EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4113137/14 Held at Aberdeen on 27 & 28 April, 16 July and 27 August 2015

Employment Judge: Mr N M Hosie
Members: Mrs S Taylor
Ms N Mandel

Ms Magdalena Konieczna	**Claimant** **Represented by:** **Ms A McCracken – Solicitor**
Whitelink Seafoods Limited	**Respondent** **Represented by:** **Mr I MacLean - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

1. the complaint of harassment in terms of s.26 of the Equality Act 2010, related to the protected characteristic of race, is well-founded; and

2. the respondent shall pay to the claimant by way of compensation for injury to feelings the sum of Five Thousand, Four Hundred and Ninety-Two Pounds (£5,492)

REASONS

Introduction

1. Ms Konieczna claimed that she had been unlawfully discriminated on grounds of race by the respondent Company ("Whitelink"). She brought complaints of direct discrimination, indirect discrimination and harassment. While she did not have sufficient qualifying service to bring a complaint of unfair dismissal, she claimed that her dismissal was an act of direct race discrimination. Her claim was denied in its entirety by Whitelink.

The Evidence

2. We heard evidence from the claimant, Magdalena Konieczna, and on her behalf from Wladfyla Baranek who worked at one time with the claimant at Whitelink.

3. The claimant also led evidence from Andrew Sutherland, a Whitelink Director and Manager, by way of witness order.

4. On behalf of the respondent we heard evidence from:

- Valerie Ritchie, HR Manager
- James Sutherland, Director

5. A joint inventory of documentary productions was also lodged by the parties ("P").

6. We first heard evidence on 27 and 28 April but it was not until 16 July that we were able to complete the evidence due to the unavailability of a witness. The parties' representatives then made written submissions which the Tribunal was able to consider on 27 August.

The Facts

7. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following material findings in fact.

8. Whitelink is a fish processor and exporter. It has approximately 130 employees with some 9 different nationalities. It has factories in Scotland, Germany and France. The claimant worked in the respondent's office at its factory in Fraserburgh, Scotland ("the factory"). She was employed as a "Payroll Administrator and HR Support" from 11 September 2012 until her employment was terminated on 20 June 2014, allegedly on the ground of conduct/capability.

9. The claimant is of Polish origin and nationality. She has lived in Scotland since 2007. Polish is her first language but she is also fluent in English.

10. Prior to her employment with Whitelink the claimant was studying. In 2012 she was awarded a BA in Accounting and Finance. During her time at College she worked as a Factory Operative and Operations Assistant. She was employed in a diverse variety of workplaces with people who spoke a number of different languages. She applied for the role with Whitelink after seeing an advertisement in the Job Centre website in or around August 2012.

11. When dealing with customers and English speaking colleagues at Whitelink the claimant spoke English. However, she found it was more effective to deal with work related matters such as holiday requests and back-to-work interviews with Polish employees in Polish, as many of the 50-60 Polish Whitelink employees in the factory spoke little or no English. The claimant also often acted as a link between the office staff and factory staff in a translating role.

12. At the end of March 2014 the respondent's HR Manager, Valerie Ritchie, was in the claimant's office when the claimant took a telephone call from someone who wished to apply for a job. The caller only spoke Russian and as the claimant was having difficulty understanding what she was saying she passed the call to one of her colleagues who was able to communicate in Russian. Ms Ritchie expressed

her dissatisfaction and irritation with this situation and said to the claimant: "*From now on we need to employ people who only speak English*", or words to that effect.

13. Thereafter the claimant and Ms Ritchie had various conversations about this matter when Ms Ritchie made it clear that she wanted to limit the number of employees speaking different languages. During these conversations the claimant made various suggestions such as encouraging employees to go to College to learn English, but this was difficult as they didn't always know when they would finish work in the factory; she offered to teach non-English speaking employees English; and she suggested printing English words in common use in the factory and putting them on the canteen wall. Ms Ritchie asked the claimant to check College courses which might be available but there were none starting at that time; the claimant's other suggestions did not find favour with Ms Ritchie.

"<u>The Speak English Rule</u>"

14. Without any warning, on or around 2 April 2014 Ms Ritchie introduced a new "Rule" that required all staff to speak only English while at work. The Rule was communicated verbally to the employees by their Supervisors. There was nothing communicated in writing. Although this was disputed by the respondent, we were satisfied on the basis of the evidence of the claimant and her witness Mr Baranek which we accepted, that the claimant and all the other Polish employees believed that the Rule was to be applied at all times within the factory, including "break times". The respondent may not have intended the Rule to apply at break times, but that was what the Polish employees believed and any confusion in that regard was due to a failure on the part of the respondent to communicate clearly the terms of the Rule, why it was being introduced and how and where it was to be applied. Even Andrew Sutherland, one the Whitelink Directors, conceded when he gave evidence at the Tribunal Hearing that he did not know how the Rule was communicated to the staff.

