



EMPLOYMENT TRIBUNALS

Claimant

Mr D Foster

Respondents

The Carphone Warehouse Ltd

Heard at: London Central

On: 26 – 27 May 2021

In chambers: 28 May 2021

Before: Employment Judge Lewis
Ms J Cohen
Mr B Furlong

Representation

For the Claimant: Mr Foster represented himself, but was accompanied by his mother for assistance and support.

For the Respondent: Mr J. Arnold, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The unanimous decision of the tribunal is that the respondent subjected the claimant to direct race discrimination in the following actions:
 - 1.1. During the final week of Mr Foster's employment, his new manager, Ms Abdalla, was aggressive towards him, displayed a negative attitude towards him, and undermined him by being rude to him in front of customers.
 - 1.2. Ms Abdalla calling the claimant into a meeting on 10 September 2019 without any prior notice;
 - 1.3. Ms Abdalla telling the claimant in that meeting that how he spoke was not suited to the company's clientele;
 - 1.4. His dismissal with effect from 10 September 2019.

2. The claims for racial harassment are not upheld only because those matters have already been found to be direct race discrimination and under the Equality Act 2010, both definitions cannot apply.
3. The claims for direct age discrimination and age-related harassment are not upheld.
4. The claim for breach of contract (notice) is dismissed, having been withdrawn by Mr Foster.
5. The remedy hearing will take place on 2 November 2021. The parties will be notified shortly of a date for a preliminary hearing to discuss preparation for the remedy hearing.

REASONS

Summary

1. Mr Foster is a young black man. He brought claims of age and race discrimination regarding his dismissal from his sales post at Carphone Warehouse at the end of his probationary period, and alleged harassment by a new branch manager who had started at the store only one week earlier. His dismissal was ostensibly because he was not meeting targets and because his manner and attitude were allegedly unsuited to the area's clientele and did not indicate that he wanted to learn. He strongly denied the criticisms of his manner and attitude. Regarding the targets, he said he had never been properly supported and trained because of the previous lack of a dedicated store manager. The tribunal upheld the claims for race discrimination but not age discrimination.

Claims and issues

2. Mr Foster brought claims for age and race direct discrimination and harassment and for breach of contract in relation to notice. It had been decided at a preliminary hearing to allow in those claims which were out of time. Time-limits were therefore not an issue before this tribunal.
3. The issues were agreed as follows:

Direct age / race discrimination

4. Was Mr Foster, the claimant, treated less favourably by the respondent because of his race and/or age than the respondent would have treated a hypothetical comparator in circumstances with no material difference by the following acts or omissions:

4.1 During the final week of Mr Foster's employment, his new manager, Ms Abdalla, was aggressive towards him, displayed a negative attitude towards him, and undermined him by being rude to him in front of customers. This is described more fully in Mr Foster's further particulars at pages 108-9 of the trial bundle;

4.2 Being called into a meeting on 10 September 2019 by Ms Abdalla without any prior notice;

4.3 Being told in that meeting by Ms Abdalla that how he spoke was not suited to the area or the company's clientele;

4.4 His dismissal with effect from 10 September 2019.

5 The respondent does not rely on the defence of justification to direct age discrimination.

Harassment

6 Whether the respondent engaged in any of the conduct set out at paragraphs 4.1 – 4.4 above.

7 If so, whether the conduct was unwanted.

8 If so, whether the conduct related to Mr Foster's race and/or age.

9 If so, whether the conduct had the purpose of violating Mr Foster's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

10 If that was not the purpose, whether the conduct had that effect, taking into account Mr Foster's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

Breach of contract (notice)

11 Whether the respondent breached Mr Foster's contract by failing to pay him his notice pay in lieu of notice of £124.50.

Procedure

12 Because of restrictions caused by the pandemic, the hearing was held over the CVP video platform. No one objected to this, and we were unaware of any reception problems.

13 As is usual in discrimination cases, Mr Foster as the claimant gave evidence first. We then heard from Ms Abdalla for the respondent. No other witnesses were called for either side. There was an agreed trial bundle of 111 pages. Ms Abdalla provided a witness statement. Mr Foster used two

statements he had written previously to provide particulars, which were in the trial bundle at pages 105 - 109.

14 Ms Abdalla's witness statement had not been supplied to Mr Foster until the day before the start of this hearing. We asked Mr Foster whether he needed more time to absorb what Ms Abdalla's witness statement said and to prepare. We agreed that he would let us know after we had stopped to do our own reading. At that point, we offered an early lunch break. However, Mr Foster said he was happy to continue. In the event, we were able to leave the start of Ms Abdalla's evidence to day 2, so Mr Foster also had overnight to further prepare his questions.

15 Mr Arnold provided written closing submissions and added some oral comments. Mr Foster then made his final comments orally. Finally, Mr Arnold added a few points on a couple of matters which Mr Foster had raised. This included an observation that although Mr Foster repeatedly said Ms Abdalla had told him *he* was not suited to the area, in fact the notes of the final review meeting showed she had only said that the way he spoke was unsuited to the clientele. Mr Foster had signed the notes as accurate. Mr Foster responded that the notetaker had not written down everything which was said, and that he had been told he could not use the recording which he had secretly made of the final review meeting. On probing by the tribunal, Mr Foster said he had been told this by Carphone Warehouse and also by some lawyers who had advised him. He had never asked the tribunal whether he was allowed to use the recording.

