



EMPLOYMENT TRIBUNALS

Claimant
Mrs Luis Daniella Postelnicescu

Respondent
Tesco Stores Limited

v

Heard at: Watford

On: 5-8th March 2019

Before: Employment Judge Bedeau
Member: Mr D Sutton
Member: Mr S Bury

Appearances

For the Claimant: Mr J Taylor, Counsel
For the Respondent: Miss S Tharoo, Counsel

RESERVED JUDGMENT

1. The claims of direct race discrimination because of race are not well-founded and are dismissed.
2. The claims of harassment related to race are not well-founded and are dismissed.
3. The claim of constructive unfair dismissal is not well-founded and is dismissed.
4. The listing of this case for a provisional remedy hearing on 31 October 2019, is hereby vacated.

REASONS

1. By claim form presented to the tribunal on 13th October 2017, the claimant made claims of race discrimination and constructive unfair dismissal, arising out of her employment with the respondent as shift leader from 3rd November 2014 to 16th July 2017.
2. The respondent has denied the claims.

3. At the preliminary hearing held on 3rd March 2018 before Employment Judge McNeill QC, the claims and issues were clarified. The claims are: harassment related to race; direct discrimination; and constructive unfair dismissal. The parties also agreed that the issues to be determined at this final hearing and they are set out below.

Section 26: Harassment related to the claimant's race.

- 3.1 The claimant defines her race as of East European origin.
- 3.2 Did the respondent engage in unwanted conduct as described by the claimant in her claim form, but in summary as follows?
- 3.2.1 By Mr Kumar and/or Mr Shah failing to consider the claimant for Sunday overtime shifts with the frequency with which other comparable employees were considered?
 - 3.2.2 Failing to recommend the claimant for a team leader role until shortly before January 2017.
 - 3.2.3 Failing to treat the claimant's training needs sufficiently seriously
 - 3.2.4 Giving unreasonable instructions to the claimant as particularised in paragraph 7 of the claim form.
 - 3.2.5 By Mr Kumar giving the claimant no administrative tasks to carry out.
 - 3.2.6 By Mr Kumar giving the claimant less praise than he gave to other colleagues, including in October 2016 when she passed a 'Think 25' test, and giving exaggerated thanks to the claimant after she raised this matter.
 - 3.2.7 By Mr Kumar calling in his manager Mr Shah in January 2016 when it was unnecessary to do so as particularised in paragraph 8 of the claim form.
 - 3.2.8 Refusing regular overtime to the claimant in March 2016 by Mr Kumar and/or Mr Shah.
 - 3.2.9 By reducing the claimant's overtime to zero in September 2016.
 - 3.2.10 By Mr Kumar after October 2016 putting excessive pressure on the claimant in relation to the performance of specific tasks.

- 3.2.11 In January 2017 when the claimant was placed on training to be a team leader failing to provide a uniform and a set of keys to her.
 - 3.2.12 By Mr Francis Pinto behaving unfavourably towards the claimant as particularised in paragraph 15 of the claim form.
 - 3.2.13 By refusing in March 2017 to give the claimant two weeks' leave and asking her to work on a day on which authorised leave had been granted.
 - 3.2.14 By Mr Shah requiring the claimant to complete e-learning in her own time rather than during working hours.
 - 3.2.15 By suggesting on the 26 May 2017 by Mr Kumar that the claimant was unable to cope with running a shift on her own.
 - 3.2.16 By management turning a blind eye to staff who were demeaning the claimant, in particular on 2 June 2017 and not supporting her.
 - 3.2.17 By sending the claimant to another store to complete her career development.
 - 3.2.18 By refusing the claimant two weeks annual leave when she was unwell.
 - 3.2.19 By not contacting the claimant, during her four weeks period of sick leave in June/July 2017 to ask how she was feeling, or at all.
 - 3.2.20 By failing to acknowledge a letter of grievance sent by the claimant to the respondent on 18 July 2017 or to deal with the issues raised in that grievance.
- 3.4 If and in so far as the claimant may make out all or any of the conduct relied upon, were such acts related to the claimant's race?
- 3.5 If and in so far as the claimant may prove all or any of the conduct set out above, did such conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.6 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.7 In considering whether the conduct had that effect the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

Section 13: Direct discrimination because of race.

4. Did the respondent subject the claimant to all or any of the treatment set out and relied upon in relation to the claim of harassment above?
5. If so, did the respondent treat the claimant as alleged less favourably than it treated or would have treated named or hypothetical comparators? The claimant relies upon a comparator identified as 'Thenuga' in relation to paragraphs 4, 13 and 27 of her claim, and on a comparator 'Lakshmi' in relation to paragraphs 4 and 27. In relation to paragraph 14 the claimant relied on comparators identified as 'Amuthan', 'Attawan', 'Francis' and 'Kiri'. She relied on hypothetical comparators in the alternative.
6. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?
7. If so, what is the respondent's explanation? Does it provide a non-discriminatory reason for any proven treatment?

Time/limitation issues

8. The claim form was presented on 13 October 2017. The parties agreed that any act or omission which took place before 13 July 2017 fell outside the primary three months limitation period subject to any issue of whether conduct extended over a period. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? If so, provided the conduct extended until on or after 13 July 2017 a claim in relation to such conduct would be in time.
9. In so far as any claims are out of time, was the complaint presented within such other period as the employment tribunal considers just and equitable?

Constructive Unfair dismissal

10. In claiming that she was constructively dismissed, the claimant relies on the acts and omissions which she relies upon in relation to her claims for harassment and direct discrimination.
11. Did those acts or omissions individually or cumulatively amount to a breach of the claimant's contract of employment with the respondent?
12. If so, was any breach fundamental?
13. If so, did the claimant accept the breach by resigning in response to it?
14. If so, did the claimant delay too long before resigning, thus affirming the contract?

