



EMPLOYMENT TRIBUNALS

Claimant: Ms J Capistrano

Respondents: Ryohin Keikaku Europe Limited (1)

Ms P Lu (2)

Mr J Fernandez (3)

Heard at: London Central (remotely by CVP)
On: 23 – 25 February 2021

Before: Employment Judge Brown
Members: Ms H Bond
Ms C Buckland

Appearances

For the claimant: In person

For the respondent: Mr L Welsh, legal advisor

JUDGMENT

The unanimous judgment of the Tribunal is:

- 1. The Respondents did not subject the Claimant to race harassment.**
- 2. The Respondents did not discriminate against the Claimant because of race.**
- 3. The Respondents did not victimise the Claimant.**

REASONS

1. By an ET1 presented on 11 April 2019, the claimant brought complaints of direct race discrimination, race-related harassment and victimisation. The respondents resist these complaints.

2. The Tribunal heard evidence from the claimant. For the respondents, the Tribunal heard evidence from: Phan Lu, the second respondent; Jose Fernandez, the third respondent; and Leila Blackman, HR Manager.
3. The issues in the claim had been established at a Telephone Preliminary Hearing on 20 May 2020 as follows:

Direct race discrimination (sections 13 and 39(1)(c) of the Equality Act 2010 (“EQA”))

1 Have the respondents subjected the claimant to the following treatment?

a. The third respondent on 27 December 2019 revoked a verbal offer of a permanent contract made on 11 December 2018. The respondents say that no offer was made. The claimant was invited to make an expression an interest if she wanted to be considered for an extended / permanent contract

b. She was dismissed abruptly on 27 December 2018. The respondents say they told the claimant on 27 December 2018 that she would not be granted an extension of contract or a permanent contract and her last shift would be on 31 December 2018.

2 Was that treatment less favourable treatment i.e. did the respondents treat the claimant as alleged less favourably than they treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on a hypothetical comparator.

3 If so, was this because of the claimant’s race i.e. being of Filipino ethnic origin?

Harassment related to race (sections 26 and 40(1)(a) EQA)

4 Did the respondents engage in the following unwanted conduct?

a. On or around 14 November 2018, the second respondent: made negative remarks about the claimant’s American English accent being annoying and made head nodding gestures; criticised her behaviour as “distant” and told her that she was “disrespecting European cultures by not learning French or Italian” after overhearing the claimant speaking in her native language, Tagalog, to customers in the store.

b. On or around 14 November 2018, the claimant overheard two assistants talking about “insignificant Hispanic minorities”, with whom the claimant says she shares characteristics.

c. On 30 November 2018, between 12pm – 2pm, the second respondent repeatedly shouted at the claimant, instructed her to go to the office to talk about her alleged behaviour, and threatened her with dismissal.

5 If so, did it relate to the claimant's race i.e. being of Filipino ethnic origin?

6 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

Victimisation (sections 27 and 39(3)(c) EQA)

7 Did the claimant do a protected act? The claimant relies on the following as amounting to protected disclosures for the purposes of sections 27(2)(c) and / or (d) EQA:

a. On 18 November 2018, the claimant raised concerns to the third respondent regarding the comments made by the second respondent and co-workers on / around 14 November 2018

b. On 1 December 2018, the claimant raised concerns to the second and third respondents about the second respondent's conduct on 30 November 2018.

8 Did the respondents subject the claimant to any detriments as follows?

a. The third respondent on 27 December 2019 revoked a verbal offer of a permanent contract made on 11 December 2018.

b. She was dismissed abruptly on 27 December 2018.

9 If so, was this because the claimant did a protected act?

4. The Hearing was conducted by CVP remote videolink. There were some connectivity issues but these were resolved.
5. The parties each relied on their own bundle of documents. Page numbers are referred to as C/B (Claimant's Bundle) and R/B (Respondents Bundle).
6. During the Hearing and after the Claimant had completed her evidence, Ms Blackman, one of the Respondents' witnesses, told the Tribunal that there had been three investigations into the Claimant's discrimination allegations. The notes of only one of these had been disclosed. The Claimant had made a number of applications for specific disclosure of documents during the course of the proceedings, many of which had been resisted by the Respondents.
7. The Tribunal was very concerned that such central documents had not been disclosed by the Respondents, in breach of their disclosure duties. It ordered the First Respondent to produce all records of all investigations it had undertaken. The Respondents then produced a number of additional interview notes, taken almost a year after the incidents in question. The Claimant agreed that these should be admitted, but with the Tribunal taking into account that

they were not contemporaneous; and with the Tribunal also taking into account that the Respondents had not disclosed clearly relevant documents until ordered to do so during the hearing. The Tribunal admitted those documents on that basis.