16 We were concerned to hear this, particularly as Mr Foster was unrepresented. A tribunal can decide whether or not to listen to such a tape-recording. We asked whether the recording was available so we could decide what to do. Mr Foster said that he could not find it currently and would have to 'dig deep'. We therefore decided that he would have to do without the recording. It was now at the very end of the case, Ms Abdalla had left after giving her evidence and Mr Foster did not have ready access to the recording. He could have asked for permission to use it at the start of the case or at any of the preliminary hearings. In particular, he had discussed the matter with solicitors who had given advice on the matter.

Fact findings

17 Mr Foster started working for Carphone Warehouse on 16 or 17 June 2019 as a customer services assistant. He was employed on a three month probationary period.

18 Mr Foster has been working since the age of 17. Since his dismissal, he has successfully applied for funding to an entrepreneurship programme for young entrepreneurs, He had to attend a board meeting as part of the application process. Having set up a digital marketing agency, Mr Foster recently obtained his first contract from an American company where there

were other competitors. He received feedback that his interpersonal and communication skills were excellent.

- 19 Mr Foster also has an honours degree in business management and marketing from Middlesex University.
- 20 Mr Foster worked in the Kensington High Street branch. There was no branch manager when he started. He worked with two colleagues, Natalie and Alex. Mr Foster describes himself as a young black man. He was aged 22 at the time of his employment. Alex, a white man, was aged about 24. He had worked in the branch for a few months before Mr Foster started and had previously worked in a Coventry branch. Natalie, whom Mr Foster describes as of Arab heritage but fair-skinned, was in her early 30s, with many years of experience. In practice, she was in charge. Mr Foster got on well with Natalie and Alex.
- 21 Although this was not coherently described to us by any witness, Carphone Warehouse appears to have been situated within a larger Curry's store, which is part of the group. Someone called Cameron appears to have been general store manager, but he was not specifically in charge of Carphone Warehouse.
- 22 Mr Foster had attended and passed an initial 3 days' training and assessment which was carried out for a group of new starters at headquarters in Birmingham. After that, Mr Foster was expected to learn on the job. He had two coaching sessions, one after 4 weeks and one after 8 weeks. These were fairly informal judging by the record of them.
- 23 We had no clear evidence regarding what happened at the 4 weeks session. All we have is a form headed 'Insurance Quality Observation' which records Keisha Gumbs as 'observer'. The form is not systematically completed, but instead has what look like coaching tips scribbled all over it, eg 'Ask lifestyle questions, what are they using it for?' 'If they broke their phone, I'll tell them about insurance.' Mr Foster has signed at the bottom that he had been coached on the above. The respondent produced no witness to explain this form or what happened. Ms Gumbs was a 'people team leader' for Currys. We were told her job involved matters such as admin, interviews, payroll and HR related matters. She was not in sales.
- 24 At 8 weeks, another Currys manager, Ms Mugabe, had a conversation with Mr Foster about his figures and made some suggestions. For example, she typed on the 8 week statistics print out: 'You need to start asking everyone the key questions even if they aren't interested in phone' and 'Daniel it will only happen if you want it happen you got go out there to look for it don't wait for customers to come to you.'
- 25 There is nothing in either review about Mr Foster being rude or abrupt. They are talking about how he can up-sell by asking certain types of open question.

Probation policy

- 26 The probation policy says under the heading 'What is my probation period and what is its purpose?':
'Probation gives the opportunity for both you and your Line Manager to decide whether you have the right skills and knowledge to carry out your new role and whether or not it's right for you. We use probation period to help and support you during the start of your career with us, enabling you to gain the right skills and knowledge in order for you to do a great job.'

New branch manager

- 27 Ms Abdalla started as manager of the Kensington branch on 2 September 2019. Cameron was her line manager.

- 28 Ms Abdalla describes herself as of mixed heritage. Her mother is Egyptian and her father is Sudanese. She was born and raised in the Sudan until the family moved to the UK when she was aged 9.

- 29 This was Ms Abdalla's first management position at Carphone Warehouse, though she had worked as a manager for other companies. She had been trained the previous three months in the Brixton store.

- 30 In her witness statement, Ms Abdalla says that she had reviewed the personnel files of each of the three employees at Kensington and spoke to each of them. There is no mention of any briefing or handover by Cameron or any other manager. However, when asked by the tribunal at the end of her evidence whether she had had any handover, she then said that the day before she started, she had received a handover from Cameron. She said Cameron had had concerns about Mr Foster's shopfloor behaviours but it had been decided that it was for her to make observations and make up her mind

- 31 We do not accept there was this conversation at the time. It is inconsistent with Ms Abdalla's witness statement, which explicitly addresses how she informed herself about the branch and staff, but does not mention a handover or information from Cameron. Moreover, if Cameron had told her anything negative about Mr Foster at that point, we would have expected to see that in Ms Abdalla's witness statement since it would have supported her case. There was no other evidence anywhere that Cameron had a negative view of Mr Foster.

- 32 Ms Abdalla said that the store was not seen as a problem store. It was neither performing poorly nor exceeding targets. She says she had a '90-day plan' in mind. The plan for the first month was to observe the staff from a distance to see how they were performing. She would then consider over the next month what changes needed to be implemented, and she would use the third month to review the effect of any changes she had made. Her aim was to improve performance, ensure systems compliance and ensure staff were happy.

