



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms S Williams

v

Net-a-Porter Group Limited

Heard at: London Central

On: 23 – 24 January 2020

Before: Employment Judge E Burns
Mrs J Griffiths
Mr D Ross

Representation

For the Claimant: In person

For the Respondent: Mr Z Sammour (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that the respondent did not discriminate against the claimant because of race and her claim is therefore dismissed.

REASONS

Claims and Issues

1. By a claim form presented on 25 June 2019, following a period of early conciliation between 15 May and 15 June 2019, the claimant brought complaints of unfair dismissal and race discrimination. As the claimant did not have 2 years' service, her claim of unfair dismissal was struck out on 30 September 2019.
2. The claim was case managed on 9 October 2019 where a list of issues was agreed as follows:

Direct race discrimination (section 13 Equality Act 2010)

The claimant relies on the following conduct as constituting discrimination against her because of her race, being less favourable treatment than would have been the treatment of a hypothetical comparator who is not black – save where particular comparator(s) are identified below.

1. Micromanaging the claimant during her employment and particularly her induction period, with excessive one to one meetings, having to explain herself to her manager, etc.
2. Requiring the claimant throughout her employment to do excessive amounts of work, without adequate support – inter alia by comparison with the other members of the team, who are not black.
3. Extending the claimant's probation period on 11 February 2019, initially on the basis that the claimant had taken time off to recover from eye surgery.
4. At a probationary review meeting in about late February 2019 conducted by Rachel Dowle raising inaccurate and unfair criticisms of the claimant's performance.
5. Sarah Fenn criticising an email the claimant had written to Olivia Young, as aggressive.
6. When the claimant gave 3 weeks' notice in resigning, requiring her to leave her employment after only 1 week (through paying the additional 2 weeks' salary in lieu, but without affording the claimant her other contractual benefits during that period). The claimant believes that other employees, who are not black, were treated differently in similar situations, but does not know their names.
7. In about the last week of the claimant's employment, Sarah Fenn booking a meeting with the claimant for 9 am only on that day, criticising the claimant for being 15-20 minutes late for work that day and initiating a conversation with colleagues in the claimant's absence about how often she had been late for work previously.

Remedy

8. In so far as the claimant succeeds on liability:
 - 8.1. What are her direct financial losses?
 - 8.2. What, if any, should be the award for injury to feelings?

Hearing

3. The hearing was held over the course of two days, during which we heard evidence and submissions on liability.
4. For the claimant, the tribunal heard evidence from the claimant herself. For the respondent we heard evidence from:

- Ms Sarah Fenn, former Continuous Improvement Manager
 - Ms Rachel Dowle, Head of Customer Care Operations
 - Mr Stuart Clarke, HR Business Partner
5. There was a hearing bundle of documents of 393 pages, as well as additional folder of Inter-Parties Correspondence, to which we did not need to refer. We admitted into evidence some additional documents from the claimant with the agreement of the respondent. We noted that most of these documents appeared to be in the hearing bundle in any event. We read the documents to which we were referred. We refer below to the page numbers of key documents that we relied upon when reaching our decision.
 6. The respondent's counsel provided a written skeleton at the start of the hearing. He made his closing submission orally. The claimant provided a written closing submission.
 7. We explained the reasons for various case management decisions carefully as we went along, including our commitment to ensuring that the claimant was not legally disadvantaged because she was a litigant in person. The claimant was provided with support by a lay representative (Mr Leonard) on the first day of the hearing. He was not able to attend the start of the hearing on the second day. The claimant confirmed that she was happy to proceed without his support and conducted the cross-examination of the respondent's witnesses herself.

Findings of Fact

8. Our findings of fact and any inferences we have drawn from our primary findings of fact are set out below. Where we have had to reach a conclusion in relation to disputed facts, we have made our findings on the balance of probabilities.

Background

9. The respondent is a leading online retailer of luxury fashion goods employing in the region of 2000 people in the United Kingdom. It is part of the YOOX Net-A - Porter group ("YOOX").
10. The claimant, who is a black woman, was employed by the respondent as a Continuous Improvement Analyst under a contract of employment dated 23 October 2018 (53 – 68). She commenced employment on 5 November 2018 reporting to Sarah Fenn, Customer Care Continuous Improvement Manager.
11. The claimant's employment was subject to a three month probationary period as set out in clause 1.2 of her contract of employment. This stated:

"Your employment will be subject to the satisfactory completion of a probationary period. This probationary period will last until the results of

the Company's background checks on you are received or three months after the date your employment commenced, whichever is the later. The Company may extend this probationary period at its discretion. During this probationary period may give the company a minimum of one week's notice in writing of your resignation and the company may give you a minimum of one week's notice in writing of the termination of your employment." (54)

12. The claimant's probationary period should have concluded on 5 February 2019, but was extended to 5 April 2019. A final probationary review meeting planned for around 5 April 2019 not take place because the claimant submitted her resignation on 29 March 2019.
13. In her letter of resignation, the claimant initially suggested a last day of 19 April 2019. She did not work until this date. The respondent and the claimant agreed that her last day of employment would be 5 April 2019. The respondent paid the claimant in lieu of the additional 2 weeks that she had been prepared to work.

Grievance and Complaints

14. The claimant submitted several complaints during her last week of employment.
15. The first complaint was a whistleblowing concern submitted on 2 April 2019 to an automated email address established for employees to raise concerns. (296). The claimant sent a report (268 – 269) and attached documents which she believed supported her report, including an earlier grievance about her line manager which she had submitted on 15 March 2019, but retracted a few days later (221).
16. In that grievance, the claimant had stated:

"I am thoroughly disappointed with how I have been managed during my time here. I felt at times completely isolated and not always supported by my manager.

