THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Mr J Hutchings**
Ms E Thompson

BETWEEN:

Miss B Abioye

Claimant

And

B & Q Plc

Respondent

ON: **23, 24, 25 & 26 November 2020**

Appearances:

For the Claimant: In Person
For the Respondent: Mr D Piddington, Counsel

RESERVED JUDGMENT

The claims of direct race discrimination and victimisation fail and are dismissed.

REASONS

1. By a claim form presented on 4 March 2018, the claimant claims direct race discrimination and victimisation against the respondent. All claims are resisted.

2. We heard evidence from the claimant on her own behalf. The respondent gave evidence through Damien Readman, Unit Manager. The respondent also provided witness statements from Gavin Pearson and Tyrone Barrett, who did not attend the hearing. We have read those statements but have chosen not to attach any weight to matters which have not been corroborated, either by the witnesses who are present or by documentation in the bundle.

The issues

3. The issues are set out in an agreed List of Issues document and are dealt with more specifically in our conclusions.

The Law

4. Section 13 of the Equality Act 2010 (EqA) 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.

5. Section 23 EqA provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.

6. "The relevant circumstances" for the purposes of the statutory comparisons are those which the respondent took into account when deciding to treat the claimant as it did. If the relevant circumstances are to be "the same or not materially different" all the characteristics of the claimant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. MacDonald v Advocate General for Scotland and TSB Governing Body of Mayfield Secondary *School* [2003] IRLR 512 House of Lords.

7. Section 27 EqA provides that 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.

8. The protected acts in question are listed at section 27(2) EqA. The claimant relies on her grievance as the protected act.

Burden of Proof

9. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

10. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved the burden passes to the respondent to prove that it did not discriminate.

11. In determining whether treatment is by reason that the person has done a protected act, the test is different to that in determining whether an act is done on racial grounds. The relevant question is to ask why the discriminator acted as he did. In other words, what consciously or unconsciously was his reason? Chief Constable of West Yorkshire v Khan [2001] IRLR 830

12. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination."

Findings of Fact

13. The respondent is a leading home improvement and garden living retailer, with stores across the UK. The claimant was employed by the respondent as a customer adviser, between 10.9.12 and 28 or 30 April 2018. She was originally based in a store in Cambridge but transferred to the West Norwood, London, store in 2014. The West Norwood store was ethnically diverse with the majority of the staff being black.

14. The claimant describes herself as Black African.

15. The claimant was originally contracted to work 20 hours per week, Monday to Sunday [49]. The contract states: *Due to the nature of our business we need to have the flexibility to ensure are (sic) store teams are in place to deliver great service to our customers, particularly on our busiest trading days e.g. Saturday, Sunday and Wednesday or during any peak trading periods.* [49].

16. All staff employed on flexible contracts were required to complete an Availability Questionnaire on joining, indicating the days and hours they were prepared to work. The claimant completed one in 2012 and although we did not have a copy of it before us, she confirmed that she had signed it indicating she was fully flexible between Monday to Sunday, at that time.

17. In August 2013, at the claimant's request, her hours were reduced to 15, working weekends only [52].

18. Following her transfer to West Norwood store, the claimant spoke to HR and her line manager and requested to work specific shifts. The claimant has suggested that this was a verbal agreement replacing the flexible working arrangements in her contract. This is denied by the respondent. Whilst we accept that the claimant worked the same shift pattern for a prolonged period, there is no evidence that this amounted to a contractual change. The respondent records contractual changes by the completion of an Employee Contract Change Form, signed by the employee and employer. No such form was

completed in respect of her request. However a form was completed when the claimant reduced her hours again (see para 20 below). It was within the gift of the respondent to allow the claimant to work specific shifts but the requirement to work flexibly remained.

19. In late 2014, the claimant was asked to cover the cash office role while Gloria Kusi (GK) was on annual leave. In the event, GK was away from the business for longer than anticipated, and in February 2015, Denis Banton (DB) store manager, asked the claimant to continue the cash office role on a permanent basis.

20. The claimant's working shifts at that time changed to 7.00am to 2.30pm on a Saturday and 9am to 4.30pm on a Sunday. The only contractual change that occurred around this time was a reduction in the claimant's total hours from 15 to 14. The change was recorded in an Employee Contract Change Form, which the claimant signed on 29 March 2015. [53]

21. At some point in 2015, Tyrone Barrett (TB) became the deputy store manager and the claimant's line manager. TB is said to be of black Caribbean origin. In early 2016, Pauline Ricketts (PR) transferred from the Peckham store as a customer adviser. She too is said to be of black Caribbean origin.

22. The shift rota is generally prepared 4 weeks in advance and posted internally on the canteen notice board and on a group WhatsApp site. Responsibility for the rota lies with the store manager/deputy though the task is sometimes delegated downwards to the customer service staff. Indeed, the claimant refers to both herself and GK as having done the rota.

23. On the 4 November 2016, the claimant discovered that her Saturday shift on the 4-weeks rota for that period had been changed from 7am to different start times and that the 7am shift had been given to PR.