8. The Tribunal also ordered the Respondents to disclose records of other contemporaneous leavers' forms. These were also clearly relevant and, in the Tribunal's view, ought to have been disclosed by the Respondents as part of normal disclosure. The Claimant was alleging that she had been discriminated against and victimised by being dismissed, rather than being kept on after December 2018, or being offered a permanent role. The records of other employees' leaving in 2018/2019, including the dates they left, were centrally relevant to these issues.
9. The late disclosure caused delay in the hearing. The Tribunal allowed the Claimant several hours to consider the new disclosure. The evidence and submissions concluded in the listed 3 days' hearing. The Tribunal reserved its judgment and listed a further day in Chambers.
10. A remedy hearing will not take place, in light of the Tribunal's judgment.

The Facts

11. The Claimant is Filipino, of native Tagalog descent, and was born and raised in Hong Kong. In 2018, she sought employment in London. In September 2018 the Claimant commenced employment with the First Respondent, working in its "MUJI" store in Covent Garden as a fixed-term, "Temporary Full Time Christmas Sales Assistant", R/B, p74.
12. Her terms and conditions of employment stated that her contract would be for a fixed term commencing on 9 September 2018 and terminating on 31 December 2018, R/B, p74. The terms also provided, R/B p78, "14. Notice of Termination. Your employment will automatically cease at the end of the period which has been determined above."
13. Muji is an Asian retail company selling household goods, office stationery and clothing.
14. The Claimant applied in person for a Sales Assistant role at the Muji Covent Garden store on 7 September 2018. She was initially interviewed by the Second Respondent, Ms Phan Lu. Ms Phan Lu explained what the role of a Sales Assistant entailed and asked for the Claimant's original proof of identity and entitlement to work in the UK. Ms Phan Lu commented that the Claimant's name was not Chinese and the Claimant explained that both her parents are Filipino. Ms Phan Lu told the Tribunal that the Claimant was a little nervous and reserved in the interview and a short conversation about the Claimant's background was a way of breaking the ice at the beginning.
15. The Claimant was also interviewed by the Third Respondent, Mr. Jose Fernandez. He told the Claimant that there were sometimes opportunities for

fixed term employees to apply for permanent employment at the end of their fixed term contract. The Claimant anticipated that she would be interested in this.

16. The Claimant's first shift at the store was on 9 September 2018. The Claimant told the Tribunal that she was very pleased and excited about her new job.
17. The structure of the retail team at the Covent Garden store was: Manager – Jose Fernandez; Assistant Manager – Phan Lu; Supervisors – Ioanna Michailidou and Sayoko Shibuya; Senior Sales staff; Sales Assistants.
18. The employees at the store came from a range of national and ethnic origins, including Chinese, Korean, British, Greek, Romanian, Spanish, Italian, Vietnamese and Japanese. There was one other Filipino employee, Gareth. He is still employed by the First Respondent. Mr Fernandez and Ms Lu told the Tribunal that Gareth is a long-standing employee. The Tribunal accepted their evidence. The First Respondent's rotas show that Gareth is still employed, working Saturdays and Sundays.
19. The Claimant told the Tribunal that, initially, her employment went well. She said that, in early October, Sayoko and Jose commented that she was hard-working and interacted well with customers. This was just after she had sold some expensive items, such as stainless steel kitchen stands, cupboard units and furniture.
20. The Claimant told the Tribunal that, from early November 2018, things started to change. She said that her assignment of rubbish and toilet duties increased compared to other employees. The Claimant said that on one occasion, she was told by Ioanna, a supervisor, to take all the rubbish from the toilet and other rejected goods without any help. The Claimant objected to this because there were 13 heavy bags in total.
21. In the Claimant's witness statement, the Claimant also told the Tribunal that, around this time, Phan Lu became much more critical of her work, saying that the Claimant's folding was terrible, that she was arranging the products in the wrong way and not handing baskets quickly enough to customers. The Claimant said that Phan Lu always insisted that the Claimant clean the rubbish bins in the toilet, despite the task being supposed to be shared between the Sales Assistants.
22. Phan Lu told the Tribunal that the First Respondent uses a white board daily planner to assign duties to staff on daily changing basis, to ensure that duties are fairly rotated amongst staff. The Tribunal accepted Phan Lu's evidence on this, she described the system clearly and her recall of the store's operations was much more detailed than the Claimant's. The Tribunal concluded that the Claimant was not allocated unpleasant tasks more frequently than other assistants.
23. Phan Lu also told the Tribunal that she worked upstairs and the Claimant worked downstairs. Phan Lu said that clothes were upstairs, so the Claimant did

not work with folding clothes. The Tribunal noted that the Claimant mentioned greeting customers, handing out baskets and selling sink units and cupboards in her evidence. This would be consistent with the Claimant working downstairs, and not on clothes, as Phan Lu described. The Tribunal accepted Ms Lu's evidence in this regard. It found that there was little interaction between the Claimant and Ms Lu and that Ms Lu did not closely supervise and criticise the Claimant's work.