15. The Rule was a cause of considerable concern to the claimant and many of her colleagues due to their differing levels of ability speaking English. In the past

when dealing with customers and English speaking colleagues the claimant spoke English and she also acted as an interpreter from time to time. It was natural for the claimant to speak Polish to non English speaking Polish workers in the factory, but after the Rule was introduced she had to speak English to all the Polish employees whatever their level of ability speaking English

16. After the Rule was introduced the claimant was reprimanded frequently by Ms Ritchie and Andrew Sutherland, one of the Whitelink Directors, for speaking Polish. The claimant often found it difficult to apply the Rule as it was not practical to do so, especially when she was speaking to a Polish employee who could not speak English and who instinctively would speak in Polish to the claimant. For example, on or about 19 May the claimant had to conduct a back-to-work interview with a factory worker, Ms Justyna Penkala, who could only speak Polish. She could not speak English. She had to arrange for her friend Ms Katarzyna Krysta to attend the meeting to translate from English to Polish, despite the claimant being fully fluent in Polish. The claimant described the situation as *"comical"* and *"not time effective".*

17. On another occasion in mid May 2014 when Andrew Sutherland heard the claimant speaking in the corridor to Justyna Penkala in Polish about a work related matter he said to her, abruptly, as he passed: "*speak English*".

18. The Factory Manager, William Bruce, also told the claimant on a few occasions to speak English. Mr Bruce was aware the claimant was Polish and yet within her hearing he often referred to Polish employees *"the fucking Polish"* and on occasions when he was in the claimant's office checking on absences he was heard to remark*: "fucking Poles".*

19. On or about 23 May Ms Ritchie overheard the claimant speaking Polish in the corridor to an employee about a holiday request. Ms Ritchie reprimanded the claimant and told her she was disrespecting her and her policies.

Disciplinary

20. On 28 May 2014 Ms Ritchie came into the claimant's office and said that they needed "*to have a talk*". Ms Ritchie proceeded to read from notes and make various allegations concerning the claimant's conduct. The claimant was shocked at these allegations and upset.

21. Later that day Ms Ritchie handed the claimant a letter (P38). The following are excerpts:-

> "*You are required to attend a Disciplinary Hearing on Monday 2 June 2014 at 11am in the main office to discuss the following matters of concern:*
>
> - *Allegedly failing to adhere to Company Procedure regarding Speaking English during working hours.*
> - *Allegedly failing to adhere to the e-mail and internet Policy by going onto Facebook during working hours.*
> - *Allegedly failing to maintain as required the Training Matrix by failing to issue required Training Sheets as per TO36 and marking on attendance sheets that all training sheets required are in place.*
> - *Allegedly taking six months to resolve an employee Ernest Murray's pay query. It was only when he spoke a colleague this then dealt with*."

22. Apart from the first allegation, the other four allegations had never been raised with the claimant before and she denied any such misconduct.

23. On 1 May 2014 the claimant had sent an e-mail to Ms Ritchie asking for a pay rise; Ms Ritchie replied on 20 May to say that she would consider her request (P36/37).

Disciplinary Hearing on 12 June 2014

24. The claimant was signed off work on 29 May 2014 due to ill-health (P40/41) and as a consequence the disciplinary meeting did not take place until 12 June. Notes of that meeting were produced (P43-59). The following are excerpts:-

"*VR…….The English only speaking policy or as much as we could was put in place on 02/04/2014. We spoke at length at the time new policy making and the importance of seeing the staff, migrant workers, everybody and you know, integrating into the community and the workplace. We discussed about how not trying to learn English so much and how there was issues in communications in the factory because of this, you were going to find about English lessons and you seemed really behind me on that. However, since then, on numerous occasions you have been speaking Polish at reception and there seems to be no attempt to speak English to the staff despite being reminded repeatedly. It seems that you have chosen to ignore the rule, can you tell me why?*

MK: Well, I didn't ignore the rule, it was just hard, because it is my native language and it is a natural thing for me to speak my language not English, especially with people who does not speak English at all, like, for example, Grazyna or many other employees from the factory, they can't speak a word even. Even though those people are here for ages they can't speak a word and it is very hard to communicate with them in English. They maybe understand a little bit, like Ewa Maladobr, for example but she can't speak a word.

VR: Who is that?