33 During her evidence to the tribunal, Ms Abdalla said that she loved giving coaching and feedback, and that she did it instinctively.

How many days did Mr Foster and Ms Abdalla work together?

34 One of the key factual disputes was how many days Mr Foster and Ms Abdalla worked together. Mr Foster said they worked together for three days at most, including the day of his dismissal. Ms Abdalla said they worked together every day since she started except the Sunday. During the first day of the tribunal hearing, we asked the respondent to search their records, eg clock-in records or rosters, to establish when the two had worked together. Apparently it was not easy to trace the records and work this out. By the end of the hearing, the most the respondent had been able to establish was four days of coinciding shifts: 2, 3, 4 and 10 September 2019.

35 Mr Foster said that he had hardly seen Ms Abdalla on her first day, Monday 2 September. She had just popped in and she was not wearing her uniform. We find this plausible, including the detail about not wearing uniform, and we accept this evidence.

36 We find that Mr Foster and Ms Abdalla worked together three days after that, ie 3, 4 and 10 September. These are the dates which were supplied to us by the respondent, albeit the respondent said it had difficulty tracing records. It is consistent with what Mr Foster repeatedly stated in his evidence. It is also consistent with what he said during his grievance meeting, when his memory would have been relatively fresh.

37 Mr Arnold suggested the only other guide might be the payslips. We looked at these. They were lacking in all the detail needed. The October 2019 payslip (which refers to time worked in September) noted 74.5 hours and a PILON payment. This included a week worked in hand – the July 2019 payslip, covering June, pays 15 hours, ie only for one week; Mr Foster started mid June and therefore worked two weeks. We do not know whether he worked more than 15 hours in the second week, but certainly by the next month he was up to 131.5 hours in total. Taking Mr Arnold's suggestion of dividing 74.5 hours by two weeks (one for 2 – 10 June and one for the week held back), we get to 37.5 hours/week. So it is possible that Mr Foster worked say 5 days from 2 – 10 September. We have accounted for 2 - 4 and 10 September. Mr Foster might have worked one more day, but there is nothing to say that Ms Abdalla also worked that same day. It could for example have been the Sunday.

The first day worked together

38 The first day Ms Abdalla and Mr Foster worked together, which we take to be 3 September 2019, they were the only two people in the branch. Mr Foster arrived and clocked in at noon, when his shift started. He had cycled in and was out of breath and sweaty, and so not immediately ready to start. Ms Abdalla greeted him on the floor with 'Why are you late?' in a hostile tone, and required him to complete a late form. This upset Mr Foster. No one had

spoken to him in that way since he had started. He later complained to Cameron who told him to keep calm.

39 Ms Abdalla told the tribunal that she was trying to set a precedent for behaviour, and that she had on a different occasion required Natalie to fill in a late form for being late

40 The day was busy. Ms Abdalla did not at any time suggest Mr Foster take a break. She took a number of short cigarette breaks. Shortly before the end of the shift, after Mr Foster had mentioned that he had had no break, Ms Abdalla told him to go home early because he had not had a break. Mr Foster said that there were 15 minutes left, but his break would be an hour. Ms Abdalla, who was with a customer about two metres away, shouted across to him aggressively, 'You do realise I am the one that is paying you? She then pointed to the bins, told him to take out them out, after which he could clock out and go home.

41 Ms Abdalla says that Mr Foster was anxious about whether he would be paid for the full shift if he went early and she was simply reassuring him that she was the one who pays him. We do not accept this. Her words would then have been something like, 'Don't worry, I'm saying it's OK; I'm the one who makes the pay decisions'. The words 'You do realise' in that context sound hostile. Regarding the bins, she says she did indeed tell him to take out the bins. It was part of his duties.

42 This is all about the tone in which Ms Abdalla spoke to Mr Foster, especially as it was in front of customers. We accept that Ms Abdalla did adopt a rude and peremptory tone in this exchange. Mr Foster was sufficiently upset to speak to Natalie and then Cameron about it. He repeated his complaint in his grievance meeting after dismissal. He had not complained in the previous 11 weeks about how anyone else spoke to him.

43 Mr Foster says that as well as the above specific incidents, Ms Abdalla had been negative and aggressive towards him all day. We find that she did display that manner towards him. It is consistent with her manner in pulling him up on his lateness, as soon as he arrived, in a hostile manner and on the very first occasion they worked together. It is consistent with his description in the grievance meeting about how she kept sighing and saying 'Why are you not helping me?' It is also consistent with her negative approach in the final review meeting that he should have known how to do more than he did.

Forewarning of the final review meeting

44 Ms Abdalla conducted a 'final review meeting' with Mr Foster on 10 September 2019, at which he was dismissed. The meeting started at 4 pm.

45 Ms Abdalla says she had had a conversation with Mr Foster a few days before as to whether he wanted his final review meeting to be before or after his planned holiday, and that he had asked for it to be before. Mr Foster says there was no such conversation and he would not have wanted to have such

a conversation immediately before going on holiday to visit his elderly grandmother in the USA. We accept this. We find it unlikely that Mr Foster would have agreed to a final review in the next few days after he had been so upset by Ms Abdalla's manner on the first day.

- 46 Moreover, the minutes of the final review meeting suggest to us that Mr Foster had not been expecting it, because he asked fairly early whether it would be a long review as Natalie had not had her break. At the very least, that indicates he had not expected the review at that time, since otherwise he would have made arrangements with Natalie in advance about her break.