I strongly believe that I have been solely hired to work on the projects I have been working on and that my manager had and has no intention of allowing me to pass my probation and that she is being supported by senior management in this.

I have been given an extension on my probation and was told that the reason was because I was not prioritising my work. This has not been congruent with my feedback since I've started this job. I believe it was an excuse to ensure there was enough time for me to complete my projects before I was due to be failed and dismissed.

She has proceeded to look for faults in my work to build a case against me that will successfully lead up to the failure of my probation." (221)

17. The claimant included several examples of concerns about her manager in the letter saying:

- *“I feel like I am being penalised for having to take four weeks off for work due to my eye surgery because the relationship has changed drastically since this happened.”*
- *“She also requested that I send her a copy of the time I spent on each project during her time away which was two weeks. I have never been asked to do anything like this before.”*
- *“It was feedback to me in my final review, that I was removed from performing Trustplot activities publicly because of my poor attention to detail. This is incorrect because I was told that this was technically not in my job description and therefore I was told to stop.”*
- *Regarding my Salesforce classifications project, I was steered every step of the way by my manager and had no room to make any decision for myself even down to my presentation which started off at 11 slides and was reduced to 8 by her and was now missing vital information.*
- *I have been told that I do not ask any questions ... I am an analyst and the way I conduct research is by asking questions. This is clearly not a true representation of my abilities, but instead an excuse as to why she does not know how to support me for the role within this company.*
- *I am very disappointed at the lack of support I have received from my manager and how combative her approach is towards me when expressing my thoughts and opinions.*
- *It is clear her management level is not yet up to standard and suggests she has never managed anyone at this level and that she is very inexperienced in her role; although she has been in this role for one year.”*

18. The claimant concluded the letter by saying:

“I have never been dismissed from a job neither have I ever not passed my probation. In my 13 years of employment. I have a reputation of maintaining employment in any company I have joined for a minimum of two years.

I am beginning to be very stressed out by this situation and now I am fearful that I won't pass my probation due to the things mentioned in this letter that I do not believe warrant a failure of probation.” (222)

19. The claimant retracted this grievance on 19 March 2019, telling HR by email that she had met with her manager and managed to resolve the issue (223).

20. This did not reflect the way the claimant truly felt. The truth was that by this time, the claimant had decided to resign and intended to whistleblow against what she believed were unfair recruitment practices being operated by the respondent. The claimant felt that there was a “bigger issue” at play that did not just affect her. She therefore deliberately misled HR in order to prevent them becoming suspicious that she might be about to whistleblow.

21. The “bigger issue” was that the claimant believed that she had been “Hired Under False Pretences”. In the whistleblowing report the claimant stated:

“I strongly believe due to the issues that have taken place during my 4 months here that I was hired for the sole purpose of completing the Salesforce classifications project, I felt at times I was treated as a consultant by my manager and hers rather than an employee. With all the negative feedback I received in my reviews no steps were taken to ensure that I was supported in improving on my weakest areas. Neither was no support action plan put in place.

I ask that you conduct a thorough investigation into my employment and those hired within the last 12 months. I strongly believe there have been many people that have been hired to do the work of the support team when the fall short.

This is extremely unfair to the individuals such as myself who have left their secure jobs in the hopes of starting a new career at YNAP.

I have resigned for fear of being dismissed.” (269)

22. The claimant subsequently updated the whistleblowing concern on 3 April 2019. In a further email to the whistleblowing email address she added the following:

“I have been advised by Claire Hussey in HR, that my final probation review will not take place because the decision would usually be made on this day instead of prior. To which I disagreed.

She also had previously suggested that I was only allowed to give a one week notice but I challenged this.

They have now offered me payment in lieu of notice of two weeks. Which I have since accepted. My final day is supposed to be 5th April 2019. Unless something changes.

It was mentioned in my meeting that ‘I should keep in mind that I am still in my probation period whilst I am here’, which I took as a threat from Claire Hussey.

As a whole I have essentially been bullied/ managed out of the business to suit the needs of the individuals in the support team. This has evidently been supported by HR who are supposed to be a neutral party.

I cannot imagine why they wouldn't want me to work my final two weeks but they have tried numerous things to make me decide to leave ahead of the 19th April 2019.

I would suggest both HR and the support team are thoroughly investigated and I would suggest you look at staff in the last 12 months that have been dismissed or did not pass probation.

I am devastated to be leaving such a renowned company after 4 ½ months.” (305 – 308)

23. On 4 April 2019, the claimant emailed to Deborah Lee, the respondent's Chief People Officer saying:

“I hereby make a formal complaint about Claire Hussey regarding my resignation.

I resigned on the 29th March 2019 via email and gave a three week written notice.

I was advised by the HR business partner in my exit interview on Monday 1st April that the company will not accept my three week notice because I am only allowed to give a one week notice in my probation period. I was then told verbally I would need to leave on Friday the 5th April 2019. I then said that it is a breach of my contract employment not to honour my notice period. I then requested clarity via email but was ignored.

I also requested to have my final probation review go ahead as planned for the 5th April 2019, this has now been confirmed in a second unscheduled meeting with the HR business partner on 3rd April 2019. I have requested on two separate occasions to have all this information in writing for my records and have been ignored.

I was then offered yesterday 'payment in Lieu of notice' which I accepted but I advised I would need this to be in writing before I exit.

I have since been forced to whistleblow against the harassment and targeting that I have received since joining on 5th November 2018 and I have also advised of my belief that I was hired under false pretences with no intention of making my employment permanent.

