in quotes a number of things attributed to Mrs Reece. That included, in summary, the two comments set out above. The Tribunal noted that these were not included in the Claimant's letter to the Respondent on 23 April 2018. She referred in general terms to discrimination but she did not refer to these comments. However, we accepted the explanation she gave for that in cross-examination, namely that she simply wanted a good reference and a modest sum in wages at that stage. That is consistent with the letter she wrote. It was only after the Respondent failed to address the points raised in that letter that she decided to take matters further.

- 3.7 We have indicated that we prefer the Claimant's version of events on 23 March 2018. In brief, when Mrs Reece arrived that morning she came to the counter for a coffee and the Claimant asked whether she had received anything regarding her tax. Mrs Reece's mood changed. She told the Claimant that she was sick of her questioning her and telling her how to do her job. The conversation became heated on both sides and they moved into the back room. It was in the back room that the two comments were made. The Claimant was tearful. Mrs Reece left the room and came back about 10 minutes later to try and show the Claimant her colleague's P9 form and then left the room again.
- 3.8 It is clear that both the Claimant and Mrs Reece were upset by what had happened. Mrs Reece telephoned Mrs Rawling in an upset state. During their conversation she asked Mrs Rawling to tell the Claimant she should speak to Mrs Rawling rather than Mrs Reece.
- 3.9 Mrs Rawling then telephoned the Claimant and there is a further dispute about the content of this conversation. In particular, the Claimant says that when Mrs Rawling told her that Mrs Reece was upset she told Mrs Rawling about the offensive comments made by Mrs Reece. Mrs Rawling says that the Claimant did not report any such comments to her. Again, we begin by saying that we preferred the Claimant's version of events. Fundamentally, the Tribunal found Mrs Rawling's evidence unconvincing and inconsistent in a number of respects. For example:
- 3.9.1 Mrs Rawling was asked whether she had made notes of her conversations with Mrs Reece and the Claimant. She said that she had not because she was driving at the time. She was asked whether she had made any notes after she had stopped driving and she said that she had not because she felt that the matter was dealt with. There was no indication it would escalate. It was a brief conversation and she wanted to "keep a lid on it and be diplomatic." Mrs Rawling also said that the Claimant's version of events did not correlate with Mrs Reece's but she did not believe it was appropriate to explain to the Claimant during the conversation that Mrs Reece's version of events was different to hers. At one point she said that this was because she was driving, at another because the Claimant was upset and later because the Claimant was on a busy shift. Mrs Rawling was asked what the differences between the Claimant's account and Mrs Reece's were. She said that it was about who directed whom into the back room. She was asked if there was anything else and she said that there was not.
- 3.9.2 However, subsequently Mrs Rawling told Mr Patel that she was investigating this incident. She was asked why, if she had felt the matter was dealt with on 23 March 2018, she subsequently came to be investigating it. She said that on reflection she decided she needed to

investigate because two people were telling her different stories. She was reminded of her evidence that the only difference between the Claimant and Mrs Reece was about who directed whom into the back room. She said that she was investigating for her own knowledge, not necessarily to do anything with it. She was asked what had changed since 23 March 2018 and she said that the question of who suggested they went into the back room “spoke volumes about who the aggressor was.” If the only difference between the Claimant’s version of events and Mrs Reece’s, as reported by telephone on 23 March 2018, was about who directed whom into the back room, it was difficult to understand why Mrs Rawling was now referring to one party or the other being the “aggressor.”