The final review meeting

- 47 Ms Abdalla says she was open minded going into the meeting whether to extend Mr Foster's probation or not. She had power to do so under the policy. She says the key issue was not so much that he was below targets, as she could work on that with him, but his attitude and willingness to learn, which she felt was lacking. We will come back to this in our conclusions.

- 48 Ms Gumbs took notes of the meeting. Mr Foster has signed each page as accurate. However, he was asked to check and sign the pages after he had just been told he was dismissed. Mr Foster is not a lawyer, and we accept that at that point, he was not in a frame of mind to do a careful check. We take the notes as a good guide to what was discussed since they were written by a third party (Ms Gumbs), but we also accept the possibility that they may not have recorded every detail precisely.

- 49 It is noted that the meeting started as follows:

'AA: The reason for meeting is concerns that you are failing to meet standards and expectations specifically in expected areas: broadband, TKH, ACR, NPS and accepted behaviours.'

- 50 Mr Foster asked what NPS and ACR were. Ms Abdalla explained that NPS was customer satisfaction and ACR was accessories.

- 51 After some short discussion about falling short of targets, there was the following exchange:

'AA: Overall I have concerns with your behaviours with the way you speak is very abrupt and not suited to our clientele.

DF: What do you mean by abrupt?

AA: For example, instead of asking a customer 'Can I have a look at your bank card?', you say 'Bank card', 'Name' etc.

DF: I don't believe I come across that way, so I disagree. I disagree completely. I don't know what I've done to make you think that. I live in this area so I understand the clientele. Just to take out the picture before you

were here if you ask Natalie or Alex, they'd say I speak to customers correctly, my customers come back even if they don't give me CSAT. Can you elaborate.

AA: As people we have to flex according to the people you meet. For example if I'm in the Brixton store, it'd be different to here where we have more affluent customers and international customers. Example I'm standing next to you and you ask what to do next.

DF: Maybe I might have been abrupt because I felt pressured in a situation, but if that happened, I don't understand why that happened. But is that the whole summary of what you mean by speaking to clientele in a certain manner.

AA: Moving on next point, I'm concerned by your capability to use pie.

DF: Why is that?

AA: Because I haven't seen you complete a full journey.

DF: When you say confident about using pie I don't understand what you mean as there were days when I've been on my own and used pie. Even today I put through a sim and some things I don't understand.

AA: I'm making the judgment based on what I've seen.

DF: I'm just giving you the back story.

Meeting adjourned at 4.33'

52 In the adjournment, Ms Abdalla talked to employee relations to say she was considering dismissal. The brief note of the conversation records underperformance on targets, speaking abruptly to customers 'is rude', and that he did not give any mitigation. There is no mention in the note that he had not had a branch manager or that she had only be in place for one week. Ms Abdalla decided to dismiss Mr Foster.

53 On returning to the meeting Ms Abdalla asked if there was anything Mr Foster would like to expand on further. He said he felt he understood 'pie' but there were a few elements he did not understand, especially when they had not had a branch manager. Ms Abdalla did not explore this. She thanked him for his time and told him he was dismissed. Mr Foster wanted to work the rest of his shift but this was refused.

54 In her outcome statement, she noted as the summary of issues considered: 'Failure to hit HBB target. Failure to hit insurance target. Failure to hit ACR target. Failure to hit CSAT target. Attitude towards customers. Pin point usage. Knowledge of pie systems.' She summarised her findings as 'No improvement at all 0% TKM. 1 Broadband sale in 11 weeks. 1 NPS score

given by a colleague in 11 weeks. ACR hit 3 times in 11 weeks.' In the box for 'Reasons for decision', Ms Abdalla referred back to the summary of issues.

- 55 Under 'Summary of mitigation and responses put forward by colleague' she noted 'You felt the shopfloor can get busy. Other stores do it differently. No branch manager.'
- 56 We add here, that the only other example given by Ms Abdalla to the tribunal of Mr Foster being blunt to the point of rudeness with customers was not getting up from his seat when a customer approached and asking 'What do you want?' rather than 'How may I help you?' Mr Foster denies not getting up from his seat. We accept that. We think it is inherently unlikely, and even more unlikely given all the studying of and interest in business management and marketing which Mr Foster had displayed before and after his employment with Carphone Warehouse. Moreover, it was not mentioned during the probation review hearing - when Mr Foster asked for more examples of how he had been abrupt, Ms Abdalla simply moved on.
- 57 We also do not accept that Mr Foster generally spoke abruptly to the clientele. Ms Abdalla was unable to give him detailed examples. As we have said, Mr Foster had an interest in business management and marketing. He confidently suggested that Ms Abdalla should ask Natalie and Alex how he spoke to customers. He had not been criticised for abruptness or rudeness in his 4 week and 8 week reviews. Telling him he should draw people into talking about their lifestyle and should eg offer insurance if they had broken their previous phone, is a different point entirely.

