EMPLOYMENT TRIBUNALS

Claimant **Ms Wan Kit May Leung**

Respondent **Oriental Merchant (Europe) Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields **On 8-11 October (deliberations 29 October}2019**

Before Employment Judge Garnon **Members Ms S Don and Mr S Moules**

Appearances

For Claimant Ms K Ephraim Paralegal

For Respondent: Mr M Howson Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of direct discrimination because of age, resulting in dismissal and subjection to other detriment, is well founded.

2. The claims of harassment by conduct related to the protected characteristic of religious belief on or about 24 April and 12 June 2018 and by conduct related to the protected characteristic of race on or about 13 June 2018 are well founded.

3. Remedy will be decided on a date to be fixed.

4. The remaining claims are not well founded and are dismissed.

REASONS (bold print is ours for emphasis and italics are quotations)

1 Introduction and Issues

1.1. The claimant was employed by the respondent from 9 October 2017 as a Sales Administration Assistant (SAA). She was dismissed on 13 July 2018. By a claim form presented on 2 November 2018, following Early Concilaition from 1 August to 1 September, she brought complaints of (i) direct discrimination because of the protected characteristics of age, race, religious belief and "perceived" disability resulting in dismissal and subjection to other detriment (ii) victimisation resulting in dismissal and subjection to other detriment (iii) harassment related to the protected characteristics of race and religious belief (iv) automatically unfair dismissal because she made a protected disclosure and (v) an uplift to awards under s. 38 Employment Act 2002 for failure to provide a statement of change of terms and conditions.

1.2. The claimant, born on 8 July 1970, is of Hong Kong Chinese origin, her first language is

Cantonese, she is a devout Christian and relies on "stress" as the perceived disability.

1.3. At a Preliminary Hearing on 14 February 2019 Employment Judge Shore ruled a transcript of a Skype meeting on 10 July 2018 should be admitted in evidence despite the respondent's objection to it so being. He adopted the parties' agreed list of issues but we discussed and refined them at the outset. The right not to be unfairly dismissed in section 94 of the Employment Rights Act 1996 ("ERA") does not apply if an employee has less than 2 years service ending with the effective date of termination but section 108 (3) sets out exceptions including section 103 A which applies if the principal reason for dismissal is that she made a protected disclosure. Where an employee does not have 2 years service, she has the burden of proving the principal reason was the making of the protected disclosure (Smith v Hayle Town Council [1978] IRLR 413 affirmed in Ross-v-Eddie Stobbart). The **only** basis upon which she can succeed is if the Tribunal finds that. If it does, the dismissal is automatically unfair. If not, no matter unfairly the matter was handled, the claim will fail. There is no claim of subjection to detriment short of dismissal. The respondent does not accept a protected disclosure was made but, if we find one was, accepts it was made in accordance with section 43C to her employer.

1.4. With those points in mind, the liability issues are

1.4.1. Did the claimant make one or more disclosures of information ?
1.4.2. Did she reasonably believe (i) they tended to show the relevant failure pleaded (Ms Ephraim agreed the only one pleaded is that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject) and (ii) the making of the disclosure was in the public interest?
1.4.3. Was the principal reason for dismissal that she had made a protected disclosure?

1.4.4. Did the respondent treat the claimant less favourably than it treated or would have treated (i) a younger employee (ii) an employee of Malaysian or Singaporean origin (iii) a non-Christian employee (iv) an employee who was not perceived as having a disability?
1.4.5. If so, did it dismiss or subject her to any other detriment, at least in part, for that reason?

1.4.6. Did the respondent engage in unwanted conduct relating to race or religious belief which had the purpose or effect of (a) violating the claimant's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

1.4.7. Did the claimant, by raising an informal grievance about the behaviour of Venus Teng do a protected act or did the respondent believe she had done or may do a protected act?

1.4.8. If so, did it dismiss or subject her to any other detriment, at least in part, for that reason?

1.4.9. Were there changes in the claimant's terms and conditions of employment in the relevant period which required a statement of changes to marit an increase to any award under s 38 Employment Act 2002?

2. Findings of Fact

2.1. Due to similarity of some family names, we shall in these reasons refer to some people by forenames to avoid confusion. We heard the claimant and, for the respondent, Ms Venus Teng ("Venus") manager of the UK administrative office in Gateshead, Ms Fei Li Toh ("Fei") a SAA there, Mr Clement Lee ("Clement") Head of UK operations, and Mr Cyril Cheang ("Cyril") Global HR Manager. Venus was born on 7 May 1983, raised in Kuala Lumpur, Malaysia and is fluent in English, Malay and Mandarin. Fei was born on 10 May 1996, raised in Singapore and is fluent in English and Mandarin. Clement was born on 28 September 1947, raised in Hong Kong and is fluent in English and Cantonese. Cyril was born on 15 May 1965, raised in Singapore and is fluent in English and Mandarin. Those fluent in Mandarin speak some Cantonese and vice versa. Cyril is based in Melbourne, Australia, as is Clement for half the year .They and Venus are

Christian. All witnesses gave evidence in English which they spoke well but their responses to questions were a little slower than would be expected of people speaking their first language. We drew no adverse inference from hestitency in replies.

2.2. After being interviewed on 13 September 2017 by Cyril**,** the claimant was offered a job as a SAA on 28 September. She was 47 at the time. The respondent knew of her Hong Kong origin and that she was a practising Christian. She started on **9 October 2017.** The office hours were 8.30am - 5pm initially but changed to 9am - 5.30pm in November 2017.

2.3. The respondent provides over 600 products to 250-300 Chinese supermarkets in the UK. Its European base is in the Netherlands through which products are imported. The claimant's duties included confirming orders; chasing order confirmation from Sales Representatives (SRs) and amending orders. She also responded to customer queries and complaints, liased with transport companiesand handled the mail

2.4. She was told when interviewed to report to Teresa Lok, the Assistant Finance Manager who travelled from Australia to train her to use the Systems Application and Products ("SAP") database, and in how the office worked. Michael Ho was the Sales Team Manager. Clement was in overall charge of the UK office.

2.5. The claimant worked full-time. There were 2 part-time staff, Christine Tan ("Christine") who worked 3 days a week), and a Taiwanese woman, Julie who worked 2 days a week. The office atmosphere was fine in the beginning. Venus was not always there. The claimant handled orders until the generation of the purchase order (PO), then the part-time staff handled them until delivery, uploading them to the Netherlands warehouse and dealing with logistics. In a meeting on **3 November 2017,** Clement and Ms Lok said staff should work with each other, and, if one's workload was too heavy, share the work. This accorded with their flexible job descriptions.

2.6. When Ms Lok returned to Australia in **November 2017,** the claimant was informed by Clement she would now report to Venus who would be in charge of the Gateshead office. This was confirmed at a UK team meeting on **8 January 2018.** Venus had been a SR for some time and earned her promotion to manager as it was felt she would be the best person to run the Gateshead office given her experience in the field. Her role was to manage the staff in Gateshead but she too would do some administrative work.

