EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondents
Miss A Oladipo		**Lush Retail Ltd**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 12 JUNE 2019

Introduction

1 The Respondents are manufacturers and retailers of handmade cosmetics. They also provide what they described as "high end" spa facilities at some of their stores, including their main outlet on Oxford Street. In December 2016 they employed just under 6000 people in the United Kingdom.

2 The Claimant, Miss Aminat Oladipo, a black woman born on 11 November 1977, was employed by the Respondents as a part-time Sales Assistant from 25 March 2016 and as a trainee Spa Therapist from 29 July 2016 (or thereabouts) until her dismissal on 2 September 2016 on the stated ground of rude and unprofessional conduct.

3 By her claim form presented on 16 October 2016 the Claimant brought complaints of direct racial discrimination and victimisation. All claims were resisted.

4 At a preliminary hearing for case management held on 20 December 2016 it was recorded that, for the purposes of victimisation, the Claimant relied on three protected acts: (a) her text message of 14 August 2016; (b) her email of 25 August 2016; and (c) her remarks in a telephone conversation of 29 August 2016[1], and that the only detriment asserted was the dismissal.

5 The case came before a full Tribunal chaired by Employment Judge Norris ('the first Tribunal') over three days in March 2017 and, by reserved judgment dated 17 May 2017, all claims were dismissed.

6 The Claimant challenged the adjudication in respect of victimisation only, by way of an appeal to the EAT. By order dated 16 August 2018 the EAT (Her Honour Judge Stacey sitting alone) allowed the appeal and remitted the victimisation claim for rehearing before a differently-constituted Employment Tribunal.

[1] The Order (sent out on 3 January 2017) misstated the date as 30 August 2016.

7 The remitted hearing took place before us on 6-7 June this year, with three days allowed. The Claimant appeared in person; the Respondents were represented, as they have been throughout, by Mr G Self, counsel. On day two we gave an oral decision dismissing the victimisation claim. The written judgment followed on 12 June.

8 These reasons, which should be read with those of the first Tribunal and the EAT judgment, are supplied in writing pursuant to a written request by the Claimant.

The Relevant Law

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

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
> **…**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) … making a false allegation … is not a protected act if … the allegation is made … in bad faith.**

10 When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason, it is enough if it contributed materially to the outcome: *Nagarajan* v-*London Regional Transport* [1999] IRLR 572 HL.

11 Protection against victimisation in the employment field is enacted by s39 which, so far as relevant, states:

> **(4) An employer (A) must not victimise an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B …**

12 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

13 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

Oral Evidence and Documents

14 We heard oral evidence from the Claimant and, on behalf of the Respondents, five witnesses: Ms Sonya Fanson, Spa Support (Poole), Ms Julie Roberts, Spa Support (Poole), Ms Elise McKenna, Spa Trainer (Oxford Street), Ms Claire Constantine, Oxford Street Store Manager and Mr Nick Masuda Back, People Support Manager for UK and Ireland (all roles held at the time of the material events).

15 In addition to witness evidence we read the documents to which we were referred in the substantial bundle.

16 Finally, we had the benefit of a statement of agreed facts and a cast list.

The Facts

17 We have had regard to all the evidence presented. As we have said, these reasons should be read with those of the first Tribunal and the judgment of the EAT. It is not necessary for us to recite the entire history again. The facts which it is necessary to record are as follows.

18 Having successfully applied (internally) for a Spa Therapist vacancy, the Claimant was notified in late July 2016 that she had been placed on the intensive residential training course at Poole, scheduled to take place over seven weeks between 29 July and 20 September. She duly attended the course but, on 12 August, she and another trainee, Ms Mercedes Gonzales, described by the first Tribunal as 'Hispanic American' and by the EAT as 'non-white', were informed that they were not making sufficient progress and directed to return to London, where their training would be continued.

19 As instructed, the Claimant returned to London and reported for work at the Oxford Street store.

20 The first protected act relied upon was the text message of 14 August 2016 directed to Ms Rogers, a member of the spa training team and a witness before us. In it, the Claimant made direct and unambiguous allegations of racial discrimination against her by two of the Poole trainers. She said that she would immediately set about drafting an email and that if she did not hear from Ms Rogers by the next day, she would file a complaint through 'People Support', the Respondents' human resources operation. Ms Rogers did reply promptly but, most surprisingly, did not engage with the allegations of discrimination and confined herself to addressing a query to do with expenses. Further text messages to and fro followed, but none touched on the complaints of discrimination. Ms Rogers told us that she took no action on those complaints because the Claimant had signalled her intention to pursue them through People Support.