MK: Ewa Maladobr from scallops. She said she can understand a little bit, but they are giving her the orders in the factory, but she can't say a word back in English obviously and for me it seemed to be really natural to speak back and even if the rule applies to all employees when they were coming back they were coming to me they were speaking Polish so my natural reaction was to just to speak Polish and I never even thought about speaking English.

VR: You never even thought, even though reception and myself said: "Magda, English!"

MK: Well, after that I started to speak English but it was hard, Justyna recently had a funny situation when she took Kasha to translate so I had to presume I don't understand Justyna what is she saying in Polish just to be able to get it translated by Kasha. And there was another Polish girl.

VR: I hear what you are saying. It is natural to talk in your native language, however you are fully aware of this changing policy, because we had discussed more than once about it and how are we going to do it and about the English lessons and about trying to get more into that kind of thing and so, although I understand that it feels natural, you did know the policy and there are many staff in there who do speak English and you are able to communicate with them in basic English. You can get by and there was no attempt as such.

MK: I won't agree with this. Because even if I tried, people just fail to speak with me in English or even if I spoke in English they were speaking back to me in Polish.

VR: Sorry, now you are saying you did try speaking in English?

MK: A few times, yes.

VR: Perhaps I misunderstood you, I thought you said a minute ago that you just went on the Polish because it felt natural.

MK: It feels natural, but sometimes I just started to speak English, but it didn't work.

VR: Ok, because I never heard you, only speaking Polish.

MK: But I wasn't at the reception a lot recently.

VR: I went through the people that you have recently spoken to and there are a couple of them have got very good English, but most of them can communicate in English and since you have been off I have been meeting with all the staff and its only once that I needed help from someone. With everybody else we have managed to get through.

MK: I asked Justyna a simple question, when she last time was off, I asked her: 'Were you in hospital casualty?' She was looking at me blank and then if they prescribe her some tablets or something she didn't understand me so Kasha had to translate it and it's not very complicated English especially if it comes to hospital and tablets.

VR: There are situations where speaking your native language is essential if someone has got a completely……If they have zero English or the subject is quite complicated or, you know, that kind of thing, but overall these things it's not complicated. Stuff like I say, I have managed to do this while you have been off and I have done it before and you do manage but it just seems that no attempt is being made from your side.

MK: I don't agree……

MK: You can encourage, but you never organised it, like courses or something, you knew I could learn them English, never suggested, can you spend one hour with them a week and teach them English or something. Nothing like that happened.

VR: But you are not a teacher and I would never ask you to teach people English.

MK: It was just as an example.

VR: I did take legal advice on that and told you this at the time. During their breaks they can speak their native language and nobody was ever stopped from doing that.

MK: I know that they were banned from speaking on the break time.

VR: No, no. The rule was very clear that on a break time they can speak their native language. We would never stop that, however, in the workplace to ensure instruction they got to make sure that the process is done properly and it is done safely and we need to ensure that people are understanding.

MK: But we employ people who didn't know English before so you knew what you are doing. You knew that they don't know even a word in English…..

VR: Ok, what are you trying to say is that you feel that it is discrimination?

MK: Yes.

VR: And that you should be allowed to speak your native language regardless of the consequences of the product and safety?

MK: Why before it was ok for me to speak English and you just change your rules suddenly?

VR: It wasn't suddenly, we have discussed it before it was changed and you agreed that they were not trying any more.

MK: I remember that, it was a Wednesday, you were in my office, Monta was in my office and I received a call from a Russian speaking girl, I think, and I said that I don't understand and I will give the phone over to Monta. And after the conversation finished you said stop, from now on we will employ people with English only and then you changed the rule after that situation.

VR: We discussed it, we discussed the change.

MK: Yes, I know that they have to learn English.

VR: This is not a debate or an argument ok? But my recollection of this was that you agreed that they were not trying any more and we will encourage them to learn and you will be looking into English lessons at the College. When I asked you about it last week or the week before, whenever it was, you said I did it on Facebook.

MK: I posted a poster for signing up for the English classes which started after the summer."

25. Ms Ritchie then went on at the meeting to discuss the other allegations which, by and large, were denied by the claimant.