- 3.9.3 Mrs Rawling subsequently viewed the CCTV footage showing the interactions between the Claimant and Mrs Reece on 23 March 2018. When describing it to the Tribunal she said that there was a member of staff from another store working at the computer in the back room when the Claimant and Mrs Reece were in there. When Mrs Reece left and went upstairs the lady got up spoke to the Claimant and gave her a hug. Mrs Rawling had not referred to that member of staff in her witness statement. She was asked whether she had spoken to her. She said that she did and that the staff member said that she was not paying attention to what happened. She did not have anything to offer to support either claim. That plainly suggests that Mrs Rawling was aware that the Claimant and Mrs Reece were claiming that different things had happened in the back room. Given that she said she had seen the lady speak to the Claimant and hug her on the CCTV when Mrs Reece left the room, it is surprising that Mrs Rawling would report that the lady was not paying attention to what took place.
- 3.9.4 Mrs Rawling said in her witness statement that when she viewed the CCTV footage she considered that the Claimant’s conduct warranted disciplinary action because the evidence pointed to the fact that she had “exaggerated and escalated” the matter to a point where it had become a distraction to staff and customers. She was asked in evidence what the Claimant had exaggerated and escalated. She said that she understood staff members were talking about what had happened between the Claimant and Mrs Reece. She said that she was not suggesting that the Claimant had spread it. She was therefore asked what it was that the Claimant had exaggerated and escalated. She said that because the Claimant was so emotional it became a topic of conversation. She was asked again what it was that the Claimant had exaggerated and she said that the Claimant’s responses were overly emotional for what the conversations were about. Her evidence that the Claimant had “exaggerated and escalated” matters simply did not withstand scrutiny. Furthermore, it is difficult to see on what basis she could conclude that the Claimant’s responses were overly emotional from a brief telephone conversation with Mrs Reece and CCTV footage with no audio. This suggested that Mrs Rawling had a more detailed knowledge than she suggested.
- 3.9.5 Mrs Rawling gave inconsistent evidence about who took the decision to dismiss the Claimant and why. In her witness statement she said that the decision to dismiss was made “collectively” between herself and Mr Patel whereas in her oral evidence she said that it was her decision. Initially in

her oral evidence she said that she wrote to the Claimant to confirm her dismissal at the first opportunity, but she subsequently said that the letter was written by lawyers. The reasons she gave for dismissing the Claimant were inconsistent – see further below.

- 3.10 Accordingly, the Tribunal preferred the Claimant's consistent account. Again, that was supported by the handwritten notes made by her father on 20 April 2018, which indicated that Mrs Rawlings was aware of the two comments made by Mrs Reece. The Tribunal therefore found that the Claimant did tell Mrs Rawling when she spoke to her on 23 March 2018 about the two offensive comments made by Mrs Reece.
- 3.11 The Claimant had two weeks' annual leave shortly after 23 March 2018. When she returned to work, the relationship between her and Mrs Reece was as she described: Mrs Reece was essentially saying nothing more than hello or goodbye to her, if that. The Claimant spoke to Ms Pullen who said that she would speak to Mrs Rawling. The Claimant noted that her week 52 payslip included a tax refund. She thought it strange that Mrs Reece had not told that this had been resolved. She continued to work as before until 20 April 2018. On that date, at the end of her shift she was called into a meeting with Mrs Rawling and Mrs Rawling dismissed her. The Claimant and Mrs Rawling gave different accounts of the discussion and for the same reasons already outlined the Tribunal preferred the Claimant's version of events. Again, it gained some support from the handwritten notes, although they were not extensive.
- 3.12 Mrs Rawling was asked why the Claimant was dismissed. In her witness statement she said that the CCTV footage showed that Mrs Reece's version of events was accurate and that the Claimant had approached regular customers after the altercation to seek comfort. She had left other team members with a queue building while she continued to speak to those customers. Mrs Rawling said that that was unacceptable. She said that it was also brought to her attention by another staff member that during the previous week the Claimant had been discussing her tax code issues with regular customers and had accused the company of stealing or withholding her tax money. She had already decided that the Claimant's behaviour was unacceptable and unprofessional as she had been distracting the team, ignoring her duties and being disrespectful to senior colleagues but the fact that she was now making untrue and very damaging statements to customers about the company was totally unacceptable. That is why she decided to dismiss her.
- 3.13 In her oral evidence Mrs Rawling was asked about the allegation that the Claimant was telling customers the company was stealing her tax money. She said that two customers had told a member of staff called Dane, who in turn had told Ms Pullen, who in turn had told Mrs Rawling that the Claimant had said that the company was stealing her tax money. She was asked whether she made a note of her conversation with Ms Pullen. She said that she did not because she did not feel it was relevant and she did not feel she needed to make a note of it. She was asked whether she took statements from Ms Pullen, the customers or Dane and she said that she did not because in her mind it was not the overriding reason for dismissal. She was therefore asked about the dismissal letter that was written to the Claimant and signed by her. That said that the Claimant was being dismissed, "as a result of your performance being unsatisfactory and not reaching the levels we expect from you, in particular you made an untrue allegation to a customer that the company had 'stolen your tax money'." Mrs Rawling could not satisfactorily explain

why the only specific example given in the dismissal letter was the matter she now described as not relevant or not the overriding reason for dismissal.