21 The second protected act was the Claimant's email to Ms Terri Bebb of 25 August 2016. Ms Bebb was the Spa Project Manager. In her message, the Claimant recounted certain events at Poole and the decision to send her and Ms Gonzales home. She commented that the two trainers referred to in the text message of 14 August:

> **… took me to a very low place emotionally for absolutely no reason other than the fact that they are just biased and are more into how a person looks than the content of their character.**

But she then continued:

> **I am going to try and put the experience behind me and just continue with my training at Oxford Street. If you need any more specifics regarding my experience in Poole please do not hesitate to ask.**

22 The third protected act was the complaint of racial discrimination by the Spa Trainers made in a telephone conversation on 29 August 2016 between the Claimant and Ms Fanson (a witness before us). She had received a copy of the email of 25 August and telephoned the Claimant for the purpose of discussing it. In the conversation, the Claimant made a clear and unambiguous allegation of racial discrimination on the part of the trainers. Ms Fanson, who has a human resources background, asked her if she wished to pursue the matter "formally" or "informally". The Cla you are imant replied that she wished it dealt with informally and that she trusted Ms Fanson to give the trainers the feedback which was required.

23 Although it had not been identified as a protected act, the Claimant also placed reliance on a conversation with Ms McKenna (a witness before us) of 26 August 2016. She was the Spa Trainer responsible for training the Claimant and Ms Gonzales following their return to London. In the course of the conversation the Claimant said that she felt that she had been the victim of discrimination by the trainers at Poole. Ms McKenna did not engage with the point, merely remarking that Ms Bebb might be a more appropriate person to raise it with.

24 The Claimant also drew our attention to an email addressed to the Chief Executive Officer of the company "via People Support", dated 1 September 2016, which contained allegations of racial discrimination. Again, this had not been pleaded or identified as a protected act.

25 On 1 September 2016 Ms Constantine, the Store Manager of the Oxford Street store, witnessed a member of the Communications and Coordinations Team, Ms Gemma Holt, dealing with a telephone call from the Claimant. The Claimant was shouting and Ms Holt held the receiver away from her ear. She attempted to placate the Claimant but was unsuccessful. When the call ended, she burst into tears. Ms Constantine was made aware that, in another telephone call earlier the same day, the Claimant had shouted at a colleague of Ms Holt's. It seems that both calls were about the Claimant's wish for a loan and that the answer given to her was that, because she was still in her probationary period, a loan could not be offered to her. (We will return to the subject of probation shortly.)

26 Having seen the episode with Ms Holt, Ms Constantine discussed the Claimant with Ms McKenna, who told her that she had learned of a further incident on 27 August, when the Claimant was alleged to have spoken rudely and aggressively Ms Ailsa Scott, Spa Receptionist.

27 Ms Constantine then decided to call a meeting with the Claimant. It took place on 2 September. Those present were Ms Constantine, the Claimant and Ms McKenna, as note-taker. The Claimant was given no advance notice of the purpose of the meeting or the matters to be discussed. Ms Constantine opened the meeting by explaining that it was "a form of probation review" based on information which had been received. She referred to the need, discussed in training, for Spa Therapists to carry the "correct presence" and to be calm, serene and professional at all times. Against that standard, she drew attention to the three recent episodes of allegedly rude and aggressive behaviour to which we have referred above. The Claimant strongly denied that she had behaved aggressively towards Miss Scott. As for the two telephone calls, she pointed out that she had been dealing with a great deal of stress owing to financial pressures which threatened her with homelessness. Ms Constantine acknowledged that she had had a lot of troubles to deal with but said that her conduct had not been acceptable and that in the circumstances her employment was to be terminated, although she would be paid month's pay given the "exceptional circumstances". Towards the end of the meeting Ms Constantine referred to "correspondence" she had seen. The Claimant then inquired whether People Support had shared information with her about "complaints", to which she is recorded as having replied:

> **No, as your manager, I am course aware of concerns of yours and it is my job to be in the picture so I can help.**

At the very end of the meeting, the Claimant asked why a white colleague had been retained despite allegedly "not passing sign-offs". Ms Constant refused to engage with the question, judging it irrelevant, and ended the meeting.

28 The Respondents routinely make fresh appointments subject to a three-month probationary period. We are not clear whether that practice applies in the

case of internal moves involving staff who have already passed their probation in the roles from which they are transferring. Certainly, as the first Tribunal found, no contractual term was entered into to stipulate that the Claimant's Spa Therapist appointment was subject to a probationary period.

Further Findings and Conclusions

29 Ms Constantine gave evidence that:

(1) The decision to dismiss was hers alone, although she did discuss it with Ms McKenna.
(2) When she took the decision to dismiss (soon after the episode with Ms Holt), she was not aware of any of the three protected acts.
(3) When she took the decision to dismiss she was not aware of the conversation of 26 August between the Claimant and Ms McKenna.
(4) When she took the decision to dismiss she was not aware of the email from the Claimant to the Chief Executive Officer (via People Support) of 1 September.
(5) Her references to "correspondence" and to the Claimant's "concerns" were references to information which she had received and email communications which she had read to do with the Claimant's financial difficulties and her hopes to obtain financial support from the Respondents, and nothing to do with her allegations of discrimination.

30 Ms Rogers told us that she did not take the allegations in the text message of 14 August any further because the Claimant had said that she would pursue the matter through People Support.