I believe I was hired solely to complete the Salesforce Classifications project for customer care. Which I have now completed.” (317)

24. Notwithstanding the claimant's resignation, the respondent investigated the claimant's concerns. Ms Lee responded to the claimant's email within a few minutes saying:

“I take very seriously the allegations you have made. I am aware you have also raised an issue via our Whistleblowing system which has started to be

looked into according to our company process. To help speed the overall process and experience for you, I will handle both the whistleblowing and this complaint together.” (316)

25. Ms Lee forwarded the claimant’s concerns to Stuart Clarke, HR Business Partner who arranged for Rebecca Strong, Head of Quality & Innovation to consider the claimant’s grievances with his support. Ms Strong and Mr Clarke held a grievance meeting with the claimant on 13 May 2018. She had the opportunity to review and amend the notes from that meeting (334A – 334D).
26. Ms Strong and Mr Clarke also interviewed a number of the respondent’s employees. Ms Strong produced a grievance outcome letter which Mr Clarke sent to the claimant on 21 June 2019 (353 – 357). Her grievances were not upheld. The claimant responded to Mr Clarke saying that she was not in agreement with the contents of the letter, nor was she satisfied with the outcome (351).

Recruitment and Background to Role

27. The claimant had applied for her role with the respondent in October 2018. At that time the respondent was calling the role a Customer Care Project Lead. The job description used for the purposes of the recruitment process (386A) was almost identical to the job description for the role which the claimant took up (385 – 386).
28. The claimant participated in an initial telephone interview with a member of the Respondent’s HR team and was then invited to a face-to-face interview which took place on Monday 15 October 2018. The claimant was interviewed by Ms Sarah Fenn, who would become the claimant’s line manager. Ms Fenn was accompanied by a member of the respondent’s HR team. The claimant was required to deliver a presentation during her interview.
29. Ms Fenn had joined the respondent in May 2016 as a Customer Care & Sales Lead Consultant. She moved to the new role of Customer Care Continuous Improvement Manager in February 2018. This was a new role reporting to Ms Rachel Dowle, Head of Customer Care Operations.
30. In the new role, Ms Fenn was responsible for overseeing a team of approximately 20 operational Customer Care Consultants who contacted customers and handled queries related to delay in customer orders due to warehouse issues.
31. Ms Fenn was also responsible for driving improvements in the way the respondent served its customers. The respondent aims to provide an unparalleled level of customer service.
32. The respondent had created the new role of Customer Care Continuous Improvement Analyst to support Ms Fenn, who was overseeing an increasing number of complex Continuous Projects.

33. The role of Customer Care Continuous Improvement Analyst was intended to be centred around driving productivity and finding smarter and more cost efficient ways of working within customer care, whilst also supporting the improvement of overall customer satisfaction. The respondent also wanted someone who was able to assist with GDPR work and managing escalated complaints. This included customer complaints raised on public forums such as Trustpilot.
34. The role was unique within the Customer Care department and within the respondent. There was another Continuous Improvement Analyst employed in the Warehouse section of the respondent's business. Although the job title was similar, the role he did was very different to the role in the Customer Care Department.
35. Following the claimant's successful interview, she was offered the role of Customer Care Continuous Improvement Analyst role and sent a contract of employment, which she signed and returned.

Induction

36. The claimant's first two weeks constituted an induction period, during which she joined an existing induction programme created for entry level Customer Care Consultants. The respondent considered this was appropriate as it would enable the claimant to be trained on the respondent's key systems and internal processes and fully understand the responsibilities of the teams that she would be working with in the future.
37. As part of this induction week, all Customer Care Consultants sit an open book 'assessment'. The claimant was asked to sit the assessment and failed it on her first attempt, scoring 62% (the pass rate is 85%). The respondent was concerned about this, but gave the claimant another opportunity to take the assessment. This was because the claimant had taken a day off during her induction for an eye appointment connected with a long standing eye condition. The respondent felt the claimant's absence may have contributed to the claimant not being fully prepared for the assessment. The claimant successfully passed the assessment the following week.

Ms Fenn's Management Style

38. Once the claimant's induction period was completed, she began to be assigned work by her line manager Ms Fenn in the form of projects. She also undertook GDPR work and dealt with customer complaints on Trustpilot.
39. The claimant says that her line manager micromanaged her, but also that she was required to lead most of the projects she was assigned single handedly with very little support. The claimant was unable to explain to us how these two things occurred simultaneously.

40. The micromanagement was said to consist of an excessive number of one to one meetings. In addition, Ms Fenn followed the meetings up with emails detailing the action points which she expected the claimant to undertake rather than trusting the claimant to work under her own initiative.
41. The claimant also stated that she was overloaded with work and required to work to tight deadlines.
42. Ms Fenn accepts that she met with the claimant regularly. She acknowledges that this was more than other employees in her team, but told us that this was because the other employees were more experienced whereas the claimant was in her probationary period.
43. Ms Fenn wanted the claimant to feel supported in a unique, new role that had been designed to alleviate her own workload. This necessitated a close working relationship. Ms Fenn denies that she overloaded the claimant with work or put her under pressure by giving her unreasonable deadlines. In fact, she considered that the claimant had a reduced workload compared to other employees who reported to her.
44. Ms Fenn acknowledged that her natural management style is to be directive. She also took a close interest in the work levels of her direct reports. For example, she checked their email inboxes on a daily basis in order to review their email volume.
45. Ms Fenn's management style was considered by Ms Strong when investigating the claimant's complaints. She made the following observations on it in her letter to the claimant:

"My belief is that the management style that [Ms Fenn] was using was more suitable to a Customer Care Consultant, rather than a more senior role, nonetheless, it is also clear that she was trying to provide support to you where necessary" (355).

"You also cited that on one hand you were expected to question the status quo, whilst on the other hand the objectives you were set were so specific they did not allow much room for creative thinking. It is hard to corroborate this – however based on the number of meetings with your line manager & the number of notes that were written up, it does seem that you were being very closely managed, which in general, I would agree allows limited scope for questioning & offering alternative suggestions." (356)

"In summary, from my investigations and interviews, I can see that there are a few areas for improvement for the line manager concerned and these will be addressed. However, in general I believe that Sarah Fenn acted in good faith in her role as your line manager and was doing her best to support you to perform to the expected standards. It was noted also by other managers I interviewed that your work was not at the required level, hence it was Sarah's duty to work with you to help you improve. Based on these findings, my decision is to not uphold your grievance." (357)

46. We have reviewed the communications between Ms Fenn and the claimant and our finding overall, is that while Ms Fenn did supervise the claimant closely, this was not excessive or oppressive. The tone of the communications from Ms Fenn to the claimant is extremely supportive and encouraging.
47. We find that Ms Fenn was initially being genuine in the emails. She wanted the claimant to succeed in the role and sought to assist her to achieve the standards Ms Fenn expected. She continued in this vein throughout the vast majority of the claimant's employment.
48. As time progressed, however, towards the end of the claimant's employment, Ms Fenn formed the view that the respondent should not confirm the claimant's successful completion of her probationary period. She continued to be supportive and encouraging towards the claimant in her emails and meetings, but was less genuine in this as she believed the claimant's performance would not improve sufficiently to overcome her concerns.
49. Our finding is that Ms Fenn was thinking along these lines on 19 March 2019. In response to a request for 2/3 days holiday from the claimant, Ms Fenn emailed Ms Dowle saying:

"Pro rata, Shakeela has no allowance remaining if she is not to be working with us past April 5th, I obviously can't say this to her..

I understand that everyone needs to take time off but in her final month when we are still no closer to her completing the objectives set out at the beginning of Month 3, I don't think the timing is particularly great." (259)

The use of the word "if" in the first sentence demonstrates that Ms Fenn had not yet reached a final view. We note that the claimant was allowed to take the holiday she requested.

50. We also find that there is no evidence that the role was not intended to be permanent or long term. This was considered in the investigation by Ms Strong who concluded:

"This was a new role for Customer Care with a clear job description, but the need was identified to support ongoing projects & initiatives. Based on the investigation it seems that there were a number of pressing initiatives that were lined up for this role, and the longer-term intention was for the role to champion some of the systems & processes within Customer Care." (354)

Probationary Process

51. The respondent's probationary process requires its probationary employees and their line managers to complete reviews at the end of months one and two of their employment. There is then a full review at the end of month three.

52. The claimant took two weeks' annual leave in late January / early February 2019. This was in order to have surgery on her eye.
53. The claimant's probationary period had been due to end on 5 February 2019. Because this was while the claimant was absent the final probationary review meeting was delayed until 12 February 2019 after her return.
54. On the claimant's first day back at work (11 February 2019), Ms Fenn informed the claimant that her final probationary review meeting would be taking place the following day. Ms Fenn told the claimant, as a heads-up, that she would be extending her probationary period due to ongoing concerns she had about her performance. She mentioned that the extension was related to the claimant's absence due to her eye surgery, saying that she wanted to give the claimant more time to meet her objectives.
55. Unfortunately, it transpired during the course of the working day on 11 February 2019, that the claimant had not recovered from her eye surgery. She had to go home early that day and was subsequently absent on sick leave for two weeks.
56. The claimant's sickness absence meant that the probationary review meeting planned for 12 February 2019 had to be postponed until 26 February 2019. As Ms Fenn was due to take a period of extended leave (in order to get married and go on honeymoon), the claimant's probationary review meeting was conducted by Ms Dowle, accompanied by Claire Hussey, HR Business Partner for Customer Care.
57. Prior to going on leave, Ms Fenn had completed the claimant's final probationary review form. In addition, Ms Fenn briefed Ms Dowle on the reasons why she felt the claimant's probationary period should be extended.
58. The claimant was meant to provide Ms Dowle with her reflections on her performance in advance of the probationary review meeting. She did not do this however, and in fact, only sent a document containing her thoughts to Ms Dowle by email on 11 March 2018 (209 - 211).
59. The outcome of the probationary review was that the claimant's probationary period was extended until 5 April 2019.
60. The reason for the extension was because the claimant was not performing her role to the standards required by the respondent. Rather than fail the claimant and terminate her employment, the respondent decided to extend her probationary period to allow her additional time to improve.
61. The extension was not because the claimant had taken time off to have her eye surgery. The respondent was, however, influenced by the fact that

the claimant had had some time off and so had not had the opportunity of a full three month probationary period to prove herself.

62. The final probationary review form incorporated the feedback from months one and two as well as new feedback from month three and an overall view (280 – 288). It provided a balanced account of the claimant's work and assessment of her performance.
63. The form contained praise for the claimant's interpersonal skills and GDPR work acknowledging that:

"[The claimant] has settled into her team well after coming out of the Customer Care Induction. She has formed some good relationships with her colleagues at both consultant level and within the support team. she conducts herself with a friendly manner."

"[The claimant] has a fantastic knowledge around GDPR regulations and brings a lot of background knowledge from her previous role. [She] has worked well with her colleagues in the privacy team to action requests in a timely manner." (285)

64. She is criticised, however, in relation to four key areas headed: Classifications, Knowledge Base, Trustpilot and Demonstrating Curiosity.