24. In the Claimant's witness statement, she told the Tribunal that, in early November 2018, she was on duty at the door, greeting customers, when she overheard Phan Lu say loudly to a Security Guard "I can't work with her", while looking at the Claimant.
25. The Claimant did not give any further detail about this allegation to the Tribunal. There was no date and no context to Phan Lu's alleged comment. The alleged comment was not made directly to the Claimant. Ms Lu denied that she had ever said such a thing. She said that, if she was having a conversation with a security guard, it would have been about shoplifters. The Tribunal did not accept the Claimant's evidence on this. It was vague and unspecific. She did not discharge the burden of proof to show that it was more likely than not that Ms Lu had made the comment.
26. In the Claimant's witness statement., the Claimant also told the Tribunal that, in early November 2018, Phan Lu made a comment about the Claimant's American accent and said that it was "annoying". The witness statement said that Phan Lu mimicked the Claimant and repeated what she had said in a different voice, to imitate her in a derogatory manner. The Claimant's statement said that she felt ridiculed and found it really offensive that Phan Lu was copying her voice. The Claimant's witness statement also said that Phan also made a head-nodding gesture, mocking the Claimant's mannerisms and that the Claimant felt completely humiliated and embarrassed.
27. Throughout her evidence the Claimant was very unforthcoming about her allegations. The Claimant did not give any further detail about this allegation to the Tribunal. There was no date and no context to Phan Lu's alleged comment. Phan Lu emphatically denied that this had ever happened. By contrast, Phan Lu answered questions in cross examination readily and openly. The Tribunal found Phan Lu more credible than the Claimant regarding this allegation.
28. Furthermore, the Claimant told the Tribunal, in her witness statement, that she had complained about this matter during a meeting with Mr Fernandez and Ms Phan Lu on 1 December. However, in her evidence, she was invited to describe the meeting on 1 December and her complaint. The Claimant was rambling and incoherent in reply. She spoke in half sentences. She appeared unable or unwilling to repeat her evidence that she had complained that Phan Lu had imitated her accent and described it as annoying. Both Mr Fernandez and Ms Lu denied the Claimant complained during the meeting. They said that the Claimant sat silently throughout the meeting and failed to engage with them.

29. The Claimant's witness statement also said that, on or around 14 November, Phan Lu called the Claimant to the office, having overheard her speaking her native language, Tagalog, to some customers. The Claimant said that Phan Lu told the Claimant that she was "disrespecting European cultures by not learning French or Italian". The Claimant said that she thought the whole conversation was bizarre and didn't know what Phan Lu meant. The Claimant said that Phan Lu went on to comment that the Claimant's behaviour was distant.
30. The Claimant was asked a number of questions about this allegation in cross examination. She provided no further detail. Again, her answers were somewhat incoherent. Insofar as she did answer, she simply repeated that Phan Lu had said that she was disrespecting European culture by not speaking French or Italian.
31. Phan Lu told the Tribunal that this conversation never happened. She said that she had, in fact, never heard the Claimant speak in Tagalog. Mr Fernandez said that, in the Muji Covent Garden store, the employees speak in many different languages. He said that employees are not told not to use their own language, although on the shop floor it might create a barrier with customers and colleagues. He said, however, that if a customer speaks the employee's language, then it would be "the best service" to speak in that language.
32. The Respondents' witnesses' evidence was much more credible than the Claimant's regarding this matter. The Tribunal concluded that Phan Lu did not tell the Claimant that she was disrespecting European cultures by not learning European languages.
33. In mid-November, the Claimant told the Tribunal overheard two members of the team, Andreea Vihristencu and George Loftis, talking about "insignificant Hispanic minorities" and laughing. She said that they were talking about native Brazilians at the time. She told the Tribunal that she thought that this was a really cruel thing to say. She found it offensive and hurtful as she identifies as non-White Hispanic.
34. The Claimant again gave no details about how this conversation arose and what it was about. She said that she overheard the comment. She said, however, that she told Mr Fernandez about it on 18 November on the shop floor, when he asked her how she was, and then again in the office. In her witness statement she said, "I informed Jose that I felt offended by some of the racial comments made by Andreea and George. I also told him about what Phan had said to me. I talked about Phan first and that she had made negative comments about my accent.... I told him about what Andreea and George said and that Andreea had started to laugh and I thought that it was racist." The Claimant's witness statement said that Mr Fernandez agreed with her that it was racially offensive and told her to "leave it with him". The Claimant's witness statement said that Mr Fernandez held her hand and seemed genuinely concerned and sympathetic.
35. Mr Fernandez agreed in evidence that he does sometime ask employees on the shop floor how they are getting on. He denied the Claimant had made any