26. On 17 June Ms Ritchie sent an e-mail to the claimant to advise her that she had decided to: "*put the outcome of the disciplinary hearing on hold to allow the claimant to raise a grievance should she wish to do so (P 42).*

27. When no grievance was raised, on 20 June 2014 Ms Ritchie wrote to the claimant to advise her that she had decided to dismiss her with immediate effect and pay her one month's pay in lieu of notice (P 60-62). Ms Ritchie said this in her letter concerning the Rule :

"*At the hearing your explanations were:*

- *You did not ignore the rule, it was hard as it was a natural thing to speak your own language. Some of the staff you said had known this. You also said you never thought about speaking English but later you said you did try but they spoke back to you in Polish. You also said it could not be a company rule as it was discrimination. However you also said you now objected to it as I had put an allegation against you……..*

I considered your explanations to be unsatisfactory because:

- *Although I understand it may feel natural to speak your own language, you agreed when the change of rule was being discussed and that it was important to communicate as much as possible in English. In addition to company reasons. You had become frustrated as you were being called on translation when the person had sufficient English to communicate with for example Reception* (sic)*. After the rule had been implemented, you continued to speak Polish even though the person could communicate in English and you were being reminded by Reception and myself. You never once raised an issue during this time.*"

Appeal

28. On 25 June the claimant wrote to the respondent to intimate that she wished to appeal against her dismissal (P 63/64). Her grounds of appeal were as follows:

> "*There was insufficient consideration of my explanation of the circumstances leading up to the dismissal. Generally speaking I doubt my explanations were considered at all.*
>
> *The dismissal was too harsh a penalty given the circumstances. As I said above, I was not listened to and no matter what I would say the decision has been made already…… I still think that the reason behind my dismissal and a harsh treatment was the fact that I asked for a pay rise. All the problems arose after I asked for it.*
>
> *The new rule applied to speak English–only was a discriminatory one where Polish people were ridiculed while not being able to communicate and where I was being harassed for not speaking English. Actually a full responsibility has been put on my shoulders for the employees to learn English……...*
>
> *I have had a relatively long service with the company which I feel should have been considered in imposing a penalty less than dismissal.*"

Appeal Hearing on 16 July 2014

29. The Appeal was conducted by James Sutherland, a Whitelink Director, Minutes of the Appeal Hearing were produced. They were not disputed. We were satisfied that they were reasonably accurate (P 69-78). The following are excerpts :-

> "*MK: According to ACAS – can employer require employees from different nationalities to communicate only in English at the workplace? There is an explanation – may be able to justify a requirement to have a common language in the workplace for work-related communications. I mean achieving business aims as this may avoid misunderstanding because that can have potentially serious consequences for the organisation. However a rule requiring all communication to be English could be discriminatory. Another website on internet explained that it can only be applied…. English only rule can only be applied to some institutions where the use of another language would be harm to the business or create a safety problem. But I had nothing to do with safety because I was a Payroll and HR Admin and I had nothing to do with business because I wasn't doing*

the sales. And I was only beneficial for the company before everything was fine. As soon as the new rule applied Magda was bad so you had to get rid of me.

JS: Can you tell me who harassed you and by which form?

MK: Andrew, he didn't say me in nice manner. I should speak English (sic) *I got scared when he told me that I was speaking with Justyna at that time and that was beside the pigeonholes.*

JS: When was that?

MK: He just walked passed me 1-2 weeks before my disciplinary. Just walked passed me (sic) *and said to me: 'English only'. I just said to Justyna 'I can't speak with you anymore'. She went back to factory and that's it.*

JS: But you knew that you only had to speak English.

MK: Yes, but she can't speak English, there is no communication with her. 90% of the Polish people who work here they can't speak English, same as Bulgarians or other nations. That's a really limited requirement to me to speak English when they can't speak English.

JS: Tell me as you know we've got a lot of other nationalities working in this factory, here at Whitelink, are they being discriminated against as well or only Polish?

MK: Mainly Polish people. From what I've heard from people from the factory when that rule applied Aleks was still speaking (the supervisor) his language. Andris was still speaking his language, Ronnie was still speaking Bulgarian."

30. On 24 July Mr Sutherland wrote to the claimant to advise her that her appeal had been unsuccessful (P 79-81).

Final Appeal

31. On 1 August the claimant wrote to the respondent to intimate that she wished to exercise her right to a "Final Appeal" (P 82/83). The grounds for her Appeal were as follows:-

"*That dismissal was too harsh a penalty given the circumstances – according to Employee Handbook I should be given a warning.*
Unfair treatment comparing to other office colleagues.

> *Discriminatory rule applied to speak English-only/being harassed for not speaking English.*
> *Lack of training – my college education has nothing to do with on-job training which is supposed to be provided when I started the job.*"

32. The Final Appeal was conducted by Graham Sutherland, one of Whitelink's Directors, on 26 August 2014. Minutes of the Appeal Hearing were produced (P88-101). We were satisfied that these Minutes were reasonably accurate.