Targets

- 58 We have looked at the statistics on targets for Mr Foster as an individual and for the branch as a whole. We were told that apart from Broadband, Natalie and Alex had higher targets than Mr Foster because of their longer experience. While Mr Foster undoubtedly fell short on targets, it is clear that the other two experienced employees also fell short to some extent.
- 59 None of the three employees met the HBB (Broadband targets). All three had the same target of one sale / week because it was recognised to be difficult in that area. Though Mr Foster did only make one sale in 11 weeks, the entire branch only made five sales in the same period. Even if Mr Foster's one sale was in fact achieved by one of the others, as Ms Abdalla suggests, none of the three achieved anywhere near target on this.
- 60 On ASR (accessories), for four of the 11 weeks, Mr Foster exceeded the branch total. He achieved 87.5% in week 10, whereas the branch achieved 46.7%. On Insurance, Mr Foster never made any sales, but in five out of 11 weeks, the store as a whole made no insurance sales either.
- 61 Mr Foster had 20% of the total branch PostPay sales over the 11 weeks (27% in the most recent five weeks of that); 41% of PrePay Sims over the 11

weeks and 34% of Prepay Sales.

Dismissal letter and Grievance

- 62 Ms Abdalla wrote to Mr Foster confirming his dismissal by letter dated 16 September 2019. She said her dismissal was based on:
‘ - failure to meet the required levels of performance
- failure to demonstrate the correct attitude & behaviour throughout your Probation.’
- 63 Mr Foster wrote to HR complaining about his dismissal on 1 October 2019. He said his newly appointed manager had discriminated against him on a personal level and mocked and ‘treated him like scum’. He said he was going to take legal proceedings.
- 64 Ms Floyd, a people assistant manager, was appointed to investigate his concerns. Ms Floyd met Mr Foster on 24 October 2019 and there is a detailed note of what Mr Foster told them.
- 65 On 4 December 2019, Ms Floyd wrote to Mr Foster, rejecting his complaints of unfair dismissal and discrimination. It is not clear to us why it should have taken six weeks from the meeting to provide the outcome.
- 66 We found Ms Abdalla’s evidence regarding when she knew about the grievance to be vague and inconsistent. In her witness statement, she said ‘I spoke with the General Manager who dealt with his complaint who, following his investigation, let me know that I had not done anything wrong.’ Which suggests that she had the initial conversation between the presentation of the grievance and its outcome, and then another conversation after the outcome. In her oral evidence, Ms Abdalla said the person she originally spoke to was Cameron, not the investigating officer, and that she was not told the grievance had not been upheld until much later, about March 2020. Then a bit later in her evidence, she said she had an email dated 26 February 2020 asking her to ‘re-send’ the final review script and telling her Mr Foster had raised a tribunal claim. She said she was only told about the grievance then too.
- 67 We find it very surprising that Ms Abdalla was not formally interviewed prior to the grievance outcome, given there was an allegation of discrimination and a threat of legal proceedings. On a natural reading of the witness statement, Ms Abdalla was told by someone about the grievance after it came in and before the outcome. Although Cameron was not the person who investigated, he was the general manager, and on the balance of probabilities, we find that is who Ms Abdalla spoke to. Indeed, we would find it very surprising if, as her line manager, he had not mentioned the grievance to her at all at the time. We also find it extremely unlikely that he would not have mentioned there was an allegation of both unfairness and discrimination, and that Mr Foster had referred to legal action.

Staff taken on since Mr Foster’s dismissal

68 Ms Abdalla told us that four black people were taken on to work permanently or temporarily in the store following Mr Foster's dismissal: one black African and three of black Caribbean descent. These comprised two peak workers (ie seasonal workers): one woman aged 23 who was hired around 21 November 2019, and one 26 year old man; a man in his mid 30s who was hired on a permanent basis on 28 October 2019; and another woman in her early 20s who had applied to transfer from the Brixton branch before Ms Abdalla joined Kensington.

69 We accept this general overview. We do not know who else may have applied for these positions or their ethnicity, or if anyone else was jointly involved with Ms Abdalla in the recruitment and transfer decisions. We do not know how long they all remained in post.

Notice pay

70 Under Mr Foster's contract, if his employment was terminated during his probationary period, he would be entitled to one week's notice in writing. Mr Foster's October payslip showed an entry for a 'PILON' payment of £124.50. He was asked whether he was saying that sum had not in fact been paid. He appeared not to be saying that. He was asked whether he was saying that he was entitled to more than 1 week's notice. He did not appear to be saying that either. As he was unable to explain any basis for his notice pay claim, he decided to withdraw it.

Law

71 We also noted the law as helpfully set out by Mr Arnold in his closing submissions.

72 Under s13(1) of the Equality Act 2010, direct discrimination takes place where a person treats the claimant less favourably because of race or age than she treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

73 The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

74 The function of the tribunal is to find the primary facts from which they will be asked to draw inferences and then for the tribunal to look at the totality of those facts including the respondent's explanation. A fragmented approach will inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds (Anya v University of Oxford [2001] ICR 847.)

75 Under s26, EqA 2010, a person harasses the claimant if she engages in unwanted conduct related to a relevant protected characteristic, and the

conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

76 By virtue of s212, conduct which amounts to harassment cannot also be direct discrimination under s13.

Burden of proof

77 Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that she did not contravene the provision..

78 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. Once the burden of proof has shifted, it is then for the respondent to prove that it did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.

79 The tribunal can take into account the respondent's 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.)

80 The burden of proof does not shift to the employer simply on the claimant establishing a difference [in protected characteristic] and a difference in treatment. Those bare facts 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. 'Could conclude' in s63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. (Madarassy.)