31 Ms Fanson told us that she did not take her conversation with the Claimant of 29 August (or the content of the email to Ms Bebb of 25 August) any further because the Claimant stated in terms that she did not wish to make a formal complaint.

32 Ms McKenna told us that, on hearing the Claimant's allegation of discrimination of 26 August, she took the view that it was not a matter in which she (who had no managerial responsibility) should involve herself.

33 We find that the Respondents' evidence on all these points was truthful and accurate. We have several reasons for that view. First, we found them honest and straightforward witnesses who gave rational and internally consistent accounts.

34 Second, we found their evidence concerning Ms Constantine's knowledge inherently plausible. There was no good reason why the protected acts should have come to Ms Constantine's attention. They did raise a serious matter but the threatened complaint to People Support did not materialise and it seemed evident from the second and third protected acts that she did not intend to take it forward – at least not in any formal way. In those circumstances, it is not surprising that her remarks were not passed up to Ms Constantine.

35 Third, the explanations for the references at the meeting of 2 September to "correspondence" and "concerns" are plausible. In particular, it is plausible that Ms Constantine would have been made aware of the Claimant's request for a loan. The Claimant's "smoking gun" theory is illusory.

36 For all of these reasons, we are satisfied that Ms Constantine was not aware of any protected act when she dismissed the Claimant. In those circumstances the complaint of victimisation on the ground that she had committed a protected act necessarily fails. A cannot victimise B for doing X if a does not know that B has done X.

37 In fairness to the Claimant, we think it right to consider the claim on the alternative footing (not considered at the case management stage) that the Respondents dismissed her because they feared that she *might* do a protected act (*ie* repeat in one form or another the prior allegations of discrimination). We are satisfied that, so analysed, the claim fares no better. It seems to us that the timing of the material events argues strongly against the victimisation claim, however put. The dismissal meeting was set up within hours of the unpleasant incident directly witnessed by Ms Constantine. If there had been an intention to punish the Claimant for making the allegations of racial discrimination, or to get rid of her in order to avoid having to deal with a fresh allegation of a similar kind, one would have expected the Respondents to act much earlier than they did. By the time they did act, any risk of facing an awkward, embarrassing or difficult complaint had very largely evaporated. After the second protected act (if such it was), any such risk was nugatory. To put the broad point another way, the timing of the dismissal is strong evidence in support of the Respondents' case as to the reason for it - a case which excludes victimisation.

38 In our view, the considerations analysed so far present the Claimant with overwhelming difficulties. But there are more. We confine ourselves to four. First, Ms Constantine had compelling evidence of repeated instances over a very short period of thoroughly rude and aggressive behaviour by the Claimant. Second, the Claimant had not shown herself overall to be a promising member of the Spa Therapists team. She had struggled in training and seemed likely to be a divisive and disruptive presence if retained. Third, Ms Constantine, although under a misunderstanding that the Claimant was subject to a probation period, rightly understood that she was not protected against unfair dismissal and that no formality prior to dismissal was legally required. Fourth, the contemporary documents are consistent with the Respondents' case and no document shown to us undermines it.

39 For the reasons given, we are satisfied to a high standard that the Respondents have truthfully and fully explained the decision to dismiss the Claimant and that their explanation excludes victimisation. To be clear, we are satisfied that neither the protected acts nor the fear of any future protected act played any part in the decision to dismiss.

40 In reaching our decision we have not applied the burden of proof provisions. In our judgment this is in the normal run of cases in which the Tribunal is able to make its findings on the evidence and those provisions have no part to play.

However, had we found need to have recourse to them, we would have found that the burden did not shift to the Respondents. Further, even had we found that the burden was upon the Respondents, and we would have concluded that they had amply demonstrated that victimisation played no part in the decision to dismiss.

41 In reaching our decision we have had careful regard to all the circumstances. We have not overlooked the Respondents' cheerful disregard for the norms of sound employment relations practice, most strikingly demonstrated in the dismissal itself. We note the observations of the first Tribunal and the EAT on those matters, from which we do not in the slightest degree dissociate ourselves. And we think it a matter of concern that Ms Rogers played a dead bat to the alarming text message of 14 August 2016, contenting herself with the thought that the Claimant was aware that she could take her complaints to People Support. At the very least, we would have expected Ms Rogers herself to (a) check with People Support to find out whether a complaint had been lodged or (b) to consult her line manager as to how to proceed. The Respondents would do well to learn lessons from this case.

42 However, for the reasons stated, this claim, sincere as it is, is unfounded and the proceedings are dismissed.

43 Finally, we should say that our analysis proceeds on the footing that all three protected acts relied upon satisfy language of the 2010 Act, s27(2). We consider that there is a real question whether the second does amount to a protected act, but we do not think it proportionate or helpful to engage in the intricate analysis which would be involved if we were formally to hold that only the first and third attracted protection. As we hope is evident, our conclusion is that, taking the Claimant's case is at its highest on protected act, her complaint of victimisation necessarily fails.

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EMPLOYMENT JUDGE SNELSON
2 August 2019

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Reasons entered in the Register and copies sent to the parties on 5 August 2019

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