33. On 9 September 2014 Mr Sutherland wrote to the claimant to advise that her Appeal had been unsuccessful (P 102-108).

Employees' Grievance

34. For the sake of completeness we also wish to record, as it was included with the documentary productions, that around June 2014 when the claimant was signed off work and while the disciplinary process was ongoing the claimant arranged for a total of 23 Polish employees at Whitelink to submit a grievance (P109/111). The respondent claimed that it never received this, but maintained that when the matter came to its attention in March/April 2015 (long after these proceedings had been raised) it was investigated (P112-176).

Claimant's Submissions

35. The claimant's solicitor made written submissions which are referred to for their terms. The following claims of race discrimination were advanced:

> "*1. that her dismissal was directly discriminatory because of race within the meaning of Section 13EqA;*
> *2. that she was also indirectly discriminated against within the meaning of Section 19EqA; and*
> *3. that she was harassed because of her race within the meaning of Section 26EqA.*"

36. The claimant's solicitor made submissions in relation to the evidence and the facts first and then went on to deal with each of the three complaints in turn.

Direct discrimination (s.13 (1))

37. In this regard the claimant's solicitor referred the Tribunal to the following cases:

Nagarajan v. London Regional Transport & Others [1999] IRLR 572 (HL);
Martin v. Lancehawk Ltd t/a European Telecom Solutions UKEAT/0525/03;
Igen Ltd & Others v. Wong [2005] IRLR 258;
Reynolds v. CLFIS (UK) Ltd & Others UKEAT/0484/13;
Shamoon v. Chief Constable of Royal Ulster Constabulary [2003] IRLR 285;
Dziedziak v. Future Electronics Ltd [2012] WL609346.

38. The claimant's solicitor submitted, with reference to **Reynolds** in particular, that the respondent's decision to implement the Rule "*had a significant influence on the claimant and the other workers whose first language was not English*". She submitted that the claimant and her colleagues feared the repercussions of speaking in Polish; on a number of occasions the claimant was reprimanded for conducting meetings in Polish; and her use of her native language triggered the disciplinary process and ultimately led to her dismissal.

39. The claimant's solicitor also referred the Tribunal to the ECHR Code at page 251, Para. 17.48, which she submitted: "*recognised that an employer who uses occasions when an employee talks to another in their native language to trigger the disciplinary policy maybe considered to be acting disproportionately.*"

40. The claimant's solicitor submitted, with reference to **Shamoon**, that the claimant was treated less favourably than a hypothetical comparator working full-time with the same abilities but who spoke English as their first language. She submitted that: "*had the claimant spoken English as her first language she would not have been dismissed nor would she have been treated less favourably due to her nationality and ethnic origin.*" She submitted that the dismissal arose in consequence of the claimant's race. She submitted that the respondent had failed to show that the unfavourable treatment was "*a proportionate means of achieving a legitimate aim*" and that the respondent had failed the "*so-called objective justification test*".

41. Although the respondent maintained that the Rule was introduced to create better communication at the factory and avoid confusion, it was submitted that far from improving communication it actually hindered it.

42. It was submitted that the real reason for the dismissal was the claimant's race and that: "*the historic allegations put forward at the time of her dismissal were not the real reason*". It was submitted that the respondent "*ought to have made further investigation in considering how communication could have been improved throughout the factory.*"

43. The claimant's solicitor went on in her submission to refer to **Dziedziak** where, she submitted: "*it was found to be direct discrimination when a Polish employee was told by her employer not to 'use her own language' while having a work-related conversation with a fellow Polish colleague. The respondent did not provide an adequate explanation. It was clear on the evidence heard by the Tribunal that employees of other nationalities were not subjected to the same restriction as that imposed on the claimant. The Tribunal found that by the respondent instructing the claimant not to speak in Polish it established an intrinsic link between language and nationality and was capable of amounting to a detriment*."

44. For all these reasons, the claimant's solicitor submitted that the imposition of the Rule in the present case constituted direct discrimination.

Indirect discrimination

45. In this regard the claimant's solicitor referred the Tribunal to **PF Franco v. Fyffes Group Ltd ET 2012**

46. The claimant's solicitor submitted that there was no legitimate business reason for the claimant being required to speak English at her meetings with Polish staff. It was the evidence of Andrew Sutherland that the Rule was introduced for health and safety reasons related to machinery in the factory. However, it was submitted that Mr Sutherland did not give any specifics in relation to the office

staff such as the claimant; the evidence of Valerie Ritchie was that it was "*a blanket rule for all employees*"; James Sutherland accepted there were no health and safety implications so far as the claimant was concerned, as she did not work on the factory floor, that it would not make her job easier and nor would it improve her language skills. For all these reasons, the claimant's solicitor submitted that the imposition of the Rule constituted indirect discrimination.