81 A false explanation for the less favourable treatment added to a difference in treatment and a difference [in sex] can constitute the 'something more' required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)

Conclusions

82 We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length. But we have taken all the evidence into account.

Issue 4.1 – the treatment:

83 Ms Abdalla was negative and aggressive towards Mr Foster during the final week of his employment. Her first action was to accuse him of being late in a hostile tone because he was not ready to work immediately on his arrival, having cycled in, and to require him to complete a late form. She was negative towards him throughout the first day they worked together, repeatedly sighing and saying he was not helping her. She did not ensure he had a break during the busy day and when he mentioned this near the end of his shift, she shouted across to him in front of a customer in a peremptory manner, ‘You do realise I am the one that is paying you?’ She then pointed to the bins, told him to take out them out, after which he could clock out and go home.

Issue 4.2 – the treatment:

84 Ms Abdalla called Mr Foster into the final probation review meeting on 10 September 2019 without any prior notice. He was called in one or two hours before the end of his shift, the day before he was due to go on holiday.

Issue 4.3 – the treatment:

85 Ms Abdalla told Mr Foster during the final probation review meeting that how he spoke was not suited to the clientele of the branch. She said they had to ‘flex’ to the people they met. So for example, the Brixton store would be different from the Kensington High Street store, which had more affluent customers and more international customers.

86 The only example Ms Abdalla gave Mr Foster was that the way he spoke was abrupt, eg saying ‘Bank card’ and ‘name’ instead of ‘Can I have a look at your bank card’.

87 Ms Abdalla did not give Mr Foster any other examples. When he asked for other examples, she simply moved on.

Issue 4.4 – the treatment:

88 Mr Foster was dismissed at the end of his final probation review with immediate effect. He was not allowed to work out the remainder of his shift. He was paid one week in lieu of notice.

Issues 4.1 – 4.4 – direct discrimination

89 We found it helpful in this case to apply the burden of proof.

90 It is artificial to consider the treatment in each of 4.1 – 4.4 in isolation from each other. When considering the evidence, the primary facts on each of the four issues are relevant to each individual issue.

Issue 4.1 – direct discrimination

91 In relation to 4.1, has Mr Foster proved facts from which a tribunal could decide, in the absence of any other explanation, that the treatment by Ms Abdalla was direct race or age discrimination? We find that he has, in relation to direct race discrimination, but not in relation to direct age discrimination. Our reasons are as follows.

92 Mr Foster was the only black member of staff working at the Kensington High Street branch. Ms Abdalla jumped on him in an aggressive manner regarding his lateness at the very start of their first shift working together. This is more than an ill-advised way to start an employment relationship, it is very surprising. Moreover, this is not a situation where the employee arrived late into the shop. It was simply that he was not ready to go at the start of his shift. We are not saying that a manager is not entitled to expect an employee to be ready to go at the start of the shift. We are simply saying that it is unusual and surprising for a manager to take an aggressive stance in these particular circumstances.

93 We would expect that a new manager would normally attempt to build some rapport with her staff. Instead, she was negative all day, repeatedly sighing about Mr Foster not helping her, even though she was aware that he was on his probationary period and had not previously benefitted from a line manager. She did not give him a break. She was aggressive towards him in front of a customer at the end of the day in the discussion about him leaving a bit early.

94 Taken together with the grounds for his dismissal, the way the final probation review meeting was handled, the comment about the way Mr Foster spoke, and the fact that everything was compressed into three days, as we set out in detail below, we find the burden of proof has shifted on 4.1 in relation to direct race discrimination.

95 The burden of proof does not shift on direct age discrimination in relation to 4.1 and that claim therefore fails. We explain the reason for distinguishing race and age discrimination below.

96 It is then for the respondent to prove that the treatment in 4.1 was in no sense whatsoever because of Mr Foster's race. The respondent has not done so. We therefore find that the treatment of Mr Foster at 4.1 was direct race discrimination. The following are our reasons.

97 Ms Abdalla said she challenged Mr Foster for being late because he should be ready to start work at the start of his shift and he was not. That is also why she required him to fill in a late form. She says she was trying to set a precedent for behaviour, and that she had on a different occasion required

Natalie to fill in a late form for being late. This does not explain why she adopted an aggressive manner or challenged Mr Foster in that way right at the start of the first shift when they worked together. There is no evidence that this is what happened with Natalie.

98 Ms Abdalla said she asked Mr Foster to take out the bins because that was within his duties, and he should have known that. She says neither of them had a lunch break because it was a busy day and she was simply reassuring him that he would get paid if he left early. We have rejected the latter explanation. In any event, the point again is the manner in which she talked to him in front of a customer. That is not explained. Nor is it explained why she should have displayed an intolerant 'sighing' manner towards Mr Foster's abilities that day. She told the tribunal that she loved coaching and feedback and that she did it instinctively.

99 We therefore do not find the explanation credible, and we find direct race discrimination in 4.1.

100 Further, this was the start of a pattern of behaviour over only three days' working together which led to Mr Foster's dismissal, including remarks about the way he speaks, which we also do not find satisfactorily explained. For that reason too, we find an inadequate explanation on the treatment described in 4.1.

Issue 4.2 – direct discrimination

101 On its own, the failure to give Mr Foster forewarning of his final probation review meeting would not shift the burden of proof on direct race discrimination or direct age discrimination. However, taken together with Ms Abdalla's reaction to Mr Foster from the outset (issue 4.1), the comment she made (issue 4.2) and her decision to dismiss (issue 4.3), we find that the burden of proof has shifted on direct race discrimination. We could infer that the lack of notice was direct race discrimination if unexplained.