- 3.14 Later in her oral evidence Mrs Rawling was asked why the Claimant was dismissed, when she was acknowledged to be very capable and there seemed to have been one incident on a day when she was emotional and upset. Mrs Rawling said that she dismissed her because she could not see the Claimant continuing to work at the store; that would not be appropriate given the close proximity to Mrs Reece. She was asked what made her decide to dismiss the Claimant as opposed to giving a final warning and she said again that she felt that the Claimant's position had become untenable because relations had broken down with Mrs Reece who worked within the store. What had happened had become a topic of discussion and a distraction. There was another store 3 miles away and Mrs Rawling was asked whether she considered moving the Claimant. Her answer was, "No because of the nature of her ... Rather because of the relationship breakdown between herself and Mrs Reece." The focus in oral evidence on the relationship between the Claimant and Mrs Reece was quite different from the reasons set out in Mrs Rawling's witness statement.
- 3.15 The Tribunal also considered Ms Rawling's evidence about the basis for her conclusion that the Claimant was guilty of misconduct worthy of dismissal. We noted that the Respondent apparently has a policy not to carry out a proper disciplinary investigation for members of staff with less than two years' service. Plainly that is inconsistent with the ACAS Code of Practice on Disciplinary and Grievance procedures, but it explains why a proper disciplinary investigation and process was not carried out. However, in this case the Tribunal considered that there was not simply the absence of a proper disciplinary investigation and procedure. Rather, there was what we regarded as a striking lack of curiosity about what had actually happened. On her account Ms Rawling had brief conversations with Mrs Reece and the Claimant while she was driving on 23 March 2018. She regarded the matter as closed at that point, but then for some reason decided to start investigating. She viewed CCTV footage that had no audio and she had a conversation with Ms Pullen who reported second or third-hand hearsay to her. She did not ask the Claimant at any point for her version of events. She was unable to provide a satisfactory explanation of how it was possible to conclude from the silent CCTV footage that Mrs Reece's account of 23 March 2018 was correct nor why she did not simply speak to those involved. She was apparently entirely content to rely on third-hand hearsay relating to what the customers had said without ever asking either the customers or Dane or the Claimant about it. This was an employee who was trusted and well-regarded and it seemed to the Tribunal surprising that Mrs Rawling displayed such a willingness to dismiss her for misconduct that had been so inadequately investigated.

Legal principles

- 4.1 Claims of discrimination are governed by the Equality Act 2010. So far as discrimination in employment is concerned, s 39 prohibits discrimination and victimisation and s 40 prohibits harassment. Turning to the specific prohibited conduct relevant to these claims, direct discrimination, harassment and victimisation are governed by s 13, 26 and 27 respectively of the Equality Act 2010, which provides, so far as material:

13 Direct discrimination

(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.

...

26 Harassment

(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.

...

(4) In deciding whether conduct has the effect referred to in subsection (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.

(5) The relevant protected characteristics are –

...

race;

...

27 Victimisation

(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 –

(a) bringing proceedings under this Act,

...

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

...

4.2 The burden of proof is dealt with by s 136 of the Equality Act 2010, which provides, so far as material:

136 Burden of proof

(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.

...

(6) A reference to the court includes a reference to –

(a) an employment tribunal;

...

4.3 The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of the burden of proof provisions and the Tribunal had regard to it.

4.4 Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual

or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason: see *Nagarajan v London Regional Transport* [1999] ICR 877, HL.