47. It was further submitted by the claimant's solicitor that there was indirect discrimination when the respondent applied the following "Provision, Criterion or practice ("the PCP"):

"

- *The provision of banning employees from speaking their native language while at work. The practice's disadvantage to the claimant as English is not her first language. The Policy was introduced without any consultation with employees. The terms of the Policy were also never outlined to the staff.*
- *There is no dispute that the said practice constitutes a PCP within the meaning of the EQA 2010. The claimant was disadvantaged compared to persons without her race when the PCP were applied because we heard from the claimant as a result of her nationality she had to deal with a number of employees who spoke little to no English. Had the claimant's native language been English she would not have been dismissed or, discriminated against.*
- *It is submitted that the claimant was indirectly discriminated against in the circumstances. It is further submitted that the respondent's actions cannot be objectively justified. Further and in any event even if a legitimate aim was established it was established that 'the PCP was not proportionate to that aim'."*

48. By way of summary in relation to the indirect discrimination complaint, the claimant's solicitor said this in her submissions:

> "*Blanket rules or policies, as was put in place in this case, involving the use of a particular language within the workplace may also be difficult to objectively justify as a proportionate means of achieving a legitimate aim unless there are good business reasons for it, the position will depend on the facts of each case. It is submitted that the respondent has not satisfied that there was good business reasons for the policy.*
>
> *When trying to objectively justify a potentially indirectly discriminatory language policy, employers will be expected to demonstrate that they have considered whether there is any less discriminatory way of reducing any*

advantage to a particular group. The evidence of the respondent has not demonstrated this was considered. Further, there were a number of positive actions that could have been considered but were not."

Harassment

49. The claimant's solicitor submitted that on a number of occasions the claimant was "*singled out for speaking Polish by Ms Ritchie and Andrew Sutherland*". On one occasion in particular Mr Sutherland "*aggressively shouted 'English' at her as she walked past*". As a consequence the claimant became very anxious about speaking her native language for fear of condemnation.

50. Further, on 23 May 2014 when Ms Ritchie heard the claimant speaking Polish at Reception she took her aside "*and aggressively asked the claimant why she was 'disrespecting' her and her policies*". The claimant, in evidence, said that this "*hostile tone*" made her feel "*like a little kid*" with her '*dignity on the ground*'. The claimant was humiliated but did not feel she could complain. The respondent's Directors were all Ms Ritchie's brothers.

51. Andrew Sutherland also shouted at the claimant "*English. You aren't meant to speak Polish*" when he heard the claimant speaking to another Polish employee about her maternity leave.

52. Mr Sutherland was asked when he gave evidence what he himself would do if he was working in Poland and wished to speak to a Scottish colleague. His answer was that he would "*learn Polish before he went there*". It was submitted that: "*the arrogance of this statement showed the true intent of the language policy and the prejudice to the claimant and other staff were subjected to.*"

53. It was submitted that throughout her employment the claimant was "*subjected to derogatory and disparaging comments about Polish people*" and that it had "*the effect of creating a hostile and intimidating environment*".

54. The claimant also heard William Bruce, the Factory Manager, claim that he refused to "*employ any more fucking Poles*". On that occasion Ms Ritchie who also heard the remarks "*got a fright*" telephoned the claimant to make sure she had not been upset, telling her that "*Mr Bruce did not really mean it*", whereupon the claimant advised Ms Ritchie that "*she was used to Mr Bruce making comments of this nature*".

55. The claimant also told the Tribunal that she heard Mr Bruce say that it was "*normal for fucking Poles to be off*" when staff phoned in sick and she found these comments to be offensive and intimidating. In this regard the claimant's solicitor also referred the Tribunal to **Richmond Pharmacology v. Dhaliwal [2009] IRLR 336** in which there was the following comment from the EAT:

> "*While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…..it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline…..but we are satisfied the Tribunal, which clearly considered the case most conscientiously was entitled to hold that what it found [the employer] to have said did indeed fall on the wrong side of the line.*"

56. The claimant's solicitor submitted that the conduct of Ms Ritchie, William Bruce and Andrew Sutherland amounted to harassment.

57. Finally, the claimant's solicitor referred the Tribunal to the ECHR Code at Para. 17.51: *"which details that inappropriate or derogatory language in the workplace could amount to harassment if it is related to a protected characteristic and is sufficiently serious.*"

Respondent's Submissions

58. The respondent's representative also made written submissions. These are referred to for their terms.

Direct discrimination

59. The respondent's representative submitted that only one of the grounds for dismissing the claimant was her repeated breach of the Rule and that there were other grounds of misconduct identified in the disciplinary process which led to her dismissal.

60. The respondent's representative drew to the Tribunal's attention that when giving evidence the claimant appeared to be aware of the Rule and accepted that it was necessary and although she was spoken to on a number of occasions about breaching the Rule she raised no formal complaint or grievance until disciplinary action was commenced. It was only at that time that the allegation of discrimination was raised.

61. It was submitted, therefore, that the dismissal, which was the only detriment relied upon by the claimant in terms of the allegation of direct discrimination, was not on the grounds of race but "*rather as a result of an accumulation of perceived shortfalls in performance".*

Indirect discrimination

62. It was submitted by the respondent's representative there was no evidence that the introduction of the Rule placed the claimant at a particular disadvantage. It was further submitted that: "*the introduction of the Policy was a proportionate means of achieving a legitimate aim*. *While the driving force was the question of improving health and safety, it also served to encourage better communications over a diverse, multi-national workforce.*"

Harassment

63. It was submitted that the claimant had failed to demonstrate that she had been harassed as defined in the 2010 Act. It was submitted that the claimant only gave "limited evidence" about this: that she had been spoken to on more than one occasion about breaching the Rule.

64. The respondent's representative went on in his submission to say this:

> "*It cannot be correct to class as unwanted conduct a mild request to adhere to a Policy that posed no material disadvantage to the claimant. It is not enough for an individual to merely state that an alleged act violated their dignity. The Tribunal should consider whether the alleged unwanted conduct would have had that effect. Given the evidence supplied by the claimant as to what was actually said to her in respect of speaking English at the workplace I would respectfully suggest that the words used cannot reasonably be construed as to amount to conduct equating to harassment as detailed above.*"

65. Accordingly, the respondent's representative invited the Tribunal to dismiss the claim.

Conclusion

Direct discrimination

66. Section 13 of the 2010 Act is in the following terms:-

> "***13 Direct Discrimination***
>
> *(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.*"

67. Race, of course, was the "*protected characteristic"* on which the claimant relied in the present case. In particular, she claimed she had been discriminated against because of her Polish nationality and *"nationality"* is one of the characteristics included in the definition of *"race"* in s. 9 (1) of the 2010 Act.

68. In order to claim direct discrimination, therefore, the claimant must have been treated *less favourably* than a comparator who was in the same, or not materially different, circumstances as the claimant.

69. In the present case the comparator was a hypothetical one, namely an individual in the same employment as the claimant who was not Polish and did not have Polish as her first language.

70. However, it is an essential component of the definition of direct discrimination that the individual who complains has been treated "*less favourably"* by his or her employer than the employer would treat others. The difficulty for the claimant with this complaint was that although instructed by her employer to only speak English in the factory and although Polish was her "first language" she could speak fluent English. She was not treated less favourably, therefore, than her hypothetical comparator.

71. We were of the unanimous view, therefore, that this complaint was not well-founded.

72. We should perhaps add, for the sake of completeness, that we were not persuaded, as the claimant's solicitor maintained, that the claimant was dismissed for breaching the Rule.

73. While clearly the claimant's apparent disregard of the Rule was a source of irritation for the respondent and while we had reservations about the validity of all of the other allegations of misconduct which were levelled against the claimant as part of the disciplinary process, we were not satisfied that breaching the Rule was the sole or only reason for her dismissal.

74. Ms Ritchie gave evidence, in a surprisingly open manner, that one of the main reasons for the dismissal was that the claimant was approaching the time when she would have had two years' continuous employment with the respondent for qualifying service for an unfair dismissal complaint and we believe that this was a major factor in the respondent's decision to dismiss the claimant.

Indirect discrimination

75. Section 19 of the 2010 Act is in the following terms:

> "***19 Indirect discrimination***
>
> *(1) A person (A) discriminates against another (B) if (A) applies to (B) a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of sub-section (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) (A) applies, or would apply, it to persons with whom (B) does not share the characteristic,*
> *(b) It puts, or would put, persons with whom (B) shares the characteristic at a particular disadvantage when compared with persons with whom (B) does not share it,*
> *(c) It puts, or would put, (B) at that disadvantage, and*
> *(d) (A) cannot show it to be a proportionate means of achieving a legitimate aim."*

76. The "provision, criterion or practice" ("the PCP") in the present case was the Rule which was introduced by the respondent: an instruction to all employees in the factory to speak English.

77. That put Polish nationals in the factory at a substantial disadvantage, but only those who, unlike the claimant, could not speak fluent English.

78. We were not persuaded that the PCP was "a proportionate means of achieving a legitimate aim": we were not persuaded that there was a sound business reason for introducing the Rule. "Health and safety" was advanced by the respondent as the prime reason as the respondent had concerns about communicating clearly health and safety instructions in relation in particular to machinery which was inherently dangerous. However, in our view preventing employees in the factory from communicating in their first language was more likely to create a greater health and safety risk than reduce it. In this regard the comments of the Employment Judge in **PF Franco** were apposite:

"*…..to allow people who share a mother tongue to communicate in it is generally likely to lead to clearer communication and efficient management, and no sensible employer would try to suggest that two Polish workers should not speak in Polish between themselves. Of course it is quite different when someone who does not speak that language is also party to the conversation.*"

79. However, in any event, once again the claimant's ability to speak English fluently was relevant to this complaint. To satisfy the definition the claimant has to be "disadvantaged". We were not persuaded that the PCP put the claimant, in particular, at a disadvantage.

80. We arrived at the unanimous view, therefore, that this complaint was not well-founded.

Harassment

81. Harassment is now a free-standing cause of action. Section 26 of the 2010 Act is in the following terms:-

"***26 Harassment***

(1) A person (A) harasses another (B) if –
(a) (A) engages an unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating (Bs) dignity,
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…….

(4) In deciding whether conduct has the effect referred to in sub-section (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."

82. We found in fact that on a number of occasions the claimant was reprimanded, by Valerie Ritchie and Andrew Sutherland in particular, for speaking Polish, and that she often heard William Bruce making disparaging comments about the Polish employees in the factory. All of this caused her considerable distress. The

claimant also spoke of the *"hostility"* towards her, a *"loss of dignity"* and being made to feel like a child and eventually she was signed off with *"depression"* due to *"stress at work".*

.

83. The main problem was that practical application of the Rule was not thought through by the respondent before it was put in place and was not effectively and clearly communicated to the employees. Nor, apparently, was there any attempt to assist employees learning to speak English. The claimant was prevented from speaking her first language, her mother tongue, to other Polish employees, many of whom who could not speak English and she was put in the nonsensical position of having to speak English and having what she said translated to a Polish employee who could not speak English, through an interpreter and was then reprimanded when, on occasions, instinctively, she was heard speaking Polish. It was a quite bizarre situation and we could well understand why the claimant described it as *"comical".*

84. We were satisfied on the basis of the evidence we heard from the claimant which we considered to be credible and reliable that this conduct was "*unwanted*": we were satisfied that the conduct related to "*a relevant protected characteristic*" namely her race.

85. We were also satisfied that this violated the claimant's dignity and that this created at least a "*degrading and humiliating environment"* for the claimant.

86. In arriving at this view we had regard to the factors detailed in s.26 (4).

87. A standalone complaint of harassment does not require a comparative approach. It was not necessary for the claimant to show that another person was, or would have been treated more favourably. Instead, all the claimant needed to establish was a link between her harassment and a *"protected characteristic"* which in the present case was race. Clearly there was such a link between the harassment and the claimant's Polish nationality and "nationality" is included in the definition of race in the 2010 Act.

88. We were of the unanimous view, therefore, that the complaint of harassment was well-founded.

Compensation

89. We decided, in all the circumstances, that an award of compensation for injury to feelings was appropriate. The claimant spoke of her distress at being reprimanded in the workplace on several occasions by Ms Ritchie, Andrew Sutherland and William Bruce for speaking Polish. She was signed off work due to depression caused by *"stress at work"* (P40/41). This was partly due to the disciplinary action which had been taken, but also, we believe, to the distress caused by the reprimands she had been given when speaking Polish and hearing Mr Bruce's comments about Polish workers.

90. We were of the view that the appropriate award lay towards the higher end of the first band in **Vento v. Chief Constable of West Yorkshire Police [2003] IRLR 102** and that an award for injury to feelings of **£5,000** should be made.

91. Interest also falls to be applied to that award at the rate of 8%. As the alleged breach of the Rule was part of the disciplinary process, we were of the view that the award of interest should run for a period of 62 weeks from the date of dismissal on 20 June 2014 until the date of calculation, namely 27 August 2015, which amounts to which amounts to **£492**. Accordingly, the total award of compensation, inclusive of interest is **£5,492**.

Employment Judge	**EJ N Hosie**
Dated	**14 December 2015**
Date sent to parties	**14 December 2015**