complaint to him about Phan Lu criticising her accent, or colleagues talking about insignificant Hispanic minorities. He said that, if the Claimant had ever approached him about such matters, he would have contacted his line manager and head office. He said that, in a different employment, he had himself been subjected to discrimination for being Spanish. He said that, therefore, he understood that it is traumatic and can affect employees' self-esteem. He said that discrimination touches his very deeply, so he is even more keen, as a manager, to enable employees to feel free to approach him.

36. The Tribunal did not accept the Claimant's evidence about her colleagues' comments. Her evidence was vague and unreliable. Furthermore, it preferred Mr Fernandez evidence that she did not complain to him about it on 18 November. It found his evidence about taking discrimination allegations seriously, and acting on them, very credible. The Tribunal accepted his evidence that, if the Claimant had raised discrimination with him, he would have taken the matter to his manager and to HR immediately. The Tribunal found that the Claimant did not complain to Mr Fernandez about discrimination on 18 November.
37. The Claimant told the Tribunal that, on 30 November, around lunchtime, Phan Lu suddenly yelled at her whilst she was sorting out the bedding section. She said that Ms Lu said something about her behaviour and threatened her job. The Claimant said that she asked Phan Lu not to speak to her like that, in a quite firm way, but did not scream at her the way that Phan Lu had to her. The Claimant said that she had never seen Phan behave viciously to other people. The Claimant said that, for the rest of her shift, Phan Lu kept shouting about the Claimant's "rude behaviour", and had said "don't just stand there, are you deaf", on the shop floor.
38. Phan Lu told the Tribunal that, on 30th November 2018, she thought there was a shoplifter in the store and needed to alert a sales assistant to keep close watch. The Claimant was nearest, so she tried calling her 3 times, but the Claimant did not respond. Eventually, Ms Lu noticed another sales assistant walking past, so she asked them to keep an eye on the suspected shoplifter. When Ms Lu approached the Claimant to ask her why she had not answered, she continued to ignore her. Later that day, Ms Lu said that the Claimant was 30 minutes late returning from her break. At the end of the day, Ms Lu approached the Claimant to ask her to explain why she had ignored Ms Lu and taken an extended lunch. Ms Lu said, "she went crazy on me on the shop floor, although the store had then closed. Jennifer was shouting at me repeatedly saying that I was "rude" and "disgusting"." Ms Lu said that could not understand the reason for the Claimant's outburst.
39. In oral evidence, Ms Lu described the Claimant as having had an unexpected outburst on 30 November. Ms Lu said that the schedule for the day was on the daily planner and that the Claimant had kept another member of staff waiting, who was due to go their lunch break when the Claimant returned.
40. The Claimant was asked in evidence whether she called Ms Lu disgusting. She said that she did not remember, but that Ms Lu said, "You are rude".

41. There was clearly an argument between the Claimant and Ms Lu on 30 November. While the Claimant described this as an unprovoked attack by Ms Lu, the Tribunal found that the altercation was prompted by the Claimant not responding to Ms Lu's repeated requests for help regarding the shoplifter. This is consistent with the Claimant own allegation that Ms Lu asked "are you deaf". Furthermore, the Tribunal accepted Ms Lu's evidence that the Claimant did not return from her scheduled break in accordance with the daily planner. Ms Lu was able to describe the details of this.
42. The Tribunal found that the Claimant did become engaged in an argument when Ms Lu reasonably challenged her about her lack of cooperation that day. On the Claimant's own evidence, she asked Ms Lu "not to speak to her like that", in a quite firm way.
43. On 1 December 2018 Mr Fernandez called the Claimant to a meeting in the office. Ms Lu also attended the meeting. Mr Fernandez asked the Claimant for her version of the events the previous day, 30 November.
44. The Claimant told the Tribunal that she explained what had happened and that she said Phan Lu did not have a good reason for her behaviour, but that Ms Lu kept interrupting and saying that the Claimant was "not professional" and "not normal". The Claimant said that she had become very upset and tearful and had said that she thought that Ms Lu didn't like her and had treated her differently because she was Filipina. The Claimant's witness statement recounted that the Claimant had said that she wanted to report Phan Lu for the way she had treated her, but that Mr Fernandez made it sound like this would be really difficult. She said that Mr Fernandez said things like, "we'll have to call HR and we'll have to go all the way up" and something about the Claimant being unable to work until it was cleared up. The Claimant said that the meeting became heated and that she became frustrated and said something like, "I know my rights and I am going to make a formal complaint".
45. In oral evidence, the Claimant was asked what words she used in the meeting to complain about Ms Lu. Her evidence was opaque and fragmented. She said she said that it was because of "who I am" and that people were laughing at her.
46. Mr Fernandez and Ms Lu's account of this meeting was diametrically different.
47. They both said that the Claimant objected to attending the meeting at all without a witness and without one week's notice. They said that the Claimant was silent and uncooperative throughout and that, when the Claimant was asked to give an account of the events of 30 November, she simply said that she had already told "that one", pointing at Ms Lu.
48. Ms Lu said, "She was silent the whole time... We couldn't get a word through".
49. Ms Lu said that Mr Fernandez tried, throughout the meeting, to tell the Claimant that he wanted to help her address any issues she had with work. She said that