- 4.5 Under s 26, there are three elements to the definition of harassment: (1) unwanted conduct; (2) the specified purpose *or* effect; and (3) that the conduct is related to a relevant protected characteristic.
- 4.6 When considering the proscribed purpose or effect, the EAT has made clear that the word “violating” dignity is a strong word and means more than hurting or offending: *Betsi Cadwaladr University Health Board v Hughes* EAT/0179/13. Further, an environment means a state of affairs. A one-off incident is not a state of affairs. It may be created by a one-off incident but only if the effects are of longer duration: *GMB v Henderson* [2015] IRLR 452; *Weeks v Newham College* EAT 0630/11. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

Application of the law to the facts

- 5.1 The Tribunal started with the claim of harassment. This was based on the two remarks the Tribunal found Mrs Reece made on 23 March 2018. The Tribunal accepted that this was unwanted conduct that related to race or nationality. The question was therefore whether it had the purpose or effect of violating the Claimant’s dignity or creating the proscribed environment.
- 5.2 The Tribunal did not consider that it had that purpose. Mrs Reece did not intend to violate the Claimant’s dignity or create that environment. These were two comments made in the heat of the moment during a difficult and emotional discussion. We therefore considered whether they had that effect. We reminded ourselves of the legal principles set out above. Violating dignity means more than offending or hurting feelings. An environment is a state of affairs. The Tribunal accepted that the Claimant was upset and offended, but we found that this was not to such a degree that her dignity was violated. Nor was the effect of the comments to create a humiliating etc environment. There was an atmosphere after the altercation, but it was not because of these two comments. It was because of the way Mrs Reece then conducted herself. Taking into account also the fact that the comments were made in the backroom, not in public, and that they were made in the heat of the moment as we have described, the Tribunal found that they did not create the required state of affairs to amount to harassment.
- 5.3 Turning to the direct discrimination claim, the Tribunal had no hesitation in rejecting it. The evidence did not disclose any less favourable treatment of the Claimant. There was simply nothing to suggest that Mrs Rawlings would have acted any differently if the Claimant had not been white.
- 5.4 That brings us to the victimisation claim. For the reasons set out above, the Tribunal found that the Claimant did complain to Mrs Rawlings that Mrs Reece had made the two comments relating to race or nationality. Mrs Cakali did not dispute that by doing so she did a protected act. The question was therefore whether this was why she was dismissed.

- 5.5 The Tribunal found that the Claimant had proved facts from which we could conclude, in the absence of an explanation, that the reason for dismissal was the fact that she did a protected act. These were:
- 5.5.1 The fact that she was dismissed;
 - 5.5.2 The fact that she did report Mrs Reece's comments to Mrs Rawlings, but that Mrs Rawlings denied she had done so;
 - 5.5.3 The unexplained change from 23 March 2018 – when Mrs Rawlings said that the matter was dealt with – to later on, when she told Mr Patel she was investigating it;
 - 5.5.4 The fact that the investigation was so fundamentally flawed and betrayed such a lack of curiosity to find out what actually happened. That led to an astonishing willingness to dismiss a well-regarded, exemplary employee without even asking her about what happened.
 - 5.5.5 The fact that the evidence about what misconduct actually led to the Claimant's dismissal was unclear and inconsistent.
 - 5.5.6 The fact that the Claimant was allowed to work in the shop alone, including opening up, for two weeks after the altercation and before her dismissal.
 - 5.5.7 The fact that the Claimant was not told that the simple tax issue had been resolved, coupled with Mrs Reece's attitude to the Claimant after 23 March 2018 and her inability to explain why she was afraid to tell her the tax issue had been resolved.
- 5.6 All of those features point to the possibility that something else (the complaint about Mrs Reece's comments) lay behind this dismissal. That shifts the burden of proof.
- 5.7 The Tribunal therefore considered whether Mrs Rawlings had proved an "innocent" explanation for dismissal. She did not. She did not provide any clear or consistent account of the reasons for dismissal. As set out above, her evidence was inconsistent about whose decision it was to dismiss and about the reasons for dismissal. During her oral evidence there was a shift to focussing on the Claimant's relationship with Mrs Reece. In those circumstances, the Tribunal was not persuaded that misconduct of any kind was the reason for the Claimant's dismissal and the Respondent did not prove a reason that was not victimisation. The Tribunal therefore found that the reason the Claimant was dismissed was that she complained about the two remarks made by Mrs Reece on 23 March 2018. Mrs Reece's evidence about being afraid to tell the Claimant about the resolution of her tax issue made much more sense in that context.

Employment Judge Davies
4 March 2019

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