102 The respondent did not explain why Mr Foster was given no notice. Ms Abdalla denied that she gave him no notice. We are therefore not satisfied that the respondent has satisfied stage 2 of the burden of proof and we find the failure to give forewarning of the final probation review meeting was direct race discrimination.

Issue 4.3 – direct discrimination

103 Ms Abdalla told Mr Foster that the way he spoke was very abrupt and not suited to the branch clientele. When he pressed her for examples, the only example she gave was that he used a single word such as 'bank card' and 'name', rather than 'Can I have your bank card?' In the tribunal, she sought to add a further example of him not getting up when a customer came in, but we have explained why we do not accept that evidence. She did not say it at the time and we find it unlikely.

104 For reasons we have previously stated, we do not accept that Mr Foster was generally abrupt.

105 Ms Abdalla suggested the way one should speak to customers was different in Kensington from Brixton, as Kensington had more affluent and international customers. It is not clear to us why abruptness should be any more acceptable in Kensington than in Brixton. Service is service. Nor is it clear why a single word should be less suitable for international customers who did not speak English as a first language – indeed one would think a single word was easier to understand than a convoluted sentence.

106 For reasons we explain further below, and to avoid repetition, we find that a reasonable tribunal could infer, in the absence of an explanation, that the comment about the way Mr Foster spoke to customers was direct race discrimination. Again as explained below, the respondent did not satisfy us that the remark was in no sense whatsoever because of Mr Foster's race. We therefore find that it was direct race discrimination.

107 Again, for reasons set out below, we do not think a reasonable tribunal could infer that the remark was because of Mr Foster's age. The burden of proof therefore does not shift on direct age discrimination in relation to the remark and that claim fails.

Issue 4.4 – direct discrimination

108 We find that Mr Foster has proved facts from which a tribunal could reasonably decide, in the absence of another explanation, that his dismissal was direct race discrimination. The burden of proof is therefore shifted on direct race discrimination. We do not find the burden of proof has shifted on direct age discrimination. Our reasons are as follows.

109 Mr Foster was the only black employee in the branch, though in age terms, Alex was only a couple of years older. Ms Abdalla came with a 90-day plan, in which she would observe staff from a distance in the first month to see how they were performing. In Mr Foster's case, she made her observations over only three days working together, one of which was extremely busy and the third of which was the day she held the final meeting, one or two hours before the end of his shift.

110 Ms Abdalla knew Mr Foster had not had the benefit of a branch manager during his probation. She jumped on him regarding minor lateness on their first shift together, and was negative throughout that shift. She told the tribunal that she loves coaching, but a reading of the transcript of the final review meeting shows a fault-finding approach. She said she went into the final meeting with an open mind, but it does not read that way. Her explanation of the purpose of the meeting reads more like the start of a disciplinary meeting. Moreover, she sprang the meeting on Mr Foster without forewarning, which does not suggest to us any genuine intention to give him an opportunity make a case for his continued employment.

- 111 If unexplained, we would be very troubled by why Ms Abdalla should reach such a negative judgment on Mr Foster so fast, and contrary to her previous plan for the store. We explored with her whether the reason was that she wanted to bring in her own staff with whom she had worked before, but she denied that was the case. In those circumstances, and given that Mr Foster was the only black member of staff, we believe a reasonable tribunal could properly conclude that her dismissal of Mr Foster was race discrimination in the absence of another explanation.
- 112 Our view is reinforced by Ms Abdalla's comment that 'the way you speak is very abrupt and not suited to our clientele'. When pressed by Mr Foster, the only example she could give was that he said 'Bank card' and 'Name' etc rather than 'Can I have a look at your bank card?' She described the Kensington clientele as more affluent and international than in Brixton. We appreciate that she referred to the Brixton store because she had just come from there. But nevertheless, we feel there is an implication that Mr Foster's way of speaking is more suited to Brixton customers, and that it is acceptable to be abrupt to Brixton customers. Brixton is of course an area with a large black population.
- 113 We add that Mr Abdalla was unable to sustain her criticism of the way Mr Foster spoke when he pressed her for details. As we have said, she only gave the one example of 'abruptness'. He asked for further examples, but she was unable to give any. He suggested she ask Natalie and Alex how they felt he spoke to customers, but she did not do so before reaching her decision. In this context, ie put together with her apparently instant dislike of Mr Foster and her decision to dismiss him despite her original plan after only three days, a tribunal could infer – if unexplained, that Ms Abdalla felt Mr Foster did not fit into the Kensington store, and that the reason she felt he did not fit in, consciously or unconsciously, was because he is black.
- 114 We do not think the comment has any suggestiveness of age discrimination about it, and also, as we have said, Alex was also young.
- 115 We have taken into account Ms Abdalla's own heritage. It is not the same as that of Mr Foster. Moreover, although perhaps less likely, it is perfectly possible for a minority ethnic person to discriminate racially against someone else, even of their own racial group if the reason is, for example, a view of how they might appear to customers.
- 116 We also took into account the four black (African or African Caribbean) members of staff who were brought to work in the branch after Mr Foster's dismissal. One of these had applied to transfer before Ms Abdalla moved to the shop and we do not know exactly how that decision was processed. Two others were simply peak workers. We do not know whether any white candidates applied for the various posts at the same time. We do not know whether any other manager was jointly involved in any of the decisions. We do not know how long they stayed.