15. The claimant confirmed that the last straw for her was the failure to contact her when she was off sick.

Remedy

16. In relation to her harassment and direct discrimination claims, the claimant claims for injury to feelings and financial losses. She does not claim for any personal injury. She will also ask the tribunal to make recommendations if her claim is successful.
17. In relation to her unfair dismissal claim, the claimant claims basic and compensatory awards. She does not seek re-instatement or re-engagement.

Other matters

18. The parties agreed that the claimant's effective date of termination was 23 July 2017.
19. Did either party fail to comply with the provisions of the ACAS Code of Practice on disciplinary and grievance procedures? If so, should any award made to the claimant be increased or reduced as appropriate?

The evidence

20. The claimant gave evidence and did not call any witnesses.
21. On behalf of the respondent, evidence was given by Mr Mayur Shah, Door Manager; Mr Siva Kumar, Shift Leader; and by Mr Francis Pinto, Team Leader.
22. In addition to the oral evidence, the parties produced a joint bundle of documents comprising in excess of 126 pages. Further evidence was adduced during the course of the hearing. References will be made to the documents as numbered in the bundle.

Findings of Fact

23. The respondent is a multi-national grocery and general merchandise retailer trading from stores and other platforms, such as on-line. It employs more than 300,000 people in the United Kingdom.
24. The claimant is a Romanian national who has lived in the United Kingdom since 26 July 2008 with her husband, daughter and son, who are also Romanian nationals.
25. Prior to the commencement of her employment with the respondent on 16 November 2014, the claimant worked in a delicatessen in Edgware, North West London. Her employment with the respondent was as a Customer Assistant/Replenishment. We were told by Mr Mayur Shah, Store

Manager, that Customer Assistants have the generic title of Customer Assistant/Replenishment and in that respect the claimant was no different. The claimant initially worked part-time, 20 hours a week, 5 days a week, Monday to Friday, at the respondent's store, Harcourt Road, Bushey, Store No: 5018. (pages 43-44 of the bundle)

26. Mr Shah and Mr Siva Kumar, Deputy Store Manager, now Shift Leader, worked along with 16 other employees at the store who were on different shifts. These were Customer Assistants and Team Leaders.
27. In the respondent's grievance policy issued in January 2017, it states that when a grievance is received the relevant manager should arrange a meeting with the employee who lodged the grievance to understand that employee's concerns and to agree the part of the grievance to be investigated. The employee is invited, in writing, to a meeting and given the option to be accompanied either by a colleague or trade union representative. He or she would receive a written outcome of the grievance investigation and be able to raise a second stage grievance if remain dissatisfied with the outcome. (48-66)
28. The store operates 3 shifts: early, middle and late, closing at 11pm every evening.

Administrative tasks

29. Having regard to the large number of claims, we have decided to address them within our findings of fact. The claimant stated that when she commenced employment with the respondent, she was told by Mr Shah that she would be doing mainly administrative, such as daily and weekly end of day reports; lottery and safe management; shelf edge labels and points of sales; till checks; cash in transit collections; price verification; staffroom transfers; change and adding change in the tills; payroll, HRAM exceptions; and to support the team on the shop floor and checkouts when required. She said that her administrative tasks would take up 2 hours a day. This was disputed by Mr Shah who said that such tasks would take up to 1 hour a day and some did not require being done every day.
30. From the claimant's Performance and Development Review for 2014/2015, completed in March 2015 by Mr Kumar, her role is described as "Customer Assistant/Admin". We, therefore, find that she was taken on as a Customer Assistant to engage in administrative duties. She wrote that she thought she performed well and to the best of her ability and that some of her work had been appreciated by her manager. She acknowledged that, on occasions, she made mistakes but did learn from them. The ratings given were red, amber, green and blue. Red being the lowest and blue being the highest. The claimant was given by Mr Kumar an amber rating. He told us and we do find as fact, that the reason for the rating was that the claimant was learning about the job and had not completed all aspects of her training, in particular, payroll and HRM exceptions. In such

circumstances it is difficult to see how she could have expected a higher rating.

31. Another Customer Assistant, Thenuga, in March 2015, was undergoing training in administrative tasks on Saturdays and Sundays. The claimant said that Thenuga also did administrative work on Fridays, but this was denied by Mr Kumar.
32. We find that the administrative tasks took fewer than 2 hours every day which meant that most of the claimant's time as a Customer Assistant/Replenishment, was spent engaged in customer assistant duties. Administrative work was not and neither did Mr Shah tell her that it was, her main role. He had other staff members engaged in administrative tasks and there was no suggestion that they were no longer engaged in that work.

Sunday overtime

33. Then claimant said that in May 2015, she began to ask Mr Kumar if she could work the Sunday overtime shifts which would pay her time and a half, but he refused, saying that the shifts were full. Three colleagues who worked on Sundays resigned, namely Kaushan in July 2015; Neethi in October 2015; and Zafar in June 2016. Two other work colleagues, Kira and Raffi, were promoted and moved to other Tesco stores. The claimant alleged that all of them worked those shifts. She asked Mr Kumar again whether she could work the Sunday overtime shifts and he refused saying again that Sundays were fully staffed. She asked again and asserted that Mr Kumar allegedly responded by saying that Mr Shah would not agree to her working Sunday shifts. When she asked Mr Shah, he replied by saying she had enough overtime. She suggested that he could change a weekday for a Sunday, but this was not acceptable to Mr Kumar because the payroll budget was tight.
34. Her claim is that she had been treated less favourably as the only one of two white Europeans working at the store when compared with the treatment of the Asian members of staff. She claimed that Lakshmi and Thenuga, and other colleagues of Indian descent, began work at the store in June and October 2015 and were immediately added to the Sunday shift rota.
35. Mr Kumar, in evidence, said that the only shifts on Sundays which were available were the late shifts. As the claimant would finish her shift at 3pm, that to work until 11pm, the late shift, would not have afforded her enough rest time to start her shift in the morning at 6am.
36. Mr Kumar explained to the tribunal that Kaushan joined the respondent at the store before the claimant commenced employment. He worked the Sunday evening shift which became available when an employee left. Neethi, Kiri, and Raffi also worked the evening shift and that became available when they left the store. The claimant could work those shifts,

but she did not want to work the Sunday evening shift. They could not change her shift because she always wanted to work 6am – 3pm, or 6am – 2pm. He never refused to give her Sunday shifts it was just that the available shifts were in the evening and the claimant refused to work Sunday evening.

37. We find that the claimant did ask that whether she could work Sunday overtime but the response from Mr Kumar was that the only overtime available for Sunday was the evening shift which she refused to do. If that was the only shift available, it placed the respondent in a difficult situation because she would have to finish at 11pm in the evening and start a morning shift at 6am which would not have provided her with sufficient rest time and a potential breach of the provisions of the Working Time Regulations 1998.
38. In relation to the claimant's performance rating, Thenuga and Lakshmi were given a green rating because they had completed all their training as Customer Assistants by the date of her first performance review.
39. Her hours were increased from 20 to 36½ hours a week from 1st May 2016 (45)
40. With her increased contractual hours, it made it difficult for her to work overtime. In reality her hours were 6am – 2pm, Monday to Thursday and 6am – 1pm Friday with half an hour unpaid lunch.
41. It was not part of her case that she wanted to work a Sunday shift. Her case is that she wanted to work overtime on Sunday but with her increased hours from part time to full time, the only Sunday shift available was the late evening shift. The respondent said in evidence that when she was asked whether she would do the shift she had refused. In relation to her comparators, the rotas were not disclosed as evidence to show the difference in treatment in respect of working Sunday overtime.

Calling Mr Shah

42. The claimant said that in January 2016, she complained to Mr Kumar about the lack of administrative tasks given to her in preference to other non-European colleagues, such as Thenuga. She also added that Mr Kumar had never offered any thanks to her, nor did he congratulate her on any of her successes. She said that he, at that point in the conversation, became angry and called Mr Shah, who was at home on annual leave, to ask that he come to the store and deal with the issue. When Mr Shah arrived, the claimant said Mr Kumar issued a threat that either he leaves or she would have to. According to the claimant, Mr Shah explained to Mr Kumar that this was an over-reaction. It appeared that his intervention took the heat out of the situation. The claimant said that after the incident her relationship with Mr Kumar did not improve.

43. Neither Mr Shah nor Mr Kumar recalled this incident. In cross-examination the claimant said that it was not an act of racial harassment for Mr Kumar to call Mr Shah to intervene to resolve the dispute. She, nevertheless, would not withdraw this aspect of the discrimination claim. She said that Mr Shah complained to Mr Kumar that his response was an overreaction.
44. On these bare facts, this incident was unrelated to race. The fact that there was an exchange of words, without more, is not favourable treatment because of race even if we accept the claimant's account.

Team Leader role

45. The claimant alleged that the respondent failed to recommend her for a Team Leader role until shortly before January 2017. She commenced employment on 16 November 2014 and her background is accounts. In her performance appraisal in March 2015, she had been given an amber rating because she had not completed training in relation to administrative tasks. It stated that she had performed well for the previous six months and some of her assignments were appreciated by her managers. She acknowledged that on occasions she made mistakes but had learned from them which had the added advantage of increasing her knowledge. In the manager's summary, it stated that the claimant started very well and was supportive of the team and her managers. She covered her shift and always looked after customers and was willing to learn new things. (118a – 118d)
46. In the performance review for the year of 2015 to 2016, dated March 2016, she received a green rating. It stated that her aim was to become a team leader. Her manager, Mr Shah, wrote that she had performed very well on administrative tasks and by store standards (118e – 118h).
47. Mr Shah told the tribunal that in March 2016, he spoke to his line manager and said that he would nominate the claimant to be trained as a team leader. The process involved approving the nomination and waiting for the next suitable training opportunity to arise. Once training has been successfully completed, there is a technical validation by the Area Manager. After which, they are required to run a few shifts and then have a meeting with the Area Manager who would sign them off if they are suitable. Thereafter, they will have to wait for a team leader vacancy either at the store where they are based or at another store. The respondent's store is required to have three team leaders. They were, at the time, Siva Kumar, Francis Pinto and Amuthan.
48. The claimant attended training by being referred to Academy 1 in February and March 2017. She was invited to attend training by the people trainer on 30 January 2017. (118i – 118j)
49. We are satisfied that Mr Francis Pinto was already a team leader prior to joining the respondent. He gave evidence before us that he was promoted

at a store in Kingsbury. He worked as a Deputy Manager at a Tesco store in Rayners Lane which was a step up for him. He had done that work for one year. At the respondent's store in Bushey, he was shift leader. He had nine to ten years retail experience and only attended the training simply as a refresher. We accepted his account of his circumstances.

50. The claimant referred to Indunil attending the team leader training in February 2017. We are satisfied, having heard Mr Shah, that some of the modules he did in Academy 2 was a familiarisation exercise. (60b)
51. We find that the claimant was recommended for the role of team leader in March 2016 and not as she had alleged shortly before January 2017. She was formally invited to attend training on 30 January 2017. As she began her employment in November 2014, by March 2016 she was nominated for team leader training after a comparatively short period of 16 months. On these facts we cannot decide that she had been treated less favourably because of her race. This act relied upon is not supported by the evidence.

Bakery duties

52. The claimant alleged that when she was considered for career development in or around June 2016, Mr Shah said that she would need to gain experience working in the bakery as this would assist her in a Team Leader role. She said that she asked Athawan and Amuthan if they were trained in bakery and they said that they were not. Zaffer was engaged in bakery duties but left in June 2016 and the shop did not have a replacement. It was at that point that Mr Shah, according to the claimant, took advantage of her with a Team Leader promotion to use her to do bakery work. This was not compulsory training for the Team Leader role and felt her training needs were not being taken seriously by Mr Shah.
53. She did work in the bakery for a limited period. She said that while working in the bakery, Mr Kumar would frequently ask her to cook more than was necessary. This led her to feel embarrassed about the high level of bakery waste, which she felt responsible for. On another occasion, steam escaped when the bakery oven was open, activating the store's fire alarm. She alleged that Mr Kumar told her not to answer the telephone when the Fire Brigade rang to enquire if the call was genuine. She later learned from Mr Shah that the store had incurred a £100 fine from the Fire Brigade for the false alarm which could have been avoided if Mr Kumar had allowed her to speak to the Fire Brigade and explained how the alarm had been activated. She asserted that the incident further contributed to her feeling harassed on grounds of her race.
54. Those working in the bakery would start at 5:30 in the morning and put frozen dough in the oven to bake.
55. Mr Shah said in evidence that he did not mislead the claimant into doing work in the bakery. He denied telling her that she would need to learn on the bakery in order to progress to a Team Leader role. He further denied

asking her to work on the bakery as an example of not taking her training needs seriously.

56. We find that the store has a relatively small number of employees it could call upon to engage in bakery duties. Unlike larger Tesco stores where employees may be employed to solely carry out this specific task, Express Stores, like the one where the claimant worked, tend to have employees who are able to engage in a variety of tasks. This ensures that the store will always have cover.
57. We find that other staff members such as, Athawan, Lakushan, Lakshmi, Sisu, Mr Shah, Mr Kumar, Amuthan and Mr Pinto, are all bakery trained and engage in bakery duties. It is important that team leaders have the knowledge and experience in running a bakery, as this is an integral part of running a store.
58. Mr Shah told us, and we do find this fact, that all of his staff engage in bakery duties, including customer assistants. If anyone falls sick or is on holiday, he would need to provide cover. Abdullah and Lakushan, both customer assistants, do bakery duties.
59. We do not find that the claimant was asked to do bakery duties because no other member of staff or Team Leader had engaged in that work. It was important for her to learn how to do that work as a potential team leader for she will have the opportunity of running a store and would need to have the knowledge and experience to carry out that work. This was to her benefit and not to her detriment. Being instructed to do bakery duties was not less favourable treat as non-European staff members do engage in that work. It was also not conduct related to race.
60. Linked to the above allegation is the claim that Mr Kumar instructed the claimant to cook more bakery products which the claimant said were often not sold resulting in wastage which she felt responsible for.
61. Mr Kumar denied instructing the claimant to cook more bakery products than was necessary in order to increase the level of bakery waste and point the finger of blame at her. He said and we accepted his evidence, that the store has a low level of waste compared with other stores in the area and a high level of wastage would not reflect badly on the person working in the bakery, such as the claimant. However, it would reflect adversely on the whole store, including its management, as it would add to the overall waste figure. There would be no benefit to a member of management to encourage this. In addition, the amount of stock that is baked is not the decision of store management but dictated by a production planner which is a computer algorithmic calculation.
62. In relation to this allegation, there was no corroborative evidence. We find that it is not in a store's best interests to encourage wastage and accepted with Mr Kumar's evidence that it would reflect adversely on management. Of importance, is that the number of products to be baked is not

determined by an individual manager but by computer. There is no factual evidence to support this claim.

63. The reference to the store being fined for a false alarm is in the claim form but not on the list of issues. The respondent's evidence was that if the store had been fined there would be a record of it somewhere and there is no such record of a payment of £100. In any event, what the claimant said was that she later learned from Mr Shah had been fined and did not provide documentary evidence of this nor called the person who gave her that information.
64. We find that the store was not fined £100 for a false fire alarm. We also do not find that the claimant was instructed not to answer the telephone. It was not clear to us how she would have known that the unanswered call was from the Fire Brigade.

Less praise

65. The claimant alleged that Mr Kumar gave her less praise than he gave other work colleagues, including in October 2016, when she passed a Think 25 test, he gave her "exaggerated thanks" after she raised it as an issue.
66. In paragraph 22 of her witness statement, she referred to an argument she had with Mr Kumar about giving the other staff members overtime and giving her few administrative tasks, thereafter his attitude towards her changed. He never congratulated her on doing a good job. He never told her "well done", or "thank you", even when she wished him a Happy New Year in WhatsApp, he did not respond. She stated that he refused to speak to her for a few weeks, avoiding her at all time and using other work colleagues to communicate instructions from him to her. She then said that he started to express thanks and well done even when, according to her, it was not appropriate to do so. He wrote "wow" comment and in very large letters 'well done Louis' on the staffroom noticeboard.
67. She then wrote in paragraph 24 of her witness statement, the following:

"I did not see any real change in Siva's attitude towards me after this, other than he started to say "thank you" more often"
68. We have looked at the documentary evidence. When a customer has been treated exceptionally by a member of staff, it is noted in the store's notice to staff called "Moments that Matter". The claimant was complimented by a customer and a notice was displayed on 22 January 2016. Staff members congratulated her, including Mr Kumar, who wrote "well done, great job". There is nothing to suggest that that statement by him was not genuine and sincerely felt. The fact that he had written the comments in capital letters makes no difference. This congratulation was shortly after the alleged dispute between him and the claimant in or around January 2016. (58)

69. It was also clear that Mr Kumar congratulated other staff members for work well done. (60)
70. Mr Shah also congratulated the claimant on passing the Think 25 test, giving three smiling emojis. Mr Kumar also thanked all staff for the environmental health. (60)
71. On 19 January 2017, Mr Shah congratulated the claimant following her attendance on a training course, he wrote "What a fantastic live example of a colleague taking pride in development – well done Luis, remember if you want it, we will find you because you shine". (60c)
72. In a WhatsApp message from Mr Kumar to her and Mr Pinto, signed off as Team Leader in June 2017, on 8 June 2017, he wrote "Well done both – many thanks for your support". (60f)
73. The claimant said in evidence that there was nothing inappropriate about that message from Mr Kumar.
74. We are satisfied and do find, contrary to the claimant's assertions, that Mr Kumar and Mr Shah congratulated and praised members of staff when they did good work and did not distinguish between the claimant and her colleagues.

Overtime

75. In paragraphs 3.3.8 and 3.3.9 of the list of issues, the claimant alleged that Mr Kumar and Mr Shah refused to offer her regular overtime in March 2016 and that her overtime was reduced to zero in September 2016.
76. In her claim form she stated that between March to August 2016, regular overtime during the week was reduced to two hours per week and that had a negative effect on her earnings. When she finished her shift at 2pm instead of 3pm, an Asian colleague was allowed to start an hour before the evening shift, effectively taking her, that is the claimant's overtime, (paragraph 9, page 16 of the bundle)
77. She stated that in September 2016, she was informed by Mr Shah and Mr Kumar, that the store's payroll budget and been significantly reduced. The effect of this was that her overtime was reduced to zero and that no non-European staff had their overtime completely removed. (Paragraph 10, page 16)
78. We were not provided with the rotas covering the period from March to 28 August 2016, however, on 2 September 2016, the claimant worked two hours overtime (99). During week commencing 5 September to 9 September, she worked three hours overtime. (98) Week commencing 19 December she worked three hours overtime. (96) Week commencing 26

December she worked two and half hours overtime (93) Week commencing 2 January 2017, she worked one hour overtime. (95)

79. Having moved from part-time to full-time effectively restricted the number of overtime hours she could do. The respondent had to have regard to the Working Time Regulations and could not give her the 20 hours overtime she did work while a part-time employee. We were not satisfied that she was denied overtime from September 2016 nor that her overtime was reduced to zero. The position in relation to the period from March to August 2016 is not clear as there was the absence of documentary evidence. The claimant could have produced payslips for that period, but they were not produced before us. On balance, we find that she was offered overtime, though it had to be reduced when she moved from part-time to full-time employment. We also take into account that in or around December 2016, there were budget cuts affecting the availability of overtime work available to staff. There was no evidence upon which we could decide as fact that she had been treated less favourably when compared with her non-European work colleagues.

Being forced to carry out further work

80. In claim 3.3.10, the claimant alleged that after October 2016, Mr Kumar put excessive pressure on her to perform specific and time-consuming tasks. Staff had to add change daily into each of the four tills. The bags with the change were kept in the safe in the back office. Mr Kumar would take out the change from the safe five to ten minutes before the end of her shift, he would bring the change to her at the checkout where she was working and instruct her to put them in the tills. At that time of the day, between 1:45pm and 3pm, the checkouts would be very busy. She was the main cashier and there was always a long queue. She would have to stay another 15 to 30 minutes after the end of her shift to carry out that work. She said this would be done without her being paid overtime.
81. She also alleged that Mr Kumar would ask her to work with him on fresh delivery. Boxes being delivered had to be opened and the products put on the shelf. Mr Kumar would put quite a lot of boxes on the floor and would tell her after she finished shelving the products, that she would also have to scan four to five bags of cigarettes and to place them in the tobacco safe which would take about an hour to do. She was unable to complete those tasks before the end of her shift. This meant that she would have to stay another 45-60 minutes to finish the work which was unpaid overtime. She asserted that she was the only one to be treated in that way.
82. In cross- examination, she acknowledged that change would be brought to the till twice a day. Mr Shah put money in the tills in the morning. Based on the evidence, we were not satisfied that replenishing the tills occurred at a time when she was close to the end of her shift.
83. All staff had to clock in and clock out. If she worked beyond her shift, it would be recorded, and she would be entitled to be paid for working

overtime. We were not provided with those records in support of her case. We find, however, that she was not obligated to work beyond her shift and was able to hand over any takes to the person who was taking over the next shift. It was also clear from the text messages that the claimant was paid for working additional hours. (60a)

84. We do not accept that she was put under excessive pressure by Mr Kumar from October 2016 to carry out certain specific and time-consuming tasks.

Not given a Team Leader uniform

85. In paragraph 3.3.11, she alleged that in January 2017, while on training to be a Team Leader, she was not provided with a Team Leader uniform and a set of keys. In paragraph 33 of her witness statement, she stated that Mr Shah had promoted her to Team Leader in January 2017 and that Amuthan Indunil, Athawan and Francis were also promoted to Team Leader and Kiri to Deputy Manager. She, Francis and Indunil were in the last group to be promoted. She said that Francis and Indunil commenced employment after her, in October 2016 and were all given Team Leader uniforms to wear but she was not. She felt singled out because of this and that her authority as Team Leader was non-existent. She also asserted that she was not given a set of keys as Team Leader, whereas the other team leaders had their own set of keys to the store.
86. Mr Shah had nominated the claimant for Team Leader training in December 2016. She was selected for training in January 2017 and attended training in February 2017, Academy 1. On 8 June 2017, she and Mr Pinto were signed off as Team Leader. (60f)
87. We find that Team Leader training requires the trainee to complete between ten to twelve shifts before they are given a uniform. The claimant did two shifts as part of her training on 2 and 3 June 2017. Before then, she shadowed Mr Shah and others. Mr Pinto was her mentor. He was not running any shifts as Team Leader prior to 2 June 2017. A morning shift would require opening the store, refilling shelves, looking after staff and customers. On the two days the claimant wore the correct uniform as a customer assistant. When Athawan ran his first two shifts, he did not wear the uniform. Mr Pinto was already a trained Team Leader.
88. The store has only three or four keys. Amuthan and Mr Pinto had their own store keys as they were team leaders. Keys would often be passed round as the respondent would not allow further keys to be cut.
89. All stores have one store manager and three team leaders.
90. The claimant went on sick leave before she was able to complete 10 or 12 shifts for Team Leader training. She was, therefore, not entitled to the uniform. From 8 June 2017 she was not given a uniform as there was no Team Leader vacancy at the store.

91. All keys at the store were given to those who were required to use them and had the authority to do so, namely Mr Shah, Mr Kumar, Mr Pinto and Amuthan. Keys would be given to others for their use and no additional keys could be cut for safety reasons. There was no evidence upon which we could decide as fact that the claimant was treated less favourably because of race or that her treatment was related to race. The store complied with its practice.

Mr Pinto behaving unfavourably

92. The claimant also alleged that Mr Pinto behaved unfavourably towards her, paragraph 3.3.12. In paragraph 15 of the claim form, she acknowledged that she was being paired with Mr Pinto who was coaching her when she was running the evening shifts and learning from him. She stated that she felt harassed by Mr Pinto's unfavourable behaviour towards her, in that he refused to tell her the password for the PDA, a hand held device; gave inconsistent instructions on how to perform tasks; told her that being a shift leader was not for her; undermined her instructions to staff and overrode her authority with his own instructions.
93. As regards the PDA, the store number is 501, the password at the time was 1234. The claimant had used the PDA and it was difficult to accept that she was unable to recall the password being 1234.
94. On 2 June 2017, she messaged Mr Shah about an incident involving Mr Pinto. She wrote:
- “Sorry for the late hour, but I have to tell you what happened today. Francis was upset because he had an argument with Siva in the afternoon. Everything I asked him to do, at first he said “no, I don’t do it”, but in the time I was trying to find a way to sort it out he changed his mind. I asked him to take the frozen delivery and he says he doesn’t want to take it and he wants to cover the first bell. I asked Latusan and then Hari to take the frozen delivery and when I went back to tell Francis that Hari will take it from him, Francis said “I’ll take it”. I asked him to do a click and collect for a customer and he did the same in front of the customer and said that only the manger has to do the click and collect. I went in the office to take the PDA to do by myself, but he said he would do it. He was in a very bad mood all evening. He worked slower than he usually does and at 7:10, he said he’ll take his break. When he finished his break, he left the shop without letting me know that he wants to go home earlier. So if he left at 2:30 hours earlier I asked Lakshmi if she can come to help me and she came from 8:30pm to 11pm. Can you please pay Lakshmi those two and a half hours instead of Francis? She clocked in and out and she will be on the Exceptions. I ensured that she will be paid. I was lucky to have Amuthan’s keys on me to lock the doors and the shutter, otherwise I had to ask you or Siva to come to the shop at 11pm. I will bring the keys back to the shop on Sunday morning or on Monday.” (110 – 111)
95. It is clear from the above that the claimant did not have any accessing and using the PDA and well as keys to the store.
96. In evidence, Mr Francis could not recall much of the incident. We accept the account given by the claimant as she produced the message to Mr

Shah which is a contemporaneous account. There was a disagreement between her and Mr Francis but beyond these facts there is no evidence in support of the claimant's assertion that the various matters she complained of in relation to this incident, were related to her race. She did not state in her message to Mr Shah that race was the issue. According to her Mr Pinto had fallen out with Mr Kumar and had taken it out on her. It was nothing to do with race but the mood he was in at the time, according to the claimant.

Refusing two weeks' leave

97. The claimant next alleged that the respondent, by refusing to give her two weeks' leave in March 2017, and asking her to work on the day on which she was authorised leave, were acts related to race, paragraph 3.3.13
98. She told the tribunal that by March 2017, she felt that she needed a break so asked Mr Kumar if she could take two weeks' leave but Mr Kumar only granted her one week and told her that she was not allowed to have a holiday as he and Mr Shah were on holiday. He said that other work colleagues were on holiday and no one would come in early enough in the mornings to cover her shift. He also told her that he had to cut a week from his holiday to accommodate her request for leave, even though it was inconvenient for him as his son was taking his GCSE examinations. She stated that Mr Kumar asked her to work on the Wednesday of her authorised week's leave which meant she was unable to go anywhere. She said she felt that she had no choice but to agree to his request.
99. She later wrote in her grievance letter dated 18 July 2017, that Mr Kumar did not force her to work on the Wednesday and had offered the following Monday, but she suspected that if she had refused, he would not be as accommodating to her in the future.
100. We find that all requests for leave must be made with as much notice as possible. In the claimant's case it was at short notice. Mr Kumar was also on leave as well as some members of staff. It was up to the claimant to take sick leave instead of annual leave, but she did not do so. It seems to this tribunal that Mr Kumar tried his best to accommodate her request at short notice without her following procedure. He went over and beyond what was required of him by curtailing his leave by one week in order that she may have a week's leave. She was not forced to work the Wednesday and instead was offered in place of working Wednesday, the following Monday off. Based on these facts it is difficult to see how Mr Kumar's treatment of her can be viewed as either direct race discrimination or conduct related to race.

e-learning in own time

101. As regards paragraph 3.3.14, the claimant alleged that Mr Shah required her to complete e-learning in her own time, rather than during working hours.

102. In her witness statement, she wrote that as part of her training she had to complete e-learning modules. She had 60 modules, each module would take approximately 30 minutes to complete. She had to attend 12 workshops working four to eight hours on each. Two of the workshops were completed while she was on holiday and the respondent did not want to pay her for nor give her back two days.
103. Mr Shah said in evidence that training did not involve 30 hours. There were 30 modules which, in total, should have taken two to three hours to complete. The claimant told him that she would prefer to study from home because it was more comfortable and quieter. The respondent has a room in the store near the store office where the claimant and other members of staff could study. He acknowledged that staff might enter or leave the room which might be inconvenient to study but any preferred to study from home. He told the tribunal he did his e-learning from home.
104. We were not given any documents in relation to the e-learning materials for Team Leader training. We are referred to WhatsApp messages from Mr Shah to the claimant on 2 and 3 March 2017. Mr Shah, on 2 March, messaged her at 4:29pm acknowledging that she was busy but asked her to spare some time to complete her legal training 1. The claimant replied at 5:14pm the same day stating that she would do it on Saturday and that Amuthan asked her to complete it on 2 March, but she told him she was unable to do so.
105. It is seemed from the WhatsApp messages that it was at the claimant's election that she chose to complete her study on Saturday. There was no evidence that she had been forced to study from home either by Mr Kumar or Mr Shah. It was open to her to do her e-learning at the store in the office. There was also no documentary evidence before us that she had applied to be paid for the alleged two days she attended the workshop or requested that the two days be converted to leave.

Unable to run her own shift

106. As regards paragraph 3.3.15, namely Mr Kumar suggesting on 26 May 2017 that the claimant was unable to cope with a running a shift on her own, in her witness statement, in paragraph 38, she stated that on 26 May, at short notice, she was asked to work the late shift. She said the shift had been difficult because of staff sickness and late arrivals. Mr Shah ended up coming into the store to help and after this Mr Kumar would mock her offering her "help" suggesting that she could not run a shift on her own.
107. She acknowledged that the shift was difficult because of staff sickness and late arrivals. The suggestion by Mr Kumar to help her, was in the tribunal's view, a benefit to her and did not indicate that he thought she was unable to run a shift on her own. Indeed, from the evidence that we have heard, the claimant had been running a few shifts on her own. In Mr Kumar's evidence he said that he had a good relationship with the

claimant. There was no evidence upon which we could decide that Mr Kumar's comment, allegedly made to the claimant, inferring that she could not run a shift on her own, was conduct related to race or because of race.

Turning a blind eye

108. The claimant alleged that management turned a blind eye to staff who were demeaning her, in particular on 2 June 2017, and had not supported her, paragraph 3.3.16.
109. We have already made referred, earlier in our judgment, when dealing with paragraph 3.3.12, to the event on the 2 June which was the first day the claimant was on her Team Leader training and Mr Pinto was there to coach her.
110. When the claimant submitted her account of events on 2 June 2017, to Mr Shah, we were not referred to a response from him, or from Mr Kumar. Mr Pinto was rostered to work until 10pm on 2 June 2017. (94) Mr Shah told the tribunal that he did speak to Mr Pinto who was due to finish his shift at 6pm on the day but worked until 8pm on 2 June 2017. Mr Pinto told him that the claimant would not listen to him because he was only there to give advice to her. It would appear that Mr Shah did not speak to the claimant about the events on 2 June. We do not take the view that Mr Pinto's action on the day amounted to demeaning the claimant. He had a dispute with Mr Kumar and the claimant was not prepared to take his advice, according to him.
111. Firstly, what we have were the claimant and Mr Pinto together during the evening shift. Secondly, there was an argument between Mr Pinto and Mr Kumar, and this seemed to have rebounded on Mr Pinto's relationship with the claimant that evening. Thirdly, there was an issue as to whether the claimant was prepared to follow Mr Pinto's advice and instructions. Fourthly, Mr Pinto left before the end of the 10pm shift. The fifth point, being that the claimant complained about Mr Pinto in her e-mail to Mr Shah. Sixth, according to Mr Shah, this was discussed with Mr Pinto who informed him that the claimant was not prepared to listen to his advice.
112. Do these facts lead the tribunal to conclude, at the first stage, that the claimant had been treated less favourably because of race or the conduct was related to race? Mr Shah should have approached the claimant and tell her that he was taking her complaint seriously and outline to her Mr Pinto's response to her concerns. Compared with a non-European Team Leader in training and, would Mr Shah have behaved any differently? We have come to the conclusion that this was a case of Mr Shah managing this incident in an unsatisfactory way. He had supported the claimant, in that he put her name forward for Team Leader training. He had not demeaned her as he spoke to Mr Pinto and Mr Pinto did not demean her as they both did not get along during the shift. We were unable to make findings of fact from which we could decide that the claimant was treated less favourably because of race or the conduct was related to race.

113. We bear in mind in the claimant's WhatsApp message sent to Mr Shah shortly after being told that she was signed off as Team Leader, she expressed her sincere gratitude to him for going "the extra mile". It was sent because Mr Shah had spoken to the person who had interviewed her as part of the Team Leader training process and felt that Mr Shah's intervention helped her to pass her examinations. She stated in her message:

"you are always there when I'm in need with this Team Leader role, and not only, and you take the "extra mile" in helping beyond expectations you are the best example of a very good manager. Many thanks" (60m-n)

Sending the claimant to another store

114. In relation to paragraph 3.3.17, the claimant alleged that she was going to be sent to another store to complete her career development as the Bushey store had its full complement of team leaders. After passing her examinations for Team Leader, she was told by Mr Shah that she would need to be transferred to another store to work in a Team Leader role. Mr Shah had explained to her that he did not have a role for her at the Bushey store as Team Leader.
115. She said in evidence that she was not asked what she would prefer nor what she considered would be good for her. She said that Mr Pinto was not told to move but we have found that Mr Pinto was already taken on as a team leader by the store.
116. Mr Shah said in evidence that she could have remained at the store, but not be able to perform the role of Team Leader.
117. The claimant was asked by a member of the tribunal whether she had considered applying to the respondent's superstore in Borehamwood which is much closer to her home as there was the possibility, due to its size, of being taken on as a Team Leader. She replied that she did not apply although the Bushey store is further away.
118. Mr Shah advised her to look at vacancies on the respondent's portal or she could remain at the store until a Team Leader position become vacant.
119. We do not accept the claimant's assertion that she was being sent to another store. She was told of the position regarding a Team Leader vacancy and the decision whether to leave was up to her. We have not made any findings on which we could decide that her treatment was because of race or related to race. As we have already alluded to, the claimant had thanked Mr Shah for being helpful to her in progressing her to the stage of Team Leader.