24. The claimant queried this with TB by text but was unable to follow it up with him because shortly afterwards TB was away from the business for an extended period. The claimant raised the issue with DB, who told her that he was unaware of the reason for the change. The claimant was asked to do the rota in TB's absence and so changed her start time back to 7am. The rota was then taken over by GK who left the claimant's shift as it was.

25. TB returned to work in Mid-2017. On 21 August 2017, TB issued a 4-week rota which changed the claimant's Saturday shift from the week commencing 4 September 2017 shift to 8am - 3.30pm. The next day, TB rang to complain about this change.

26. On 2 September 2017, the claimant met with TB to discuss the rota changes. TB asked the claimant to explain why she was unhappy with the change and she told him that she could not work the hours because she helped looked after her younger sister on a Saturday while her mum helped out in the mosque. [90-91] As a result, TB asked the claimant to complete an updated Availability Questionnaire indicating the days and shifts she was prepared to work. The claimant completed 2 versions of the questionnaire at the time. The first is not signed but the claimant has ticked that she is available to work on any of the shifts on Saturday, Sunday and Monday, though Monday is then crossed out. [78]. In the second form, she ticked her availability for any shift on Saturday and Sunday. This form is signed and dated by the claimant and TB on that day [79].

27. The claimant says that she completed the forms as she did because she was upset and not in the right state of mind. She says that TB knew she was upset and gave her another form to take away and fill in once she had calmed down, the inference being that TB knew that she did not want to be bound by the form that she had signed. The claimant says that she completed another form and put it in the HR Administration mailbox, but heard nothing further.

28. The respondent found no other questionnaires in the claimant personal file. At paragraph 42 of her statement, the claimant simply says that she put forward a new matrix showing the correct times. She does not say what those times were. There is also no reference to the new matrix at the claimant's grievance or appeal hearings. If it was the case that the claimant completed a further form with revised available hours and this was ignored by TB, it would have featured prominently as part of her grievance. The absence of any reference to a further form leads us to conclude, on balance, that no further forms were completed.

29. Between 3-23 September 2017, the claimant was signed off work with a swollen eye.

30. On 19 October 2017, the claimant raised a grievance in which she alleged discrimination by TB. In particular, she claimed that he had changed her 7am Saturday shift in favour of PR, who was of the same ethnic background as him. She also makes general allegations of being picked on and victimised. [97]

31. On 21 October 2017, the claimant had a further period of sickness absence, with stress, from which she did not return.

32. A grievance meeting was held on 11 November 2017, by Damien Readman (DR), Unit Manager. [108-112]

33. On 12 November 2017, TB removed the claimant from the Group WhatsApp. The claimant relies on this as an act of victimisation. [112]

34. On 20 November 17, DR wrote to the claimant informing her that the grievance was not upheld. [130-131]. The claimant contends that the outcome amounted to direct race discrimination as the grievance was not properly investigated.

35. The claimant appealed against the grievance outcome on the basis that it was not investigated properly but did not allege that it was discriminatory. [96]

36. The appeal was heard by Gavin Pearson (GP) on 16 & 29 December 2017 and on 29. December, GP wrote to the claimant informing her that the appeal had been unsuccessful. [171-173]

37. On 3 April 2018, the claimant tendered her resignation [185]

Submissions

38. The parties made oral submissions and these have been taken into account.

Conclusions

39. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the agreed issues:

Direct Race Discrimination

Allegation 4b – Failure to investigate the grievance

40. The claimant told us that the reason her grievance was not investigated properly was because DR had already made up his mind that she was just a black girl looking for money. She basis this on an HR incident log relating to her in which recorded that DR had phoned HR after the grievance meeting and said that the first thing the claimant asked for as a resolution was a pay-off and a good reference (she denies this). [200] This information could not have been the basis of the discrimination allegation when the claimant lodged her claim as she would not have seen the HR log until disclosure during the course of the proceedings. In any event, this is pure speculation on her part.

41. The claimant has not provided any particulars of the failures in the grievance investigation. She confirmed that she had an opportunity to state her case and that she was happy with the way the meeting was conducted. DR interviewed TB though the claimant says this was not a formal meeting because DR simply turned up at the West Norwood store unannounced to conduct it. Whilst TB did not receive formal notice of the meeting, we do not believe that affected the substance of the meeting. It took the same form as that conducted with the claimant; it was held in private and notes were taken. In addition to the interviews, DR reviewed the claimant's personal record file and had informal discussions with staff in the store about what they thought of their shifts. It seems to us that the claimant real complaint is that she did not like the grievance outcome. However, the fact that DR came to a different view than the claimant in relation to her complaints, does not mean that it was not investigated properly, neither does not indicate discrimination.

42. The claimant relies on a Nathan Boyd (NB), who raised a grievance against his line manager, as a comparator but she did not provide any evidence about his circumstances or how they were the same or similar to hers. We had no information about the nature of the grievance, who investigated it, how it was investigated or the outcome. The claimant has not shown that NB was an appropriate comparator.