- 117 It is also possible that Ms Abdalla was influenced in her choices by the knowledge that Mr Foster had alleged discrimination against her and was talking about legal action. As we have explained above, we do believe that Ms Abdalla was aware of that much about the grievance at the time it was presented and being investigated, which coincides with the period when this recruitment was being carried out. Therefore, while we gave this matter some thought, we still find that overall the burden of proof has shifted.
- 118 The burden of proof therefore shifts to the respondent to prove that the dismissal was in no sense whatsoever because Mr Foster is black. We find that the respondent has failed to do so.
- 119 The outcome statement on the probation review meeting form notes the reasons for dismissal as 'Failure to hit HBB target. Failure to hit insurance target. Failure to hit ACR target. Failure to hit CSAT target. Attitude towards customers. Pin point usage. Knowledge of pie systems.' The dismissal letter gives the reasons as 'failure to meet the required levels of performance' and 'failure to demonstrate the correct attitude and behaviour throughout your Probation'.
- 120 Ms Abdalla never gave a credible explanation why she only gave Mr Foster three days, when her initial plan had contemplated a four week observation period for the store, which was not doing so badly that urgent action was needed. Moreover, Ms Abdalla never gave a credible explanation why she did not give Mr Foster a little longer to prove himself given that he had had no branch manager up to that point. She accepted that she had power to extend Mr Foster's probation period in order to assess him further, and she alleged that she still had an open mind on whether to do so when she went into the final probation meeting (although we doubt that she did have an open mind).
- 121 Neither of Ms Abdalla's reasons for dismissal stand up to closer examination. Although Mr Foster was indeed missing targets, so to some extent were his more experienced colleagues. Ms Abdalla knew Mr Foster had had no branch manager and so had had no proper training on the job. The 4 and 8 weeks coaching sessions had clearly been informal. She says she likes coaching and does it instinctively. Her approach to Mr Foster therefore does not make sense to us.
- 122 When pressed on this, Ms Abdalla said it was 'skill v will' and Mr Foster just was not willing to learn. She said he was dismissive in the meeting. We do not agree that the record of the meeting bears this out.
- 123 The lack of forewarning and the way Ms Abdalla conducted the final meeting do not support her contention that she went in with an open mind and that it was simply a matter of whether he demonstrated that he wanted to learn. She did not give him a chance to demonstrate that. She moved away from the topic of the way he spoke to customers before he had finished asking about it. She did not try to speak to Natalie and Alex who had watched Mr Foster for the previous 10 weeks. She did not try to unravel what aspects

of pie he did and did not understand after he said he understood it generally, but there were a few problem areas.

124 Ms Abdalla asked Mr Foster if there was anything he would like to expand on further, after the adjournment when she had already finalised her decision to dismiss. In her discussion during that adjournment with employee relations, she said he had not given any mitigation, but the notes of the probation review meeting record that he had put forward as mitigation that the shop floor could get busy and that he had had no branch manager.

125 The dismissal letter refers to failure to demonstrate the correct attitude and behaviour 'throughout' Mr Foster's Probation. But Ms Abdalla was going on her own observations and she was only in post for the last week, and only worked with him three days within that period.

126 The 4 and 8 week notes do not support Ms Abdalla's suggestion that 'attitude' was an issue with Mr Foster. As we have said previously, he was given tips for how to engage customers in the type of conversation which would end in a sale, eg by asking about insurance if they had broken their phone. But that is a completely different point.

127 The respondent did not prove that there was any problem with Mr Foster's attitude. He had an interest in business and marketing and he had got on well with everyone prior to Ms Abdalla's arrival. He defended himself in the final review meeting but we did not see evidence of an 'attitude' problem in the notes. We also note Mr Foster's achievements since dismissal, which would require communication skills and a committed attitude.

128 Nor can we see any evidence in the final probation review meeting notes of Ms Abdalla making positive suggestions as to how she could help him going forward, despite her saying she was looking for whether that was a possibility.

129 This all goes beyond mere unfairness. Ms Abdalla's alleged open-minded approach is not born out by evidence. The evidence also does not bear out the contention that Mr Foster showed such a lack of 'will' and such a problematic 'attitude' that his probationary period could not have been extended so that Ms Abdalla had a proper chance to observe him, as she said she would otherwise have done.

130 For all these reasons. Ms Abdalla has not satisfied us that her reason for dismissing Mr Foster was in no sense whatsoever because of his race. The claim that his dismissal was direct race discrimination is therefore upheld.

Harassment: issues 6 - 10

131 The four matters of alleged direct discrimination identified in issues 4.1 – 4.4 are the same as those put under the alternative category of harassment. It is not allowed under the Equality Act to find that an action is both direct discrimination and harassment. In effect, it is duplication. Therefore, as we

have found the actions were direct race discrimination, it is not necessary to consider whether they were racial harassment.

132 We would however have said that they were all unwanted conduct related to race which violated Mr Foster's dignity and created a humiliating and offensive environment for him. Whether or not Ms Abdalla intended her conduct to have that effect, it did so, and it was reasonable to have that effect in all the circumstances.

133 The claim for age-related harassment fails. For the same reasons we considered the actions were not taken because of Mr Foster's age, we find that the unwanted conduct was not related to his age.

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1.6.21

Employment Judge Lewis

Sent to the parties on:01/06/2021

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For the Tribunals Office