Salesforce Classifications Project

65. This was a project that was allocated to the claimant on 11 December 2018. It entailed gathering feedback from consultants about the classifications (i.e. reasons for customer contact) used on the respondent's Salesforce System. The claimant was asked to consult a selection of Customer Care Consultants to explore whether there were missing classifications, classifications that were no longer required and whether any were duplicated. Ms Fenn told the tribunal that she expected the claimant to have completed this work by the end of December, but in fact the project was not completed by the time the claimant left her employment.
66. The claimant delivered a draft presentation on this project to Ms Fenn and Ms Dowle on 15 January 2019. Ms Fenn and Ms Dowle were not impressed with the contents of the presentation and Ms Fenn spent a significant amount of time working with the claimant to try and improve it so that she could redeliver an updated version of the presentation on 23 January 2019. Despite this the presentation was not in a form that could be presented by this date as some key elements of it were confused and the claimant had not yet consulted a number of key people.
67. As a result, Ms Fenn wrote in the probationary form:

"[The claimant] did advise that she had been working on other things during the week. However, she did not effectively prioritise this piece of

work after the initial presentation and in my opinion not enough urgency has been placed on completing it. [The claimant] will need to be able to work across multiple different projects simultaneously if she is to become successful in this role as well as managing pieces of work that fall under BAU such as GDPR. This lack of urgency has made me consider whether she is the right fit for the role as this is an incredibly fast paced and demanding department. [The claimant] has mentioned to me many times that she feels her lack of progress is due to her being new, however, her action points are detailed and mapped out so that she is able to deliver the work in stages.” (287)

68. Having reviewed the various communications in the bundle about the progress of the project, we find this is a fair and accurate comment.

Trustpilot

69. The probationary review form recorded that the claimant had been responding to customer comments on Trustpilot, but had to be asked to stop. The reason was because she kept making grammatical mistakes in her responses.
70. Olivier Young, the respondent’s Customer Experience Content Manager, had emailed Ms Fenn on 6 December 2018 highlighting this issue (98-99).
71. As these responses were in the public domain and addressed to customers of the respondent’s business, the respondent wanted to ensure the responses were perfect. It considered that if there were errors with punctuation and spelling this did not represent the company well or reflect its brand as a high-end, luxury provider of goods. Ms Young asked Ms Fenn to ensure the claimant carefully check the responses before posting
72. Although Ms Fenn spoke to the claimant about the grammatical errors in her Trustpilot responses the errors continued. Some were picked up by Ms Dowel on 4 January 2019 who raised them in an email to Ms Fenn on this date (122-123). Subsequently Kathryn Roberts, Customer Care Director. Ms Roberts instructed Ms Fenn to stop the claimant doing any further Trustpilot work.

Knowledge Base Project

73. The probationary review form also referred to negative feedback that Ms Young had sent to Ms Fenn in connection with another project the claimant was working on.
74. The claimant had attended a meeting with Ms Young on 14 January 2019 When Ms Fenn spoke to the claimant after the meeting, she became concerned that the claimant did not appear to think that she had any follow up actions.
75. Ms Fenn therefore emailed Ms Young to ask for her feedback on the claimant. Ms Young’s lengthy reply to Ms Fenn confirmed that there were

a number of outstanding action points arising from the meeting, including several for which the claimant was responsible. Ms Young concluded her email by saying:

"I know it must not be easy as everything is still quite new to her but I feel like she is sometimes in the clouds as she nods like she understands, but maybe she doesn't." (129)

76. Having reviewed the emails in question, we consider that the criticism contained in the probationary review form was accurate and fair.

Demonstrating Curiosity

77. In the final section of the probationary review form, Ms Fenn wrote that

"Thus far I have not observed a satisfactory level of curiosity that will support [the claimant] in being successful in her role. I have reiterated that this approach is key in her achieving her objectives and driving her success within the department and the business.

I would like to reiterate to [the claimant] that though I am happy to support her during the kick off of her work with supporting documents and information, she will need to go and pull out answers and feedback using her colleagues who will also contribute to the project. I'd like to see [her] to continue explore Customer Care beyond the projects that she is working on so that she has a strong knowledge around each team's responsibilities and processes. [The claimant] does take on feedback and appears engaged to understand what she could do to improve however I feel that the feedback given particularly around curiosity and attention to detail is a reoccurring theme within our catch ups and we don't seem to be progressing with this." (288).

78. We find that this criticism is balanced and, having heard Ms Fenn's explanation for it during her oral testimony represented her genuine view of the claimant's approach to her role.

Email – 6 March 2019

79. Following her probationary review meeting, while Ms Fenn was away on leave, the claimant emailed her copying in Ms Young, to question something that Ms Fenn had included on the probationary review form.

80. The email, sent on 6 March 2019, a week after the review meeting, forwarded an email the claimant had sent to Olivia Young on 16 January 2019 and said:

"Hello Sarah,

I hope you enjoyed your holiday?

I just wanted to touch base regarding this Knowledge base project.

You mentioned in my feedback that Olivia had said to you that I didn't seem to understand what was being said in our Kick off meeting on the 14th January and that I didn't ask many questions.

Also, that I was confused about the next steps to take regarding this project. Yet below I had managed to put together an action plan for all parties involved.

Daniel had emailed me on the 2nd January to confirm all the knowledge base templates had been updated. I understand that this will require ongoing improvements but this particular project was to roll out a new knowledge base and to create a group/team of consultants that can give us feedback .

Please clarify if the below is correct or not before I move forward with this project." (135)

81. Ms Fenn picked the email up on 11 March 2019 while she was still on annual leave. Surprised to see the claimant had copied Ms Young into the email, she emailed Ms Young saying:

"Just to let you know... as part of [the claimant's] feedback, feedback from other managers has been included

I'll address this with her as I don't feel this email is particularly appropriate." (134)

Ms Young replied saying:

"I completely agree. I read this email and thought it was a bit rude." (135)

82. Ms Fenn also shared the email with Ms Dowle saying:

"She sent quite a combative email to me and Olivia following her review about a section of the feedback regarding the knowledge base. I'm not going to respond as one is quite inappropriate (Olivia also found it quite rude) that it will require a verbal conversation, and some follow up, would be interested to get your opinion on it!" (200)

83. Ms Fenn added in a subsequent email in the email exchange:

"I have no problem with her querying things post review, but I don't think copying in Olivia is particularly professional or appropriate" (199)

84. Ms Fenn met the claimant the following day. Ms Fenn followed up the meeting with an email summarising the discussion. The content of the email demonstrates that several issues were discussed at the meeting and not simply the email (215 – 216). In relation to the email, the note of the meeting says:

“We’ve discussed written communication style, specifically with an email sent to myself and Olivia Young as this email was perceived negatively by Olivia who was not anticipating to receive an email like this in relation to your probation review. We’ve discussed that we will have verbal conversations about something like this going forward should you wish to raise anything like this in future. I understand that as I wasn’t in office at this time, it was more difficult for you to reach out to me.” (215)

85. The claimant’s evidence was that Ms Fenn described the email as “aggressive” which the claimant took to be related to her race and the existence of the angry black woman stereotype which characterises black women as bad-tempered, hostile and overly aggressive. The claimant did not raise this issue at the time, however, nor did she accuse Ms Fenn of race discrimination in the grievance letter she wrote only a few days after the meeting. The letter refers to the email and to the discussion about it only in passing. The claimant says:

“[Ms Fenn] suggested in my review ... that another manager had an issue with how I was heading the Knowledge base project, once I became aware of this I wanted more clarity and so I sent an email to both of them. which I was later told in person was aggressive, however I received no response. (222)

86. The claimant did raise the issue of the email being linked to her race at the grievance meeting held on 13 May 2019. The notes of the meeting record her saying:

“I queried this [the probationary form feedback] in an email to my manager, and copied in Olivia no one responded, Sarah returned to work and took me into a room, she said the email I sent was aggressive although it was not and I believe she used this term because I am black knowing the implications of it. She wanted to hinder me from taking the matter any further.” (334B)

87. The claimant said in her response to the grievance outcome letter:

“You also failed to address the emails that were sent to Olivia [Young] by myself and that fact that I was accused of being 'aggressive' by Sarah Fenn because of this email and the vital point that I felt like this was a racially motivated statement.” (351)

88. Ms Fenn told us that she did not believe she had used the word aggressive to describe the email to the claimant, but she could not be sure. She said that the discussion about the email was only a very small part of what was discussed at the meeting and she found it difficult to remember.

89. We find that Ms Fenn described the email as combative and may well have used the term aggressive. In our view, there is little difference between these terms and the meaning is the same. Ms Fenn did not appreciate that the categorisation could be interpreted as linked to the

claimant's race and told us that she would have addressed the email in the same way regardless of the colour of the employee sending it.

Claimant's Resignation

90. The claimant sent a letter of resignation to Ms Fenn on 29 March 2019 saying that she was resigning due to:

"unsatisfactory conditions, including

- *Lack of guidance and support*
- *Lack of transparency and poor communication*
- *Lack of proper introduction to the role*
- *Differences in expectation(s)"*

She suggested her last day should be 19 April 2019. (267)

91. As the claimant was still in her probationary period, the respondent considered that, in accordance with clause 1.2 of her contract of employment she was required to give just one week's notice of termination (54).

92. The claimant, however, had interpreted her contract as requiring a minimum period of notice and assumed this did not prohibit her giving a longer period of notice. She believed that if she stayed until 19 April 2019, this would enable her to complete her ongoing projects.

93. The claimant was keen to find out if her probation review would still take place and emailed her manager to ask about this on 1 April 2019 (292). In fact, Ms Fenn had already emailed the respondent's HR department that morning saying:

"Shakeela has resigned giving me three weeks' notice from last Friday.

As her final day was due to be Friday the 5th is there anything we can do to terminate earlier than this? She is no longer adding any value to the role and is actively job seeking during working hours.

Given the points in her resignation, I'm surprised she is happy to continue working here for the next three weeks." (271)

94. This email demonstrates that Ms Fenn had indeed formed the view that the claimant would be leaving the respondent immediately on 5 April 2019 as a result of her final probationary review meeting. It also suggests that she did not believe that there was any value to the respondent retaining Ms Fenn for longer than this. This was not because the Sales Classifications project had been completed however. The work the claimant undertook on this project was never finalised, even after she left.

95. Ms Dowle (who was copied into the email exchange) was keen to see the claimant leave as soon as possible. Ms Hussey, HR Business Partner therefore arranged to meet with the claimant.
96. The meeting between the claimant and Ms Hussey took place on 3 April 2019 (301 – 302). They agreed that the claimant's last day of employment would be 5 April 2019, but that the respondent would pay her in lieu of the additional two weeks' notice she had given. This would also mean that the claimant's probationary review meeting would not take place.
97. The claimant emailed Ms Fenn after the meeting (copying in Ms Hussey) to say that, in fact, she was happy to treat that day (3 April 2019) as her final working day and have a slight increase in her payment in lieu. However, because Ms Fenn wanted a handover meeting with the claimant before she left she asked her to remain until 5 April 2019. (304)
98. The final position was confirmed in writing in a letter to the claimant on 4 April 2019, namely her last day would be 5 April 2019, she would be paid an additional two weeks' pay and her probationary review would not take place (309 – 310).
99. The claimant did not present any evidence that other employees in a similar situation as her had been treated more favourably than she was regarding their notice periods.