43. Although the claimant said that the failure to investigate her grievance extended to the appeal, she did not give any evidence of any less favourable treatment in relation to either the investigation or outcome of the appeal. We are satisfied having read the notes of the hearing and the outcome letter, and having viewed GP's witness statement, that the appeal was reasonably dealt with and the outcome had nothing to do with race.

44. This complaint is not made out.

Allegation 4 c) - Suspension

45. The claimant says she was treated less favourably than NB in that her manager, TB, was not suspended following her grievance whereas when NB raised a grievance against his manager, his manager was suspended.

46. Again, the claimant has not shown how NB's circumstances were the same or similar to hers. As already stated, we had no information as the allegations. Also, we had no evidence about whose decision it was to suspend or what factors were taken into account in deciding that suspension was appropriate. The claimant has not shown that NB is an appropriate comparator. There is nothing in employee handbook that requires a manager to be suspended during a grievance investigation. We are aware that, sometimes, suspensions take place in order to keep the parties to a grievance apart during the investigation process. However, this did not arise here because the claimant was off sick throughout the grievance process.

47. This complaint is not made out.

Allegation 4d) - Placed on rota on 4/11/17 while off sick

48. The real complaint is not placing the claimant on the rota but failing to remove her from it when she was off sick as the evidence suggests that she was put on the rota well in advance of this date.

49. The claimant's comparator is Rochelle Felix (RF). The claimant says that when RF was off sick she was taken off the rota. If that is so, all it points to is a difference in treatment and a difference in race and as is clear from Madarassy, that is insufficient to shift the initial burden on the claimant; there has to be more. At page 92 of the bundle is a message on the group WhatsApp from TB wishing a speedy recovery to a member of staff of sick. The person is not named but the claimant contends that it refers to RF. The claimant says that TB did not express similar sentiments when she was off sick. Assuming that this is so, we considered whether it was enough to shift the evidential burden but without knowing the background to the message, it was difficult to draw any inferences from it. We therefore decided, on balance, that it did not shift the burden of proof. This complaint is not made out.

Allegation 4a – Moving the claimant from the 7am shift on or before 2/9/17

50. This is a reference to the matters at paragraphs 25 and 26 above. A time point arises in relation to this allegation. Section 123 EqA provides that a claim must be brought within 3 months of the alleged discriminatory act. The alleged act occurred on 21 August 2017. The claim should therefore have been presented by 21 November 2017 or 21 December 2017, at the latest, if you take into account acas early conciliation. The claim was presented on 4 March 2018. The claimant submitted that this was in time as it was part of a continuous course of discriminatory conduct extending over a period. However, as we have found that the other acts relied on are not race discrimination, this particular matter cannot be linked to them and is therefore a stand-alone act.

51. The tribunal has a discretion to extend time if it is just and equitable to do so. The case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA makes clear that the discretion of the Tribunal to extend time on just and equitable grounds should be exercised exceptionally and that the burden is on the claimant to satisfy the Tribunal that there are reasons why it should exercise its discretion to extend time.

52. The claimant has provided no reasons whatsoever as to why she did not present her claim earlier. In those circumstances, the Tribunal has decided not to exercise its discretion. This complaint is therefore dismissed as out of time.

53. However, if we are wrong about that, we would have dismissed the complaint on its merits. We are satisfied from the evidence of DR and the statement of TB, supported by the notes of the meeting between TB and the claimant on 2/9/17 [90-91] that the change was made in order to provide flexibility so that there was sufficient cover, particularly at the weekend. The change occurred against the background of difficulties in deployment due to a huge reduction in staff numbers. The claimant was not the only member of staff to have her shift changed. PR had routinely worked Mondays to Fridays but was rotared to work weekends. The changes to the claimant's shift had nothing to do with race.

Victimisation

Removing the claimant from the WhatsApp Group

54. It was submitted by Mr Piddington that section 27 EqA was to be dis-applied because the claimant had acted in bad faith. He contended that the whole grievance process had been a mechanism by which to secure a pay-off from the respondent. We reject that submission as there is insufficient evidence to support it.

55. We are satisfied that the claimant's grievance was a protected act.

56. The respondent contends that the claimant was removed from the WhatsApp Group because she was off with stress and TB wanted to avoid any suggestion that he was exacerbating her condition by including her on the group. We did not hear any direct evidence to that effect, we only heard it second hand from DR. Although it is contained in the witness statement of TB, we were not prepared to take that at face value as we were concerned about the timing of the removal – immediately after the claimant's grievance meeting – and the statement did not address this.

57. Nevertheless, we find that TB's actions did not amount to victimisation because there was no detriment. The purpose of the WhatsApp group was to inform staff of the rotas and any changes to them. The claimant was off sick with stress so did not require that information. The claimant said that it was a detriment because without seeing the rota, she would not know what shift she was on once she was fit to return to work. That is a theoretical detriment rather than an actual one as the claimant never returned to work thereafter. The victimisation claim is not made out.

Judgment

58. The unanimous judgment of the tribunal is that all claims fail and are dismissed.

Employment Judge Balogun
Date: 15 January 2021