Mr Fernandez was incredibly patient, especially as the Claimant showed no interest in what was being said.

50. In oral evidence, Mr Fernandez said that he would have been very happy if the Claimant had spoken in the meeting, as he wanted to resolve matters, but that he was frustrated that the Claimant would not engage.
51. Ms Lu and Mr Fernandez said that, at the end of the meeting, Mr Fernandez had asked the Claimant to sign the notes of the meeting, but the Claimant refused, saying that she would only sign if she had proper notice and a witness.
52. Ms Lu and Mr Fernandez also told the Tribunal that they used the opportunity of the meeting to conduct a performance review.
53. They said that they did not conduct any performance reviews on other Christmas temporary staff because there were no performance issues with any of them.
54. The Claimant did not tell the Tribunal that other staff were underperforming in any way.
55. There was an Individual Performance Review form at R/Bp85, dated 1 December 2018 and signed by Mr Fernandez, but not countersigned by the Claimant. It said, amongst other things, that the Claimant's time keeping, attendance and enthusiasm needed to improve. In the manuscript comments the form said, " We need to see a massive improvement in avoiding confrontations with the management team and her overall professionalism... Jennifer's overall attitude to her job and her co-workers need a great improvement." The performance review documents did not record that the Claimant had made any complaint of discrimination.
56. The Claimant told the Tribunal that she had never seen this document until disclosure in this case.
57. The Tribunal preferred Mr Fernandez and Ms Lu's account of the 1 December 2018 meeting. In oral evidence they gave consistent accounts and were able to answer questions about the meeting. The Claimant gave no clear account of the meeting in her oral evidence. She did not even repeat the matters in her witness statement.
58. The Claimant was able to give a clear account of some matters in her evidence, for example, the reason that her colleague, Kevin, left work. By contrast, she was consistently unclear, rambling and highly reticent in her evidence regarding her protected acts, and her allegations of discrimination and harassment.
59. The Tribunal found that the Claimant made no complaint of discrimination in the meeting of 1 December. She did not say that she wanted to report Ms Lu, or make a formal complaint. It found that Mr Fernandez completed an Individual Performance review document in the meeting, recording concerns about her performance, but that the Claimant had refused to sign the document.

60. Mr Fernandez and Ms Lu told the Tribunal that they held another meeting with the Claimant on 8 December 2018, when another Individual Performance Review document was completed, this time by Ms Lu. They said that, again, the Claimant refused to sign this document. The Performance Review document said that there had been no significant improvement in the Claimant's performance. The Claimant denied that she had attended this meeting at all. She was evasive when asked questions about the matter and her evidence was unclear.
61. The Tribunal again preferred Mr Fernandez and Ms Lu's evidence. The Tribunal found that the Performance review document was indeed created on 8 December 2018. It supported their evidence that there was a further meeting in which the Claimant's performance was discussed, but in which the Claimant refused to participate.
62. The Claimant told the Tribunal that, on 11 December 2018, during one of her breaks, she was asked to go to the office by Mr Fernandez. She said that he was very happy with her work asked if she would like to continue working at Muji on a permanent basis, as they needed someone long-term. The Claimant confirmed that she would like to. She told the Tribunal that she left the meeting believing that her job would continue after 31 December.
63. In oral evidence, she confirmed that she was reminded in the meeting that her fixed term contract was coming to an end. The Claimant agreed that she received no further documentation offering any further work after 31 December.
64. Mr Fernandez told the Tribunal that it is standard procedure to ask all temporary Christmas workers whether they might be interested in a permanent post if one was available. He said that he started the meeting on 11 December by reminding the Claimant that her temporary contract was expiring on 31 December. He said that she signed a SPIN leaver form confirming this, R/B p93.
65. The Claimant did sign this form. It recorded that her termination date was 31 December 2018 and that the reason for leaving was expiry of the fixed term contract. It recorded that the Claimant had had 3 days holiday.
66. The Claimant said that she had signed the form on 13 December 2018, on the shop floor. The Claimant told the Tribunal that she had not even read the form. She said that Mr Fernandez had told her it recorded how many holiday days she had taken.
67. On the evidence, Mr Fernandez reminded the Claimant that her contract was due to expire on 31 December. He asked the Claimant if she might be interested in a permanent job if one were available. He did not offer her a job and, in fact, the Claimant signed a document confirming that her contract was going to end on 31 December.
68. Mr Fernandez told the Tribunal that he reminded the Claimant that he had encountered a number of issues with her performance and she would need to