2.7. The UK based SR's go out and secure business from retailers . The SAAs would liaise with them the Netherlands and the logistics companies to ensure the products bought were confirmed as to quantities and any variations up to the point of delivery. Wholly absent from the response form and the statements of any of the respondent's witnesses was Clement's oral evidence on Day 3 of the hearing that (a) the respondent shut its UK office in London in about June 2017 and after 2 months closure relocated it to Gateshead partly to be near where Venus lived, though Cyril later explained there were many other business reasons for leaving London (b) Venus was with Teresa at the claimant's training and after it expressed the view the claimant may find it difficult to work under her management and (c) Venus felt insecure having been promoted with fewer qualification than the claimant and other employees.

2.8. Mornings were busy as 11.30am was the deadline for uploading orders to the Netherlands for dispatch that day. "Order confirmation" involved generating a list of customers to the SRs, chasing them to call the customers to confirm the orders and any amendments and sening the amended order back to the customer for confirmation. Then the claimant generated the PO. She maintained her own paper version of the order details to make it easier for colleagues to check and find them. **She did this of her own initiative**. Only Venus was authorised to contact the Australia office.

2.9. The claimant heard Venus speaking with Ms Lok and Clement about not being happy with Julie's work When she repeated her concerns in January, Cyril dismissed Julie on the same day for failing her probationary period. Venus told the claimant she had passed her probationary period which was confirmed by letter on **15 January 2018.** The claimant asked when her appraisal would be completed, and her salary adjusted. Venus did not answer but produced a document for her to sign. The claimant did not as she was waiting for the answers, which shows she did not **unquestioningly** do everything Venus asked. The document was the appraisal and showed the claimant as *'consistently exceeding all expectations'* or *'exceeding most expectations'* in every category. The only note for improvement was to improve her Mandarin language skills. To do the job well, staff need to speak English, Mandarin and Cantonese. To this point there is no allegation of any unlawful act, but tension existed betweenthe claimant who with several qualifications including teaching mathematics and a Masters Degree in Education and experience as a secretary would have initiative, and Venuswho wanted all her subordinates to do as they were told--no less and no more. Clement said he knew of Venus' doubts about the claimant but, not wanting to "*stir things up*", did nothing.

2.10. In a meeting on **30 January 2018** with Clement, Venus and Christine, the claimant proposed changing working hours back to 8.30am-5pm, so they would have more time to upload orders before 11.30. Clement statement says the request was so the claimant could car share with a colleague but **in oral evidence he agreed** that was a by product of the change not the reason the claimant proposed it which was **her using initiative for the good of the company.** During the meeting, Clement said they needed to replace Julie, and the Managing Director, Bernard Tat Kin Yiu wanted to hire *'fresh university graduates'*. The claimant interpreted what he said as being young employees were willing to work longer hours, and Malaysians were more willing to work hard - including over the weekend and it was because of these factors Mr Yiu promoted Venus. The conversation was in Cantonese. Clement's statement says the claimant was hired when younger candidates applied and his saying he would rather hire university students for the vacant part-time position was only because they can be more flexibile in hours. As for his mentioning Malaysians, his statement says he does not know where the claimant got this from and in his oral evidence he started by saying her account was " *fabrication*" . Venus corroborated this. Under questioning, Clement said he did, at that meeting, describe Venus as a "*Malaysian girl*" who worked very hard 7 days a week. He said every other member of staff should obey and support her. Different people may give different accounts of the same event due to variations in their recollection and/or perception. We find the claimant's account credible but she misinterpreted Clement as saying the respondent wanted to employ young people **instead of older applicants** and Malaysains instead of other nationalities. Both Venus and Clement were, on several points evasive, equivocal and sometimes self contradictory. **Eventually** Clement said his inaccurate witness statement was influenced by him feeling the claimant was accusing him, **in her claim form though not before,** of being racist and ageist.

2.11. A recurring feature in this case is the respondent's witnesses in their statements and initially in oral evidence, saying something which is best improbable, at worst shown to be false, and accusing the claimant of lying about events which they could have said simply represented the claimant misunderstanding something . They chose to deny nearly all her allegations rather than accepting them in part and tendering an explanation.

2.12. Clement confirmed the change in working hours suggested by the claimant in February**,** with effect from **1 March 2018** and asked Venus to deal with customer calls after 5pm which meant she had to return to the office every day. She did not like having to do this and blamed the claimant. Fei started part time in **March 2018.** She was studying for a business degree at Durham Universtiy. She spoke only a little Cantonese, so in order to

improve her fluency, Venus asked the claimant to speak to Fei in Cantonese. This made Fei confused but the claimant followed Venus's instructions as she feared what would happen if she did not. Venus denied giving the instruction. **This made no sense as if she wanted the claimant to improve her Mandarin why would she not want Fei to improve her Cantonese? When our Employment Judge asked her, she could not answer.**

2.13. Fei's statement says she **felt** resentment from the claimant. Her basis for saying this was that having been trained by Teresa, remotely from Australia, to operate the SAP system, on her first day, she had to amend one order in SAP, which was eligible for the "buy 10+1 trade deal". She used the method Teresa taught of putting one line for 10 cases with normal price, and another line for the extra one at a price of £0. Venus had advised that too. However, the claimant said she was more familiar with SAP than Venus who did not it as much and Fei should input 11 cases at the price of 10. Venus said both methods are acceptable and as Fei was still learning the claimant should be less critical. Fei adds "***In the following months**, May only managed SAP. She did not answer phone calls or get involved in any logistics issues. When I had any questions, she suggested I seek help from Venus or Teresa by simply saying that she 'wasn't sure'.* (This is true as the claimant had little experience in logistics which the 2 part timers had done) *... May did not communicate with me which orders she had left me to amend and which ones she had completed. As a result, we would frequently end up doing the same orders and tasks. In turn, rather than electing to, in future, discuss to clarify matters relevant to both parties, May insisted that I report to her anything SAP related I have done, instead of reporting to Venus only so that she could keep track*" . Absent from Fei's statement is when all this happened. She started in mid March so it must have been between then and mid April. Her perception was the claimant was picking on her, but the claimant was just trying to help her get things right. Again we have differing perceptions but neither witness is being untruthful. **We accept whatever mistake Fei made Venus would regard as not being a problem, but if the claimant did anything Venus regarded as wrong , Venus would come down on her harshly** .

2.14. Fei writes of another incident on **Friday 20 April** " *.., , May reprimanded me in front of Clement..rather than talking to me directly to solve this relatively minor issue using a system I was still getting used to,.... It seemed as though May's exaggeration of the severity of the error, in the presence of Clement and in the absence of Venus, was intended to make me look incompetent.* Fei told Venus about this by telephone over the weekend. There is no mention of it in Clement's statement. He had been a teacher in Hong Kong and by now was in his seventies. We found him to be a likeable man who wanted only a smooth running office with no rivalries.