Lateness

100. One of the allegations we had to consider was the claimant's allegation regarding how her manager dealt with her lateness.
101. The respondent operates a flexible approach to start times, and this was reflected in the claimant's contract of employment (56). The claimant had, however, verbally agreed with Ms Fenn that she would arrive at 9 am to coordinate with Ms Fenn's usual working hours.
102. The claimant accepted that she arrived after this more often than she should have, although she denied that this was frequent. She said that whenever she was late, she stayed behind to make the time up and often worked beyond her contractual hours.
103. The claimant also accepted that it was fair for her line manager to raise her lateness with her. However, she accused her line manager of deliberately putting a meeting in her diary to catch her out on lateness and of openly discussing her lateness in the office with other members of the team. This allegation was contained in the letter of grievance:

"The straw that broke the camel's back for me was when my manager openly discussed my time keeping with three of my colleagues in an open forum, she then proceeded to chastise me for it in a private setting and used my colleague's opinions of my time keeping as evidence." (221)

104. The meeting in question was on 14 March 2019 at 9 am. (105). The claimant arrived 15 minutes late on this day. Ms Fenn sent the meeting invite to the claimant the previous day. She denied scheduling the meeting to deliberately to catch the claimant out on lateness. We accept her evidence on this point and find that there was nothing untoward about her scheduling a meeting for 9 am.
105. The open discussion of the claimant's lateness was investigated by Ms Strong and Mr Clarke. Ms Fenn and several of the claimant's colleagues were interviewed about it. Ms Fenn told us that members of staff had raised with her that the claimant had been frequently late while Ms Fenn was absent on leave. Ms Fenn said they volunteered the information without being asked. She confirmed that she raised this with the claimant, but this was done privately. We accept Ms Fenn's evidence on this point. The members of staff confirmed in their interviews that they had voluntarily provided information about the claimant's timekeeping to Ms Fenn (345, 346).

Race Discrimination Allegations

106. It is striking that there is only one allegation of race discrimination in any of the documents setting out the claimant's complaints. The relevant allegation is the one about Ms Fenn's categorisation of the email the claimant sent on 6 March 2019 referred to above at paragraphs 82 – 92. As noted above, the claimant did not link this allegation to her race until after her employment had ended when it was investigated by the respondent.
107. The claimant told the tribunal that she believed that all of her treatment was linked to her race, but was unable to explain why she had not said so during the grievance investigation after her employment had ended. Having observed the claimant's cross examination of the respondent's witnesses we find that had she genuinely believed that Ms Fenn's treatment of her was motivated by race, at that time, she would have raised this once her employment had ended.
108. Before us, the claimant likened her treatment to another black woman employed by the respondent who did not satisfactorily pass her probationary period. The woman was line managed by Ms Dowle who confirmed that she had left the respondent as a result of failing her probationary period. Ms Dowle explained that the same thing happened with the subsequent person employed in the relevant role, who was a white male.
109. Our attention was drawn to the fact that Ms Fenn and Ms Dowle did not manage many other black employees. Ms Dowle accepted that this was the case, but explained that she had been responsible for line managing at least two black woman who were based in the US and were still employed by the respondent. Also, after the claimant's departure, she had employed someone new who was black in London. Ms Fenn told us that she had

also line managed one of the women based in the US without any complaints.

110. Finally, the claimant explained that Ms Fenn and Ms Dowle had commented on her hair when she changed her hairstyle. Ms Dowle apparently told the claimant that she preferred her hair natural, while Ms Fenn apparently asked if she could touch it and then said, when she did, that it was “interesting.” The claimant did not cross examine either of them about this incident and it is not mentioned in their statements. Our finding is that the comments, if made, were not linked to the claimant’s race, but were the type of comments that can be expected to be made by women working in a fashion environment.

The Law

The Protected Characteristic of Race

111. Race is a protected characteristic under section 4 of The Equality Act 2010 (the Act). According to section 9(1) of the Act, race includes colour, nationality and ethnic or national origins.

Discrimination in Employment

112. Section 39(2)(d) of the Act provides that an employer (A) must not discriminate against an employee of A’s (B) by A subjecting B to any detriment. Discrimination includes direct discrimination as defined in section 13 of the Act.

Direct discrimination – Section 13

113. Section 13 of the Equality Act 2010 provides that ‘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’.
114. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.
115. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant’s protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.
116. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.
117. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment

than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the '*reason why*' the claimant was treated as she was.

118. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.
119. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.
120. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.
121. The Court of Appeal in *Madarassy*, states:

'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' (56)
122. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).
123. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and

Martin v Devonshires Solicitors [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

Analysis and Conclusions

Issue 1 - Micromanaging the claimant during her employment and particularly her induction period, with excessive one to one meetings, having to explain herself to her manager, etc

124. As indicated above, our factual finding is that Ms Fenn supervised the claimant closely rather than micromanaged her. We do not consider that Ms Fenn held an excessive number of one to one meetings with the claimant.
125. This allegation therefore fails on the facts, but for the sake of completeness, we have considered the significance of Ms Fenn's acceptance that her approach to managing the claimant was different to how she managed other members of her team. We find that the reason for the difference in approach was, in part, because the claimant was undertaking a new unique role. However, the most significant reason for the difference in approach was because the claimant was in her probationary period and not performing in the role to the standards expected by Ms Fenn. Ms Fenn therefore felt she needed to provide the claimant with lots of guidance.
126. We note that Ms Fenn was well aware that the claimant was black when she recruited her to the role, as she was directly involved in her recruitment.
127. It is also notable that the complaint made by the claimant to the respondent, that was so important she felt she needed to whistle blow at around the time she was leaving her employment, was not that Ms Fenn treated her differently because of her race. At the time, the claimant said she believed that Ms Fenn's management of her was deliberately designed to ensure that she failed her probationary period for a different reason. This was because the claimant believed that Ms Fenn had only ever intended to employ her on a temporary basis to undertake the Sales Classifications Project and that the permanent role was a fiction.
128. The claimant's belief at the time of making her complaint is not conclusive, but it is persuasive. We have therefore concluded, taking into account all the circumstances, that there was no evidence before us from which we could infer that Ms Fenn would have managed a white employee doing the same role as the claimant in the same circumstances any differently.