improve upon those issues to increase her chances of being offered a permanent role. The Tribunal accepted his evidence in this regard – it was consistent with the Claimant having been told on 1 and 8 December that her performance needed to improve.

69. The First Respondent employed a number of Christmas temporary staff in its Covent Garden branch. It is the First Respondent's practice to offer at least some of its Christmas temporary staff permanent contracts at the end of their fixed-term temporary contracts if there are permanent roles available.
70. The Tribunal accepted Mr Fernandez and Ms Blackman's evidence that management would ask all temporary staff whether they were interested in the possibility of a permanent role. They would then determine how many permanent posts were available, according to their budgets. If there were more employees interested than permanent roles available, they would select which employees would be offered the permanent roles.
71. Ms Blackman told the Tribunal that the store manager, Mr Fernandez, and the Area Manager, Mr Lennie Gowandan, would compare the temporary employees' performance.
72. She said that they should score the employees out of 28 and the top scorers should be offered the permanent jobs. Ms Blackman conceded that a scoring exercise had not been undertaken in the Claimant's case, but was something that was being implemented at the time.
73. The Claimant was never offered a permanent post. Mr Fernandez did not explain to her, after 11 December, that no offer would be made to her.
74. On 27 December 2018 the Claimant received rotas for the forthcoming week and saw that she was not rostered to work any days after 31 December 2018. One other temporary colleague, Kevin, also had no work after 31 December. The Claimant then realised that she would not be given further work at Muji.
75. The Claimant spoke to Mr Fernandez, who told her that Mr Gowandan, the Area Manager, had decided that, because of her performance, she would not be given a permanent post.
76. All other temporary employees, apart from Kevin, continued to be rostered to work after 31 December 2018.
77. The First Respondent's witnesses said that their temporary Christmas staff had different starting and leaving dates. Those who started work in October 2018 were given contracts expiring on 31 January 2019.
78. The First Respondent gave the nationalities of its 2018 Christmas temporary employees who were offered permanent positions and those who were not. Those who were given permanent roles were: 1 Romanian, 1 British, 2 Korean and 1 Italian. Those who were not were: 2 British, 2 Chinese and the Claimant.

79. Those who were not kept on were: Kevin (British), Ritika (British), Stacey (Chinese) and Wenchi (Chinese).
80. While Kevin left on 31 December 2018, Ritika, Stacey and Wenchi all continued to work after 31 December.
81. Phan Lu told the Tribunal that Stacey had wanted to be kept on, but also had alternative plans and options. Ritika wanted to go back to study, so was not interested in permanent position. Wenchi was interested in being kept on permanently.
82. Phan Lu agreed that Kevin did not want to be kept on permanently – he had been offered a role as an assistant for a designer, which was his chosen career.
83. The First Respondent produced its rosters for 2108 and 2019.
84. These showed that Stacey, Ritika and Wenchi all did leave at the end of week 52, on 31 January 2019.
85. The rosters also showed that the Claimant commenced work in week 31. Kevin started in week 34. Ritika started work in 39, which was the week commencing 29 October 2018. Stacey and Wenchi both started work in week 43, on 26 November 2021.
86. The Tribunal concluded that the rosters supported the Respondents' witnesses evidence that the temporary employees who started work later also had contracts which ended later.
87. Ms Lu said that she was involved in the decision as to which members of staff to offer the available permanent roles. She said that all managers were involved.
88. Mr Fernandez said that the Claimant had problems with her performance and other staff did not. He said that the Claimant was not offered a permanent contract because of her performance issues.
89. The Claimant left work at Muji after her shift on 27 December 2018 and did not return, despite having been rostered to work for another 2 days. In late December 2018 she sent a WhatsApp message to Mr Fernandez saying, “.. I won't find another you. I know that you have made a lot of effort on my behalf. ..”. The Claimant did not mention that she had been subjected to any unwelcome or discriminatory treatment in work. Mr Fernandez did not reply. On 5 January 2019 the Claimant sent Mr Fernandez a further text message saying, “Burn in hell you piece of shit”, RBp109.
90. The Tribunal considered that the Claimant's message of 5 January 2019 was consistent with the Claimant reacting in a tempestuous manner, as described by Ms Lu on 30 November 2018.