Refusing two weeks annual leave

120. As regards paragraph 3.3.18, the claimant alleged that she was refused two weeks annual leave when she was unwell.
121. On 13 June 2017, she asked Mr Shah for two weeks annual leave as she was unwell. She said she was experiencing lack of energy, tiredness, forgetfulness, impaired concentration and attention, depression, low self-esteem and continuous pain in her knees. These symptoms she did not have before and the situation was giving her stress and did not recognise herself anymore. She needed a break to rest and recover. She claimed that Mr Shah had refused to give her the time off.
122. Mr Shah said in evidence that she wanted two weeks leave but he did not speak to her. He saw her sick note and then later received her resignation letter. He read her message sent to him on or around 13 June 2017, in which she complained about what she was suffering from as set out above and requested two weeks holiday. (115 – 116)
123. She had also WhatsApp messaged Mr Shah at 20.55pm on 13 June 2017 stating that she was not feeling well and would be unable to work the following day; would attend hospital and would let him know on the following day if she was able to return to work. Mr Shah replied, asking whether she had spoken to Mr Kumar, to which she had responded that she had. This was on 14 June 2017. (60g)
124. The following day, 15 June 2017, she visited her general practitioner and was signed off from work from 15 June to 29 June 2017, having been diagnosed as suffering from stress at work. (61)
125. There was a further sick note covering the period 20 June to 9 July 2017, diagnosing again, stress at work. (62)
126. The final sick note in the bundle was for the period from 7 July to 21 July 2017, again with the same diagnosis. (63)
127. There was no evidence before us that either Mr Shah or Mr Kumar had refused the claimants for two weeks' annual leave. On 15 June 2017, she had been given a fit note diagnosing stress at work, whilst at the time, according to her account, suffering from several mental and physical conditions. This was more a case of going on sick leave rather than annual leave which would not have been to her benefit. The request for two weeks' leave in fact was sent in the morning at 11:37 on 14 June 2017 to Mr Shah by her. Mr Shah said in evidence he had no recollection of his response to it.
128. We were unable to make any findings of fact upon which we could decide that the claimant was treated less favourably because of her race or that her treatment was related to race. It would have been inappropriate to

have granted annual leave in a case where she was suffering from stress at work.

Not contacting the claimant while on sick leave

129. In relation to paragraph 3.3.19, the claimant alleged that she was not contacted during her four weeks period of sick leave to ask how she was feeling or at all. From the evidence, we do find that as fact, that it is not the respondent's policy to contact someone on sick leave within their first four weeks. Thereafter, the matter is referred to its People Manager, who would take appropriate action. What Mr Kumar was doing in this context was following the respondent's policy. In this respect the claimant would not have been treated any differently when compared with non-European work colleagues. From the evidence given the People Manager attempted, unsuccessfully, to communicate with the claimant.

Failing to acknowledge her grievance

130. In paragraph 3.3.20, the claimant alleged that the respondent did not acknowledge her grievance dated 18 July 2017 or dealt with the issues raised in it.
131. On 16 July 2017, the claimant resigned from her employment. She stated in a letter to Mr Shah the following:

“I am writing this letter to let you know that I am resigning from my position as shift leader, Tesco Stores Limited, Store 5018, Harcourt Road. Due to the very low payroll budget, we have to work with not enough staff, which makes the work overloaded, the daily tasks difficult to fulfil and very much pressure on the job. I thought I would be able to handle these demands but after working there for the last few months, the stress has simply become too much and my health is beginning to show the signs, at the moment being extremely depressed. Please note that as per the terms laid out in my contract I am providing a week notice of my intent to leave the company, 23 July 2017, being my last day at work here. As you pointed out before that I have to move to another store, you will not will have to look for someone to replace, and it will be easy for you to handle the fact that I will complete my notice period while on sick leave.” (64)

132. Her grievance letter covered nine pages and was addressed to Mr Shah.
133. The resignation letter was handed to Mr Shah by her son at the store. Upon reading it he asked her son whether it was possible to visit the claimant at her home to which the son agreed, but when Mr Shah called at her home the claimant was not there.
134. The grievance letter was handed to the respondent's People Manager to be dealt with. This was in accordance with the respondent's procedure. We did not hear evidence from the People Manager as to her motivation in not responding to the grievance letter. There was no evidence that the respondent's failure to do so was related to the claimant's race or was because of race. (66 – 74)

Submissions

135. We have taken into account the submissions made by Mr Taylor, counsel on behalf of the claimant, and by Ms Tharoo, counsel on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also considered the authorities they have referred us to.

The law

136. Under section 13, Equality Act 2010, “EqA”, direct discrimination is defined:

“(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.”

137. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

“There must be no material difference between the circumstances relating to each case.”

138. Section 136 EqA is the burden of proof provision. It 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 provisions 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.”

139. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

140. In Madarassy v Nomura International plc [2007] IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was

pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

141. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
142. The Court then went on to give a helpful guide, “Could conclude” [now “could decide”] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.
143. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.
144. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected

characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

145. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.
146. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.
147. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.
148. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799
149. Harassment is defined in section 26 EqA as;

 "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 and intimidating, hostile, degrading, humiliating or offensive environment for B"
150. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).
151. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was

with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

- (1) the respondent had engaged in unwanted conduct;
- (2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;
- (3) the conduct was on one of the prohibited grounds;
- (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and
- (5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

152. Section 95(1)c Employment Rights Act 1996, provides,

“(1) For the purposes of this Part an employee is dismissed by his employer if

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

153. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer’s conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

154. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

155. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the “last straw” doctrine that,

“...the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?”, Glidewell LJ.

156. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

“A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase ‘an act in a series’ in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

I see no need to characterise the final straw as ‘unreasonable’ or ‘blameworthy’ conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be.... .

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.”, pages 37 - 38.

157. The test of whether the employee’s trust and confidence has been undermined is an objective one, Omilaju.

Conclusion

Direct race discrimination and harassment related to race

158. It follows from the tribunal’s findings and conclusions above that the claimant’s direct race discrimination claim and harassment related to race are not well-founded and are dismissed.

Constructive unfair dismissal

159. The claimant’s constructive unfair dismissal claim relies on the acts and omissions in relation to the harassment and direct discrimination claims. She asserted that those matters amounted to a fundamental breach. She had resigned in response to the alleged breaches. Then she stated that the last straw was the failure to contact when she was on sick leave. We have found that the store was simply following policy and that failure did not amount to a fundamental breach of her contract.

- 160. We have come to the conclusion that the respondent had not breached the claimant's contract of employment in a fundamental way entitling her to resign. Accordingly, this claim is not well-founded and is dismissed.
- 161. The listing of this matter for provisional remedy hearing on 31 October 2019, is hereby vacated.

Employment Judge Bedeau

Date:05/06/2019.....

Sent to the parties on:

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For the Tribunal Office