2.15. On **Tuesday 24 April 2018,** Fei made a duplicate order confirmation for which the claimant criticised her. The claimant' statement says

I do not know why this led her to believe that I disliked her. ..
*I also reported the incident to Venus and Clement the next day. In a follow-up meeting ..two days afterwards on **26 April 2018 ,** I mentioned that it may be better to have someone else in the office along with me and Fei. But Clement stated, as I was older, more mature, and a Christian, I should be more understanding and considerate of Fei.*

So that there was a record, I sent a follow up email (p. 115-116), and inputted the incident into the Excel office routine document. This is there so that the Australia office can review what is happening in the UK office.
*I am not aware of any complaint being made about me by Fei as alleged by the Respondent (at 23, p. 30), and I am also not aware of any investigation being carried out (at 24, p. 30) or any "mediatory" meeting (at 24, p. 30) - especially as we could not have had one of **24 April 2018,** since that was the day of the actual incident.*
Christine later told me that Venus deleted this incident from the Excel document.

2.16. We accept Venus's oral evidence the entry was "hidden" (which means not showing all columns on an Excel spreadsheet) not deleted. **However, in sharp contrast to what follows there is a paper trail of a significant event created by the claimant .** Fei spoke to the claimant later. She was emotional, crying, and said how stressed she was as a result of studying and working at the same time. The claimant tried to comfort her, and advised her to explain to both Venus and Clement how she was feeling. Fei's version in parts of paragraphs 4 and 5 of her statement is not inconsistent

"*4….. When May came back to the office, I decided to chat with her on how we can cooperate and work together more effectively. .. I explained to her that my working style is more independent as I used to work in a company with a larger work environment and population. I was not used to reporting to my colleague constantly and not having an equal two-way communication. She suggested that she could print the emails and put in on the table so that I could go to her desk and collect some task to work on. We later agreed that it is more ideal to let each other know what we were going to do.*

5. Towards the end of the talk, I confided to her about my hopes to do well in this company, hoping she could empathise with me and be more understanding in future. Due to exhaustion and accumulating stress from university work in the critical moment of my academic year, coupled with anxiety developed from prior incidents at work, I began to cry. She comforted me for a bit before she went home.

This shows two people giving what they perceive to be truthful and accurate accounts. We find neither is lying. Fei's oral evidence helped the claimant in respects which will be seen **.**

2.17. Clement's statement says "the respondent" received a complaint from Fei that the claimant had "bullied" her. He **does not say who** received it or **when.** He asserts an "***investigation*"** found the claimant had acted in an inappropriate manner, repeatedly displayed unprofessional conduct and failed to follow reasonable management instructions from Venus , refused to answer incoming calls or get involved in any logistics related issues, blamed Fei for her own mistakes, failed to follow policies and procedures and publicly ridiculed Venus . He adds 24 April was the date of '*informal mediation'* to attempt to resolve all this of which Clement's statement says "*9. During the meeting .. I did state to the Claimant that she was "older" and "more mature", however this was not said in a malicious context. These comments were a compliment to the Claimant on her being more "wise" and "understanding" due to her position within the company. The Claimant had more life and work experience and therefore greater perspective and, given this, should be more understanding of a younger employee. I also asked the Claimant to be more "forgiving" for any hardship received from Ms Toh due to her patient and respectable nature."*

2.18. That apart, the respondent's version makes no sense. How can there have been an investigation no-one realised was taking place and which produced no paper trail at all? Clement's oral evidence was Venus told him while he was driving a car in which Venus was a passenger the claimant was too hard on Fei and he just accepted that. **We find the truth of the matter is the claimant was not acting in as subservient a manner as Venus would have liked, and whatever Venus said as regards which of the claimant or Fei was in the wrong was accepted by Clement, and later Cyril. In short they believed the person in charge is always right and her subordinates should do whatever she says. That is not unreasonable in itself. The problem for the respondent is that the thought processes of Venus, Clement and/or Cyril may have included a subconscious preference for the younger person and bias against the older person for expressing a view of her own and using initiatve both of which Venus viewed as challenging her authority .**

2.19. About this time, Venus shouted at the claimant , *'you are Christian - you don't tell a lie and you are unsuitable for this work'.* Venus' strenuously denies stating this to the claimant. Venus is Christian but not, to use a word put to her by Ms Ephraim, as "pious" as the claimant . This is the first of two examples of conduct related to religion being used by Venus to

mock the claimant and thus create a humiliating environment for her. **We find Venus probably had the purpose of harassing her, but, if she did not, her conduct had that effect and it is reasonable it would have.** Despite this incident the claimant hoped the office would return to an amicable atmosphere. She knew Fei sometimes hurried in without breakfast so when Venus was not around, offered her biscuits in the morning. She accepted these, and thanked her. Fei accepts this happened at least once.

2.20. At the end of **April 2018,** in a meeting with Christine and the claimant Clement stated the direction of the company **was now** to hire young people since they were more driven. All office staff were to follow Venus' instructions because she was young and driven. He said **younger people would be more able to obey Venus** and a fresh graduate is like a *' white paper'*, willing to obey and follow instructions. Clement accepts he did state Venus was in charge of the office and the claimant should follow her instructions but denies saying younger employees were more likely to do so or are like "white paper". The phrase was spoken in Cantonese, The English idiom is " like a blank sheet of paper". We find Clement did say something like that as this is a level of detail it is improbable the claimant would invent. In oral evidence Clement accepted younger people with less experience bring to any new job less "baggage" from past employments so can be more easily schooled in the respondent's preferred ways. As a result of what he said , the claimant felt her job was insecure. She brought in references from previous employers, certificates of qualifications and offered to be re-interviewed. **Clement accepts she did so and could give no reason why she would if she were not trying to prove her worth and that her age and experience were an asset not a hindrance.**

2.21. On 14 May Clement emailed staff saying Jacques Vaessen in the Netherlands had decided to abolish the " order confirmation " stage from 1 June to speed up processing of orders.We, and the claimant, accept this would reduce administrative work when the new system was operating efficiently.This was an anticipated reduction in the requirement for employees to do work of a particular kind–in law a redundancy situation.

2.22. However in several important respects Clement and Cyril's statements and oral evidence were incredible. Both say, in May 2018, the SR's were given IPads which enabled them to liaise directly with the distribution centre in the Netherlands, so SAA's work significantly decreased. Venus gave evidence first then Fei. Both said the iPad did not enable the SRs to liaise with the Netherlands, only with the customers but that did save SAA's having to deal with order amendments. Clement in his oral evidence later had to say the same adding SAA's now simply had to "*press a button*" to forward information to the Netherlands. That is essentially what the claimant said too. Accepting there was need to reduce staffing, the question is " by how much?".

2.23. On Clement's explanation there was a need to reduce from one full-timer (the claimant) and 2 part-timers (Christine and Fei) to one and a half full time equivalent. Venus's version was that before anyone spoke to the claimant she had spoken with Christine who said she could notwork her hours on five mornings instead of three full days. Clement's version was that his preferred order of staff to retain would have been the claimant, then Christine then Fei, so the claimant was spoken to first. He said Venus had simply become confused as to the order of events. That still does not explain why, by the time of the claimant's dismissal the respondent needed to reduce further from one and a half full time equivalents to only **one part timer**. Clement's account that it was because of improved working of IT systems and that he had asked Venus to spend more time in the office, simply does not provide a sufficient explanation as will be seen.