91. The Respondents' witnesses told the Tribunal that the First Respondent takes discrimination allegations very seriously. However, the Tribunal did not consider that the evidence supported this assertion. The Claimant's solicitors, Leigh Day, wrote to the First Respondent on 12 February 2019, setting out the Claimant's allegations of race discrimination and harassment and victimisation. Mr Gowandan, the First Respondent's Area Manager, conducted an investigation and obtained witness statements from Mr Fernandez, Ms Lu and Ioanna Michailidou, a Supervisor. He did not ask these witnesses questions about the allegations of discrimination, harassment and victimisation. The statements only addressed the Claimant's "issues, attitude, performance", primarily covering performance issues in relation to the Claimant. Ms Blackman told the Tribunal that, having reviewed these witness statements, she was concerned and asked that a further investigation be undertaken in relation to the discrimination/victimisation allegations. On the evidence, this was not done for another 9 months. This was not consistent with Mr Gowandan treating discrimination allegations seriously at all.

Relevant Law

Direct Race Discrimination

92. By s39(2)(d) Equality Act 2010, an employer must not discriminate against an employee by subjecting him to a detriment.
93. Direct discrimination is defined in s13(1) EqA 2010:
“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
94. Race is a protected characteristic, s4 EqA 2010.
95. In case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” s23 Eq A 2010.

Victimisation

96. By 27 Eq A 2010,
“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—(a) bringing proceedings under this Act;(b) giving evidence or information in connection with proceedings under this A (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.”
97. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

Causation

98. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].
99. If the Tribunal is satisfied that the protected characteristic/act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

100. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Harassment

101. s26 Eq A provides "
(1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
.....
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."
102. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

103. This guidance is instructive in respect of harassment claims under s26 EqA, albeit under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race. There is no requirement that harassment be “on the grounds of” the protected characteristic – *R(EOC) v Secretary of State for Trade and Industry* [2007] ICR 1234.
104. In *Pemberton v Inwood* [2018] ICR 1291, CA Lord Justice Underhill revisited *Dhaliwal*, and said, at paragraph 88: ‘In order to decide whether any conduct falling with sub paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub section (4)(b)...The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant’s dignity or creating an adverse environment for him or her, then it should not be found to have done so.’

Burden of Proof

105. The shifting burden of proof applies to claims under *the Equality Act 2010, s136 EqA 2010*.
106. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.
107. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in race and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para [56 – 58] Mummery LJ.

Decision

108. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.
109. **Race Harassment Allegation 4a. On or around 14 November 2018, the second respondent: made negative remarks about the claimant’s American English accent being annoying and made head nodding gestures; criticised her behaviour as “distant” and told her that she was “disrespecting European cultures by not learning French or Italian” after overhearing the claimant speaking in her native language, Tagalog, to customers in the store.**

110. The Tribunal did not accept the Claimant's evidence regarding these alleged incidents. It found that they did not happen. These allegations fail.
111. **Race Harassment Allegation 4b. On or around 14 November 2018, the claimant overheard two assistants talking about "insignificant Hispanic minorities", with whom the claimant says she shares characteristics.**
112. The Tribunal did not accept the Claimant's evidence regarding this alleged incident. It decided that it did not happen. This allegation fails.
113. **Race Harassment Allegation 4c. On 30 November 2018, between 12pm – 2pm, the second respondent repeatedly shouted at the claimant, instructed her to go to the office to talk about her alleged behaviour, and threatened her with dismissal.**
114. The Tribunal found that there was an argument between the Claimant and Phan Lu on 30 November 2018. On the facts, however, the Tribunal decided that the argument was because Phan Lu had challenged the Claimant about her failure to comply with reasonable management instructions regarding protecting the store from shoplifters and the Claimant returning late from a break. Ms Lu's reasonable enquiries as a manager in this regard prompted the argument between the women. This was nothing to do with race, or with the Claimant being of Filipino ethnic origin. Furthermore, the Tribunal accepted Phan Lu's evidence that it was the Claimant who had argued and raised her voice, in response to Ms Lu. It was not reasonable for the Claimant to regard Mr Lu's conduct as violating the Claimant's dignity or creating an adverse environment for her. Ms Lu did not subject the Claimant to race harassment on 30 November.