Issue 2 - Requiring the claimant throughout her employment to do excessive amounts of work, without adequate support – inter alia by comparison with the other members of the team, who are not black.

129. We have not found that Ms Fenn required the claimant to do excessive amounts of work without adequate support. The amount of work the claimant was required to do was less than other employees. Ms Fenn tried very hard to support the claimant.

130. This allegation also fails on the facts, but for the sake of completeness we note that there was no evidence before us from which we could infer that Ms Fenn would have managed a white employee doing the same role as the claimant, in the same circumstances, any differently.

Issue 3 - Extending the claimant's probation period on 11 February 2019, initially on the basis that the claimant had taken time off to recover from eye surgery.

131. The respondent did extend the claimant's probationary period. Her probationary period was due to end by 5 February 2019. However, the review of the claimant's probationary status was initially delayed due to the claimant being absent for an extended period in connection with her eye surgery. This meant that it was not possible to meet with the claimant to conduct a probationary review until 26 February 2019. The initial extension to 26 February 2019 was purely administrative.

132. The decision taken at the review meeting held on 26 February 2019 was that the claimant's probationary period should be extended until 5 April 2019. In fact, the decision had in reality been taken earlier and it was this decision that Ms Fenn communicated to the claimant on 11 February 2019 when giving her a "heads-up."

133. The reason for the extension was to enable the claimant to have more time to meet the objectives she had been set and demonstrate that she was able to perform her role to the required standards. It was an alternative to termination of employment and therefore cannot have constituted a detriment in the circumstances. The decision was not made because the claimant had taken time off. The time off was relevant only to the extent that the respondent was conscious that the claimant had not had a full three months in work to demonstrate her capabilities.

134. There was no evidence before us from which we could infer that a white employee in the same circumstances would not have had her probationary period extended in exactly the same way.

Issue 4 - At a probationary review meeting in about late February 2019 conducted by Rachel Dowle raising inaccurate and unfair criticisms of the claimant's performance.

135. As explained above, we have found that the criticisms of the claimant made in the probationary review form were accurate and not unfair.

136. There was no evidence before us from which we could infer that such criticisms would not have been of a white employee doing the same role as the claimant in the same circumstances any differently.

Issue 5 - Sarah Fenn criticising an email the claimant had written to a person identified by the claimant in her particulars of complaint as Olivia Young, as aggressive.

137. Ms Fenn did criticise the claimant for copying Olivia Young into the email the claimant sent to her on 6 March 2019. We have found that she described the email as combative in an email to Ms Dowle and may well have called it aggressive to the claimant's face.

138. The email and the circumstances in which it was sent were confrontational. Ms Young confirmed that she thought the email was "rude." The claimant wanted to challenge the feedback that she had been given at her probationary review. A far more reasonable way of doing this would have been to speak to Ms Fenn and ask her about it in person, without involving Ms Young in the first instance.

139. It was appropriate for Ms Fenn to raise the issue of the email with the claimant. She did so in the course of a meeting when a number of issues were discussed. It was not the sole focus of the meeting and was only touched upon lightly.

140. There was no evidence before us that Ms Fenn would have reacted to the same email sent by a white employee in the same circumstances any differently. There was also no evidence that Ms Fenn appreciated that describing the email as "aggressive" had potential racial connotations.

Issue 6 - When the claimant gave 3 weeks' notice in resigning, requiring her to leave her employment after only 1 week (though paying the additional 2 weeks' salary in lieu, but without affording the claimant her other contractual benefits during that period). The claimant believes that other employees, who are not black, were treated differently in similar situations, but does not know their names.

141. The claimant did not present any evidence that other employees in a similar situation as her situation had been treated more favourably than she was regarding their notice periods.

142. In our view, the respondent treated the claimant generously by paying her in lieu of the additional two weeks' notice she had been given, when it did not have to do so. We interpret her contract of employment as requiring only one week's notice. In addition, the respondent could have proceeded with the final probationary review on 5 April 2019 and legitimately terminated the claimant with one week's notice on that date.

143. We do not consider the respondent's treatment of the claimant amounted to a detriment, but in any event, there was no evidence before us that it

would have treated a white employee in the same circumstances any more favourably.

Issue 7 - In about the last week of the claimant's employment, Sarah Fenn booking a meeting with the claimant for 9 am only on that day, criticising the claimant for being 15-20 minutes late for work that day and initiating a conversation with colleagues in the claimant's absence about how often she had been late for work previously.

- 144. The claimant had agreed to start work at 9 am every day. She was late on several occasions and accepted that it was appropriate for her line manager to raise this with her.
- 145. We have established that the relevant meeting referred to in this allegation was a meeting on 14 March 2019, for which Ms Fenn sent a calendar invite the previous day. The meeting was at 9 am which was the time the claimant had agreed to start work. She was late by 15 minutes.
- 146. We have found that Ms Fenn did not initiate a conversation about the claimant's lateness with her colleagues. Two of the claimant's colleagues informed Ms Fenn that she had frequently been late while Ms Fenn was away on leave. Ms Fenn did not discuss the concerns with the claimant in the open plan area, but instead raised them with her privately.
- 147. There is no evidence before us to suggest that Ms Fenn's approach to the management of lateness would have been any different had she been managing a white employee in the same circumstances as the claimant.

Overall Conclusion

- 148. Having considered each allegation separately, we have also stepped back to the consider the position overall. In our judgment, the claimant has failed to prove any primary facts from which we could properly and fairly conclude that the respondent treated her less a favourably than it would have treated a white employee in the same circumstances and therefore her claim fails on this basis too.

**Employment Judge E Burns
9 March 2020**

Sent to the parties on:

11/3/2020

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For the Tribunals Office