2.24. On **16 May 2018,** in the office, the claimant was told by Clement and Venus to meet them in a nearby coffee shop the next morning. They did not tell her the purpose of the

meeting. At 8am on **17 May 2018** they met. They told her half of the responsibilities of her role would change. She could take more administrative and logistics work, and remain employed or accept redundancy. She wanted to keep her job so accepted the different responsibilities. We accept her evidence Venus looked unhappy with her decision.

2.25. Later on **17 May 2018**, Venus asked the claimant to carry out a logistics task. When she asked for instructions on how, Venus became furious ignoring the question and shouting instead. Clement and Christine were present. About a week later Michael Ho rang the claimant saying Clement had told him Venus had shouted at her, and Clement had asked her to change her manner so things should improve. Venus says " *I completely deny though becoming angry or shouting at the Claimant when she refused. I was though very firm with the Claimant that this was part of her role and that, as her manager, she should follow my reasonable managerial instruction*". We find the claimant did not "refuse" to do the task , simply asked how. **Clement does not mention this in his statement at all and said in oral evidence Michael Ho and/or the claimant must be lying. We find neither are.**

2.26. At 4pm on **25 May 2018** (a Friday), Venus found out Fei had forgotten to book in 10 customers for delivery, and made inaccurate bookings for 18 customers. Fei was off work, so the claimant offered to either stay late or return on Saturday to call the customers and share the workload. Venus refused the offer. In evidence, Venus did not disagree with this.It shows the claimant was not at all unwilling to do whatever was needed to help.

2.27. Early on **29 May 2018,** the claimant received a WhatsApp message from Christine that she had been dismissed on **28 May 2018.**This shows Venus version she was spoken to before 17 May is improbable.

2.28. On **31 May 2018,** Venus called a meeting with the claimant and Fei, whose working hours had been changed to 9am-1pm every day instead of 2 full days, so she would uploading orders to the warehouse before11.30am, and the claimant any after then.The claimant started to prepare an ' out of stock' list every day, and was assigned more logistics work. Her workload had increased but it was unclear exactly what her responsibilities now were. She asked Venus for an updated job description. She did not get one. Throughout this time, she kept on greeting Venus in the morning but she would never greet her back. One time, Venus slammed a pile of documents down on the table next to the claimant.

2.29. In **June 2018,** the claimant and Fei had conversations when Venus was not in the office about a holiday Fei was planning. The claimant felt their relationship was improving and we find it was .We do not think it was ever bad, but can understand why the claimant would come across to Fei as a strict mother figure, and Fei would come across to the claimant as not careful enough in her work. Around this time Fei said the respondent was going to make arrangements for her to do her "placement year" with it, so she would be able to work full time from October 2018**. This is almost exactly what happened.** The respondent's witnesses' statements that Fei continued to work part-time, but flexibly, after the claimant's dismissal were completely undermined by Fei's clear evidence that **from mid July 2018 to October 2019** she worked 40 hours per week because she is allowed to do so on her placement year as opposed to being limited to 20 hours a week when she had to spend part of every week in University.

2.30. Freeman Hung ("Freeman"), who is from Hong Kong started on **1 June 2018 as** a SR in the South-East. Around **5 June 2018** Venus had an argument with him about using Excel, and called Michael Ho, Teresa Lok and Clement to complain about him. On Monday **11 June 2018** in the afternoon**,** Freeman telephoned the Gateshead office to ask for the contact

number of a customer and information about the estimated time on deliveries. The claimant answered his questions. Venus shouted at her she should not have done so. Venus' statement says when Freeman phoned " *. I informed the Claimant not to answer any specifics and that I would contact Mr Hung back when available. I didn't shout or abuse the Claimant when I did this. The Claimant though disobeyed my instruction and proceeded to try to answer Mr Hung's queries*". We do not accept she gave a prior instruction which the claimant disobeyed.

2.31. On Tuesday 12 **June 2018,** Venus shouted at the claimant she should not have ***taught*** Freeman what to do. The claimant replied she was only answering his questions - not teaching. Venus said all other staff outranked the claimant so she was not in a position to teach someone else. She pressed her to admit she was wrong or she would give her a warning letter. Venus then swore at her. Venus' statement says: "*3 This resulted in an altercation between myself and the Claimant* ***on the 14th June 2018****. I strongly questioned the Claimant as to why she had disobeyed my explicit instruction and very openly criticised her for this. I did use the work "tiu" under my breath which is best translated as "fuck off". It wasn't very professional of me. It was though just born out of the Claimant refusing to follow a simple managerial instruction….*

2.32. Venus' timescale makes no sense. Why wait 3 days to speak to the claimant about what she says is blatent insubordrination? Probably on this day, Venus asked the claimant to resign and let Fei become full time as part of her work placement. The claimant said she would not resign, since, as a SAA, answering questions from an SR was justified. She begged Venus to stop the shouting. A few minutes later Venus said sorry in a strained tone, but in a few minutes, started shouting again: *'you are Christian - don't say swear words? Don't fight back? Only patient?!'* Venus denies saying this but we do not accept her evidence. Again she was mocking the claimant as a "pious" Christian. The claimant's statement says: "*This was all very intimidating. I felt that she was making threats about my job security without a good reason and was trying to verbally humiliate me. … The only thing I could do was be patient, and not talk back. I kept telling myself that the company was paying me to do my job and so, since I needed to keep the job, I had to do everything well."* We find Venus probably had the purpose of intimidating and humiliating her, but, even if she did not, her conduct had that effect and it is reasonable it would have.

2.33. On **13 June 2018,** a SR called to let the office know some orders had not been uploaded before 11:30am. Fei had stopped uploading orders after 10:45am. Fei's statement, in which we find she has made a mistake about the date, says " *On 12 June 2018, the system was slow for the entire morning, and crashed frequently. It was difficult to start the system to upload orders after 10.45am, but luckily most orders had been uploaded already.* If that was the case neither Fei nor the claimant were at fault but Venus said it was the claimant's fault because as the full-timer, she should handle everything. The claimant replied Fei was supposed to do uploads until around11:25am each day. Venus then transferred this task to the claimant saying Fei was now her personal assistant, so would only have to do what Venus instructed her. The claimant felt this was an unbalanced and unfair workload, so requested a new job description. Venus replied there was no point providing one since, as the full-timer, she had to do everything. Fei's statement includes *".. Venus … . . pointed out that it was May's job responsibility to upload orders after she had confirmed one. In addition, on my job description issued on 31 May 2018, uploading orders was not included. Instead, as the only other full-time Sales Administration Assistant, uploading orders is also rightfully part of May's responsibility of managing sales order".* In essence Fei agrees the claimant's version that Venus unconditionally and unquestioningly sided with her against the claimant. Also when Fei talks about what is in her job descriptions she is not criticised, whereas, as will be seen, the claimant even requesting a updated job description is viewed as defiance not only by Venus, but later by Clement and Cyril.

2.34. At 4pm, Freeman called with some queries. The claimant asked Venus for instructions and , as requested, handed the call over. This, save for the date, matches Venus own evidence *"**A few days later** Ms Hung phoned the office back. The Claimant asked what she should do. I asked her to pass Mr Hung through to me which is what happened".* However Venus shouted at the claimant for not knowing how to answer people's queries, then called a meeting between just the two of them at which she said *'I knew you are Hong Konger and Freeman is Hong Konger as well. You Hong Kong people like to help Hong Kong people'.* Venus denies this but we believe it was said. Venus husband is from Hong Kong and Clement's current sales team comprises five Hong Kongers and one Chinese. As we explain later, harassment can occur even if the reason for the conduct is not the protected characteristic. We do not find this had the purpose of harassing her but in all the circumstances it would reasonably have that effect because Venus was dismissing the claimant's reason for answering Freemen, which was that it was part of her job, and attributing her actions as due to her and Freeman both being from Hong Kong . This is the only claim of harassment related to race.

2.35. At the end of the meeting, she said the claimant could launch a complaint about her attitude and swearing to the HR department but if she did, they would fire the claimant and not her. **Again, this is exactly what happened.**

2.36. On **14 June 2018,** at around 9am, a logistics problem arose, which the claimant passed to Fei, as she usually handled those. Venus said, from now on, logistics would be the claimant's responsibility. The claimant felt it was unreasonable to have her handling so much work and becoming more unclear as to what her responsibilities were so again she requested job description. Venus said if she wanted a job description, she should talk directly to Clement. Venus called Clement and passed the phone over. Clement asked why the claimant wanted a job description. She replied it was the unbalanced workload, and mentioned Venus "bullying" her but gave no factual examples. He said he would pass her complaint to HR to handle immediately. His oral evidence was he did, HR being Cyril, based in Melbourne. When Venus heard that, she was furious and left the office. Fei's statement says Venus took a half day off work.

2.37. The claimant started feeling unwell **on 14 June** and called her GP surgery. Dr Douglas advised her to go home and rest. She said she could not leave. He gave her a same day appointment to see her usual GP, Dr Foo. Fei got her a cup of water, and helped with the phones for the rest of the morning. Michael Ho phoned to check a delivery and said her voice sounded bad. She told him about the incident. He said he was concerned about her, and told her to seek help from ACAS. She left the office as normal, at 5.30pm, and went to see Dr Foo who signed her off sick due to work related stress from **15 - 25 June .**Her husband said she should think about recording discussions if they were making her uncomfortable. She saw Dr Foo again who said she was still not fit for work, gave her another sick note and prescribed tablets. She returned to work on **3 July 2018.**

2.38. Clement's statement does not mention Venus threatened to resign and was later invited to go to Melbourne but that was his oral evidence on Day 3. He could not remember the date but said he had received an email from Venus but had not disclosed or mentioned it due to a connection with her having health problems . Overnight that email was "found". It was from Venus to Clement, he being in Australia at the time, sent on 13 June(UK time) but we do not have the time of sending. In her resignation letter Venus says her reason for leaving is " *I'm unable to perform my current job role and my personality problem affects atmosphere in the office . The serious point is I found out , when I am impulsive or if I lose my temper I could say "bad words" which is unacceptable in working environment* ". She does not mention ill health.

2.39. Ms Ephraim applied to recall Clement who said he believed he had sent a copy of this to Cyril but could not say when .Cyril's evidence had started at the end of day 3 and on day 4 he said it had not been sent to him until August . That still did not explain why he had not disclosed it earlier. Our Employment Judge put it to him it appeared documents had been suppressed, probably by him, because if he had sent them to Mr Howson he would certainly have disclosed them .He admitted he had not sent them but denied he had suppressed them . As the morning of day 4 wore on, it became obvious this nondisclosure was the tip of an iceberg in that when asked whether he had taken any notes of the critical meeting held by Skype on 10 July he said he had, but did not disclose them because they were his "*working notes*". Moreover, he said he had written a report to Mr Yiu, the CEO, and to Clement but that had not been disclosed either.

2.40. Ms Ephraim made an application to strike out the response on the basis of this material non-disclosure which we refused but the non-disclosure spoke volumes about credibility . It may be relevant to costs and aggravated damages too. Cyril then said there was no reason for him not to disclose documents which **helped** the respondent by showing it had been found in an "investigation" the claimant made a mistake and had tried to blame Fei . That had been suggested by Clement (see 2.17 above) but he had no documents to evidence any investigation

2.41. This is not an unfair dismissal case but the claimant's argument is that the reason for her being dismissed rather than Fei , even if there was a redundancy situation , was at least in part due to a protected characteristic. Therefore, we needed to have all the facts about who decided what and when to assess their thought processes. The respondent's approach was only to tell the claimant, **and us,** what suited its case . It was not the claimant's case there was no reduction in the requirement of the respondent for employees to do certain kinds of work, rather that her selection was due to a desire to keep Fei and not her. The question to be answered was why?

2.42. A non-dscriminatory reason would be they only needed **one part time worker**. Fei's statement says "*Since May's dismissal my hours have been adjusted again. As I remain at University I work around 16 hours per week over two or three days per week during term time. These hours can and increase outside of term time if my employer needs me to work more hours."* This is plainly misleading. In our view, Fei was, in late 2018, not only invited to write a complaint about the claimant, but told what the respondent wanted her to put in her statement.

2.43. Cyril said a further reduction in manpower to one part timer was needed after the dismissal of Christine but what he said did not explain Fei's evidence she went full-time in mid July. Cyril said he had checked the records and she did not go full-time until mid- August, which does not make the respondent's arguments much better, but those records had not been disclosed either. When our Employment Judge said he could not understand why Cyril thought any of the undisclosed material was irrelevant, Cyril said it was "*negligence on my part* " not to send it to Mr Howson. In our view it was not negligence but deliberate suppression of documents which undermined its case .

2.44**.** On **10 July 2018** the claimant had a Skype call with Cyril who had arranged for Venus to be present but did not tell the claimant that. He says the call was always intended to be about the redundancy situation which does not explain when he was intending to deal with the claimant's complaint of bullying which Clement passed to him. Cyril says: ***Around the middle of June 2018*** *I received information from Mr Lee that the Claimant had complained about Ms Teng. The Claimant had apparently stated that she felt bullied by Ms Teng. At this time I knew that the position of the Claimant was perhaps coming to an end. The roll out of the new technology to the sales reps was near completion. Ultimately I knew that we would only need a part time sales admin going forward. We had already made Ms Tan redundant. Therefore either the Claimant or Ms Toh would also need to be made redundant.*

2.45. He says the main purpose of the meeting *was intended to be the first step in a pre-redundancy consultation process, however, the Claimant asserted that the meeting should also bedirected towards Ms Teng's alleged behaviour against herself…..In line with the company's policy, the Claimant was required to submit a written statement (outlining any concerns) in order for us to fully understand the extent of the concerns raised. The Claimant chose not to do this regardless of being aware of the need to do so. Appreciating that the Claimant appearedsignificantly aggrieved during the meeting, I allowed the complaint to be heard.* As Ms Ephraim established in cross examination none of the respondent's policies require the informal stage of a grievance to be in writing. Ms Ephraim asked if Cyril was expecting something in writing why had he not written to the claimant to say so in June ? His answer was she had been repeatedly off work but as we have seen her absence was less than three weeks and would not preclude some communication to her.

2.46. The response form was pleaded before the respondent knew any part of the Skype call had been recorded and much of Cyril's witness statement appears to have been copied and pasted from it. The claimant recorded approximately the last 30 minutes of a call of about 45 minutes .

2.47. The claimant says "*Redundancy was not mentioned at all in the **10 July 2018** meeting. I tried to stand up for myself, by highlighting the bullying, and asking for an updated job description, and then they found a way to get rid of me."* We accept that version. Cyril's statement says *"The potential redundancy was also discussed in the meeting and the Claimant was afforded the opportunity to put herself forward for voluntary redundancy. The Claimant was informed of the reasons of the potential redundancy, namely, that we had introduced new technology which had led to a reduction in the duties of Sales Administration Assistant. Potential alternatives to redundancy were also discussed. The Claimant accepted that her duties had substantially decreased.* He now had to say all that was in the first 15 minutes because there is nothing of it in the recorded part. We do not accept his assertion that during the call Venus said she would apologise and the claimant refused to accept it. The recording shows the opposite.

2.48. Certain passages in the transcript are very illuminating. The person transcribing it indicates where things are inaudible and has helpfully numbered the paragraphs. At the outset the claimant mentions being being"fired" and Cyril replies
*" All right if that's the case, you know, and I have no choice, all right you know **to exercise this separation** really **because the relationship become untenable**, all right, as well you have actually highlighted you can't work with your boss, you know, you don't trust your boss, all right and you will not undertake any other job description other than the prescriptive few . Is that correct?".*
The claimant replies "*Uh-hm*" and Cyril says "*All right so then in that case has become very difficult all right now a —*" at which point the claimant interrupts and says " *But the problem is I got bullying and harassment from her ?*",

2.49. At no point can Cyril have known or believed the claimant was not prepared to do work outside her job description unless he had been told so by Venus whom, in oral evidence, he said he had not consulted in advance. At point 15 we read him saying *" of course I did actually have conversations with her as well too, all right* " which is wholly inconsistent.

2.50. At point 16 the claimant says Venus threatened to give her a warning letter. Cyril said he did not understand what she meant. When she explained his response was " …*the thing is you know May I didn't even want to touch on that. Do you know why? Because if I were to touch on that all right and for example you know and if she give you certain instruction, if you refuse to follow the instruction you know what happen? **You should be given a warning letter***—" In the background Venus is heard saying *"Yeah"*

2.51. The claimant's statement says "*Once the recording had started I asked again that, if it was her working style, why this ' style ' only happened to me (at 37,). Again, my question was ignored".* Cyril denies saying shouting was Venus' working style but adds *I did emphasise though the importance of both the Claimant and Ms Teng understanding each other's point of view and that everybody has a different style of working".* Cyril avoids addressing the allegation made by the claimant that **Venus only shouted at her**.

2.52. Various passages repeat the allegation the claimant is disobedient and questioning of orders . At point 23 Cyril says " *if you question every time of instruction then it is not right. She has the authority, you must understand that ok.*" He also said the claimant refused to work with Venus and demanded she be removed. The claimant says she does understand that and at point 27 makes it clear she is not asking for Venus to be removed as her boss only to change her attitude. Point 40 shows the claimant saying she then could work with Venus.

2.53**.** The claimant said she needed a job description because Venus treated Fei more favourably, and all Fei's workload had been transferred to her which was unfair and unbalanced.She does not suggest a discriminatory reason Cyril said she did not trust Venus which was the real problem. The crux of this case is seen at point 45. Cyril says:
"*So whatever, I know, and uh, that she says to you, you know, you just follow suit. Because at the end of the day-that you don't question your boss every decision that she makes, seriously, alright. At the end of the day, look, you are not accountable : she is accountable .. You , because she is the boss it stops at her level .Alright ? So she has every right to demand the required standard and expectation of the subordinate of hers*"
He discusses his need to obey his own boss Mr Yiu and at point 63 returning to Venus says
*" **if she asks you to charge you charge**. I can understand some time the boss asked me to run. It's not (inaudible) I wiil ask my boss "why must I run "? It's not -- I will ask my boss "how far do you want me to run ". Is very different "how fast you want me to run ?" Is very different from challenging the boss "why must I run " (laughs),,..,,.,,,*
In " The Charge of the Light Brigade", Tennyson wrote of the soldiers told to **charge** " *theirs not to reason why, theirs not to make reply*". It is such total obeduience Cyril was demanding.

2.54. Cyril denies saying Venus had a harder role or that the claimant should resign for the sake of her health. Read as a whole the transcript shows him repeatedly suggesting the claimant, if she was too mentally weak to take the pressure from Venus, would be better off resigning. Towards the end he used some biblical versus to convey to her there is a season for everything and this is Venus's season not hers. The claimant said during her evidence the culture in Chinese companies is that no subordinate must ask questions or complain but must obey all orders. We need not find whether that is a culture specific to Chinese companies because there is no doubt from the content of this transcript it was exactly what Cyril expected. The major vulnerability for the respondent is there is no evidential basis for Cyril's assertions that the claimant was "insubordinate" other than what he was told by Venus. The possibility therefore looms large that one or all of Venus, Clement and Cyril made the stereotypical assumption , the claimant would be questioning of orders because she was older than Venus, whereas Fei would be blindly obedient because she was younger. In short , this transcript sseriusly undermines the respondent's pleaded case and its witness statements.

2.55. The claimant says *" I further believe that what I disclosed **in the call** counted as information about the breach of the **Equality Act 2010,** which was in the public interest. Although, it was about what was happening to me, I wanted to make sure that such behaviour was highlighted - since I did not want it to happen to anyone else either" .* We cannot find in the transcript the claimant **conveying facts** which would show the

relevant failure pleaded. Neither can we find any reference to protected characteristics being the basis for Venus bullying her. It would be conjecture that Cyril or any other member of management **anticipated** a protected act may follow from the allegations the claimant was making. Ms Ephraim in cross examination did not suggest that was so.

2.56. On **11 July 2018** Cyril called the claimant to propose she resigned because the relationship with Venus had broken down, and because of her health. She said she would not resign. Cyril 's statement says:
A further consultation meeting was held on 11th July 2018 by way of telephone. Ms Teng was not present. The Claimant was informed that we had explored all potential alternatives and that there were no vacancies within the UK, but there was a vacancy in Holland if the Claimant was willing to consider relocating. The Claimant stated that she would not consider the relocation.
The decision was therefore made to terminate the Claimant's employment on the ground of redundancy after the two consultation meetings on 10th and 11th July 2018 as there had been an organisational restructure of the Respondent and new technology had been introduced as outlined above. ..
It was decided to retain the services of Ms Toh. Ms Toh was and still is a university student and young than the Claimant. Ms Toh is also employed mostly in a part-time capacity. Ms Toh ***usually works two days, 16 hours per week.*** *Outside of term time she can and does increase this to four to five days per week. With Ms Toh being a university student, her flexibility allows us to better accommodate having only one sales admin role.*
I must stress that the decision to make the Claimant redundant and retain Ms Toh had nothing to do with the Claimant's age, nationality, perceived disability/illness or the complaint she made against Ms Teng. Prior to the Claimant being made redundant, we made a younger employee (Ms Tan) redundant who was of Chinese descent.
The Claimant raised an informal grievance regarding Ms Teng's attitude towards the Claimant on 10th July 2018. The Claimant stated that Ms Teng shouted at the Claimant, gave her more work and gave her work that was not her responsibility. The Claimant did not make any allegations of discrimination in that she did not refer to her alleged disability, nationality, age or religion.
The emboldened words we now know are untrue.

2.57. The claimant saw Dr Foo again on **12 July 2018** who gave her two days sick leave so she could get well for attending her daughter's graduation for which in April 2018, **she** had booked leave from **16** - **20 July 2018.** She was thinking of how to write a formal grievance letter when on **13 July 2018** she received a redundancy letter (via email), to sign and return by **16 July 2018.** The letter starts by saying 70% of her role *'had already been taken over by the Sales Team',* The next paragraph mentions *'"lack of trust in your Manager", making the relationship untenable'* Quotation marks were used to imply she had said that but the transcript shows it is what Cyril had repeatedly stated. She was given an ex gratia payment .

2.58. On **17 July 2018** the claimant emailed Cyril acknowledging the letter. On **30 July 2018** she went to the office to collect belongings and was let in by Fei. Both the claimant and Fei took photographs of the items retrieved. Fei then emailed Venus and Clement to report '*unauthorised entry*'. In her evidence Fei said this was not a suggestion the claimant had done anything wrong but she had no "authority " to let the claimant in without Venus or Clement's permission

3. Relevant Law

3.1. Section 43A of the ERA says a "protected disclosure" is a qualifying disclosure (defined by section 43B) made by a worker in accordance with any of sections 43C- H.

3.2. Section 43B includes "*any* ***disclosure of information*** *which,* ***in the reasonable belief*** *of the*

worker making the disclosure, is ***made in the public interest*** *and* ***tends to*** *show one or more of the following… (b) that a person has failed , is failing or is likely to fail to comply with any legal obligation to which he is subject*

3.3. Section 43C says
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...— (a) to ***his employer****,*

3.4. Section 43(3) says "*Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to* ***bringing the information to his attention*****."**

3.5. Cavendish Munro Professional Risks –v-Geduld, drew a distinction between a disclosure of **information** and simply voicing a concern, raising an issue or setting out an objection. Kilrane-v-London Borough of Wandsworth said it is rare a communication will contain no information but the example given by Slade J in Geduld is good . A nurse saying to a manager, " *there are health and safety breaches in this hospital*" gives no information or facts. If the nurse prefaces it with "*Ward 10 has not been cleaned for two days and there are sharps lying around*" it does .

3.6. A disclosure need not be objectively correct provided the makers beliefs are reasonable, Darnton-v-University of Surrey and Babula-v-Waltham Forest College . The requirement it is "made in the public interest" does not require it to be in the interests of all the public but of a significant sector- Chesterton Global -v-Nurmohammad.

3.7. Turning to the claims under the Equality Act 2010 (EqA), Section 13(1) says:
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.*
Section 23 adds
On a comparison of cases for the puroses on s13.. there must be no material difference between the circumstances of each case "

3.8. Section 27 includes
A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this 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.

3.9. Section 40 makes harassment unlawful and section 26 which defines it includes :
A person (A) harasses another (B) if—

(a) A engages in unwanted conduct ***related to*** *a relevant protected characteristic, and*

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

3.10. Section 109 includes

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

This respondent does not plead ss(4) , rather it denies its employees have done the alleged acts.

3.11. Section 39 includes an employer must not discriminate against or victimise an employee by dismissing her or by subjecting her to any other detriment, the latter meaning anything which places her at a disadvantage .

3.12. in direct discrimination and victimisation, we must determine the **reason why** the claimant was treated as she was. The protected characteristic or the protected act need not be the only or even the main reason. It is sufficient it is a significant in the sense of being a more than trivial factor, Shamoon-v- Royal Ulster Constabulary. Before harassment was a separate statutory tort, if a person engaged in conduct towards another which was related to a protected characteristic but did not do so **because of** it , there was no direct discrimination see Porcelli –v-Strathclyde Council**.** Under section 26 the link is now between the protected characteristic **and the conduct not the "reason why" the conduct occurred.** Section 212 prevents a finding that acts which constitute harassment can also be a detriment under section 39.

3.13. As said above, in direct discrimination and victimisation we must look for the "reason why" treatment was afforded. Detecting either involves a process of fact finding and inference drawing. Unreasonableness of treatment does not show why acts were done, neither does incompetence (Glasgow City Council –v- Zafar and Quereshi-v- London Borough of Newham). Elias J as he then was, in the EAT in a case of race and sex discrimination Law Society –v- Bahl said

93. There is clear authority for the proposition that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. This is the important decision of the House of Lords in Glasgow City Council v Zafar

94 The reason for this principle is easy to understand. Employers often act unreasonably, as the volume of unfair dismissal cases demonstrates. Indeed, it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination, it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way…….. .

100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the

tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. …

101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."

3.14. The law as stated in para 101 was undoubtedly correct before the statutory reversal of the burden of proof , but is it still? Section 136 says

(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.

3.15. This reversal of the burden of proof was first explained in Igen-v-Wong. Quoting selectively Elias LJ in paragraph 40 of the post reversal case Ladele-v-London Borough of Islington

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in Igen v Wong. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill

LJ in the Court of Appeal in King v The Great Britain-China Centre

3.16. What if the evidence of a non-discriminatory reason comes from a source other than the respondent, including the claimant herself . In Eagle Place Services Ltd –v- Rudd His Honour Judge Serota Q.C. cited the Court of Appeal in Bahl **with approval even after reversal of the burden of proof was introduced :**

"The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an ***obvious reason for the treatment*** *in issue, other than a discriminatory reason."*

3.17. The Court of Appeal gave judgment on 11 October 2019 in Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648 . An Employment Tribunal (ET) had upheld a claim of a racially discriminatory dismissal .The respondent appealed saying there was no evidential basis for the ET's finding the claimant had proved a prima facie case and, even if she had, its decision the respondent had not proved a defence under s 136(3) was flawed. In that case redundancy was given as the reason for dismissal though in truth it was misconduct. The Court stated the way s 136 EqA 2010 works is that, if a respondent fails to show the relevant protected characteristic played no part in its motivation, it fails. The Court confirmed something more than a mere finding of less favourable treatment is required before the burden of proof shifts but, as Sedley L.J. said in Deman v Commission for Equality and Human Rights ,'the "more" needed to require an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer. In Solicitors Regulation Authority v Mitchell EAT 0497/12, the EAT held an ET had been entitled to apply the shifting burden of proof rule in a claim of direct sex discrimination where the employer had given a false explanation for less favourable treatment. Judge Serota explained: '*The employment tribunal was… entitled to treat the combination of the less favourable treatment, the difference in gender between the claimant and [her comparator], and the false explanation given as being evidence from which it could infer, in the absence of the satisfactory explanation, a discriminatory reason for the less favourable treatment*."

3.18. Malicious motive towards the claimant, is not a requirement where one is looking for the reason why something is done. However, benign motive does not save a respondent from liability where the necessary causation between the "protected characteristic" and the subjection to detriment is established, Amnesty International-v- Ahmed. The alleged discriminator, sometimes subconsciously, may make stereotypical assumptions. As explained in Anya-v-University of Oxford 2001 IRLR 377 facts which are not obviously discriminatory may point to sub-conscious, but still direct, discrimination particularly when good equal opportunities practice exists but is not followed. As is clear from Anya, we must look for indicators from before or after the time of the acts complained of and in a wider context than those acts, which point towards, or away from, a legitimate inference that a protected characteristic was a factor in the minds of decision makers. Also, finding someone would behave equally unreasonably towards others should not be based on the hypothetical possibility that he might, but on evidence that he does.

3.19. Subjecting someone to detriment has been equated by case law to "placing her at a disadvantage". If in an age discrimination case the **only** act complained of is dismissal, as it was in CLFIS (UK) Ltd-v-Dr Mary Reynolds OBE , one looks at the thought process of the person who took that decision. Dr Reynolds was about 70 years old and, although the quality of her work was impeccable , due partly to family circumstances and partly to preferences her working style did not fit in with the new working methods of CLFIS. The manager who took the decision to

dispense with her services, a Mr Gilmour , did so because he believed she was not capable of changing her working practices. A stereotypical assumption often made about older people is they are unwilling or unable to change their ways as illustrated by the old proverb " *you can't teach an old dog new tricks* ". Other managers may well have held and expressed such views but the ET found Mr Gilmour based his view on detailed knowledge acquired over many years of how Dr Reynolds, as an individual, worked. Reynolds is a good example of a case where a witness gave a full and cogent explanation, which was accepted, that he was not motivated by her age. Underhill LJ spelled out how the case could have been put to give the claimant the remedy she sought, if others were motivated by her age:- *(1) By making an adverse report about the claimant , someone (Y) subjects her to a detriment (2) If Y was motivated by her age, his act constitutes discrimination (3) If that discriminatory act was done in the course of Y's employment it would be treated as the employer's act; and it would be liable (4) Y would also be liable for his own act (5) The losses caused to the claimant by her dismissal could be claimed for as part of the compensation for Y's discriminatory act, since they would have been caused or contributed to by that act".* Ms Ephraim confirmed her case was that even if Cyril was the only decision maker, which she did not accept, he discriminated himself by making stereotypical assumptions but, in the alternative, if he was relying on "tainted information" supplied by Venus and/or Clement, they were motivated , at least in part, by the claimant's age .

4 Conclusions.

4.1. The first issue is "Did the claimant make one or more disclosures **of information**?" We find this is one of the rare cases where she did not. There was no protected disclosure because no facts were conveyed. The next two issues become otiose. Her ERA claim fails.

4.2. The claimant's case is that in raising an informal grievance about Venus and/or during the Skype call she **did** a protected act. We cannot find she referred to any breach of the EqA only to "bullying and harassment" without connecting it to a protected characteristic. She has not argued the respondent believed she may do a protected act, so her victimisation claim fails, even though part of the reason for dismissing her was she was viewed as having the audacity to complain.

4.3. There were no changes in the claimant's terms and conditions of employment in the relevant period which required a statement of changes in that her job duties were so broadly drawn as to include everything she was asked to do, so her claim for a s.38 uplift fails.

4.4. The acts referred to in paragraphs 2.19, 2.32. and 2.34 were unwanted conduct related in the first two to the protected characteristic of religious belief and in the last to national origin which is part of the protected characteristic of race. It had either the purpose or, reasonably, the effect of creating an intimidating and/or humiliating environment for her. That constitutes harassment. However, we conclude none of the respondent's witnesses treated the claimant less favourably than they would have treated an employee of Malaysian or Singaporean origin or a non-Christian employee in similar circumstances . It is improbable having regard to their own race or religion they were motivated to dismiss or subject her to other detriment for those reasons. More importantly, having regard to the case law in paragraphs 3.13-3.18 above despite the respondent's lack of truthfulness in its explanations, there is an obvious link, as the claimant accepted in evidence, between the less favourable treatment and her **age**. In our view the principle in paragraph 3.16 applies not only where there is an obvious non-discriminatory reason but also where the reason is obviously because of a different protected characteristic.

4.5. We accept that by 17 May a redundancy situation existed. Clement said he wanted to retain, in order of preference, the claimant, then Christine then Fei. Christine could not do the hours needed so she went. If further reduction in SAA's was needed logically the next to go would be Fei. Why did it change? The short answer is because that is what Venus wanted. Venus levelled

no criticsms at Fei whereas she found fault with everything the claimant did. Venus' assertion, adopted by Clement and Cyril, that the claimant challenged her management and at worst defied instruction is not born out by the evidence. We conclude she, as well as Clement and Cyril, made the stereotypical assumption referred to by Clement in the meeting in late April (paragraph 2.20 above) that young people are easier to command. Venus preferred Fei, at least in part, because she perceived her comparative youth would make her compliant whereas the claimant's greater age and experience meant she would always be a problem to her. The claimant has done more than enough to raise a prima facie case the reason for preferring Fei was her age.

4.6. We are not considering fairness or reasonableness, but a choice was made and it calls for an explanation. As Elias LJ said in Ladele *"Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in* Bahl v Law Society [2004] IRLR 799, *paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it".*

4.7. The claimant had more qualifications than Venus but Fei would too in the near future . Venus own insecurities may explain why she preferred Fei to the more mature claimant but she did not tender that as her explanation. The respondent's case is not that Venus shouted at everyone but that she shouted at no-one which is inconsistent with Venus' resignation letter. In this respondent senior managers Clement and Cyril accepted the view of a junior manager. Venus unquestioningly that the claimant was insubordinate without investigation. Their case was there was an investigation which produced no parerwork. In that and other respects their evidence fell far short of "the truth, the whole truth and nothing but the truth" . Unlike the dismissing officer in Reynolds. Clement and Cyril cannot show they too did not make stereotypical assumptions that the claimant, **as an older woman** would be disobedient by showing she actually was. We therefore conclude the respondent did treat the claimant less favourably than it treated Fei by dismissing her on the basis all three of them made the decision to pick the claimant not Fei. Cyril claims to have been the sole decision maker. Even if he simply did the bidding of Venus who briefed against the claimant because of her age, as explained in Reynolds, this is undoubtedly a discriminatory subjection to detriment

4.8. As for the perceived disability claim Cyril was simply trying to soften the blow of dismissal . None of the respondent's witnesses perceived or believed the claimant was a disabled person, so did not treat her less favourably for that reason.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON 30 OCTOBER 2019