Victimisation

115. The Tribunal has found as a fact that the Claimant did not tell Mr Fernandez or Ms Lu that she had been subjected to discrimination, either on 18 November or 1 December 2018. She did not raise concerns to Mr Fernandez regarding comments made by Ms Lu and co-workers on or around 14 November 2018. On 1 December 2018, the Claimant did not raise concerns about Ms Lu's conduct on 30 November 2018 being discriminatory, or harassing. In fact, she said very little in the 1 December meeting at all.
116. The Claimant did not do protected acts. Her victimisation claims must fail.

Direct Race Discrimination

117. **Allegation 1a. The third respondent on 27 December 2019 revoked a verbal offer of a permanent contract made on 11 December 2018. Allegation 1b. She was dismissed abruptly on 27 December 2018. The respondents say they told the claimant on 27 December 2018 that she would not be granted an extension of contract or a permanent contract and her last shift would be on 31 December 2018.**

Was that treatment less favourable treatment i.e. did the respondents treat the claimant as alleged less favourably than they treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on a hypothetical comparator.

118. The Tribunal found, as a fact, that Mr Fernandez did not offer a permanent contract to the Claimant. He simply enquired whether she might be interested in a permanent contract, if one was available. Indeed, on 11 December Mr Fernandez confirmed that the Claimant’s contract would be coming to an end on 31 December 2018, in accordance with the terms of her fixed term contract. There was therefore no later revocation of a verbal offer.
119. However, it is correct that the Claimant was not offered a permanent contract at the end of her fixed term contract, when some other temporary Christmas employee were offered permanent contracts.
120. There were also other employees who wanted to stay, but were not offered permanent contracts, Wenchi and Stacey. They did not share the Claimant’s nationality/ethnicity. The Claimant was not singled out. Permanent contracts were offered to fixed term employees with a range of nationalities and ethnicities.
121. In any event, the Claimant had had an altercation with Ms Lu on 30 November 2018 and had been told in clear terms, on 1, 8 and 11 December, that her performance would have to improve.
122. The Respondents’ evidence about selection process was unsatisfactory. There was no scoring or ranking of the temporary staff, to decide in a transparent manner, which staff would be offered permanent roles.
123. The Tribunal also rejected the Respondents’ evidence that the First Respondent takes allegations of discrimination seriously. The First Respondent did not investigate the Claimant’s discrimination allegations, made in February 2019, until November 2019. Mr Gowandan, in particular, failed to conduct a timely investigation into them. Even when an investigation was conducted, the First Respondent did not disclose the notes of that investigation until halfway through this Tribunal hearing. That was all deeply concerning. The First Respondent is worthy of severe criticism in this regard. These matters would be appropriately weighed against the First Respondent in assessing whether it had satisfied the burden of proof, if the burden of proof shifted to it.
124. Nevertheless, even on Claimant’s own account, there were no performance concerns about any other temporary Christmas members of staff.
125. The Tribunal did not consider that there was evidence from which the Tribunal could conclude that the failure to offer the Claimant a permanent role was because of race. On the evidence, those who were offered roles were from a range of nationalities and ethnicities, as were those who were not offered roles. Significantly, however, the Claimant was the only employee who had been told that her performance was not good enough and would have to improve. She

was the only member of staff who had been involved in an altercation with a store manager. She was not in the same material circumstances as other employees.

126. The Tribunal decided that a hypothetical comparator would be one who had been involved in an altercation with a manager and who had been told that their performance needed to improve. It decided that such a hypothetical comparator would not have been offered one of the limited number of permanent roles. The burden of proof did not shift to the Respondents to show that race was not part of the reason that the Claimant was not offered a permanent role.
127. The Respondents did not discriminate against the Claimant because of race when they failed to offer her a permanent role.
128. The Tribunal was also satisfied that the reason the Claimant was not offered work after 31 December, when some temporary Christmas staff continued to work until 31 January 2019, was because the Claimant had started work earlier, in September 2019, and her fixed term contract ended on 31 December. The other employees, Wenchi, Stacey and Ritika, had started work much later than the Claimant, in October and November 2018 and their fixed term contracts therefore expired on 31 January 2019. There was no comparison between the Claimant and these other employees in the same material circumstances. The fact that they worked until 31 January 2019 was nothing to do with race.
129. The Claimant's claims fail.

Employment Judge Brown

16 March 2021

Sent to the parties on:

16th March 2021

For the Tribunal: