EMPLOYMENT TRIBUNALS

Claimant: Ms C Hilton-Tomlinson

Respondent: No Ordinary Designer Label Limited

Heard at: London Central (remotely by CVP)
On: 1, 2, 3, 4 and 5 November 2021 (and 15 and 16 November in Chambers remotely by MS Teams)

Before:
Employment Judge Heath
Mr G Bishop
Mr M Reuby

Representation
Claimant: In person
Respondent: Mr R Bhatt (counsel)

RESERVED JUDGMENT

The claimant's claims of direct discrimination, harassment and victimisation are not well-founded, and are dismissed.

REASONS

Introduction

1. After starting the ACAS Early Conciliation procedure on 23 November 2019 and receiving her Certificate on 2 December 2019, the claimant presented her ET1 to the tribunal on 7 March 2020. In it she claimed unfair dismissal, unlawful deduction of wages, direct race discrimination, racial harassment and victimisation. Her claims of unfair dismissal and unlawful deduction of wages were dismissed prior to the hearing, and only her claims under the Equality Act 2010 proceeded. Broadly speaking, the claimant's claims relate to the way her probationary period with the respondent was handled and subsequently not

confirmed, how her grievance (including appeal) about her treatment on probation were handled, and she complains that discriminatory comments were made at various times.

The Issues

2. A Preliminary Hearing took place in front of Employment Judge Burns on 27 January 2021. By that stage the parties had been unable to agree a List of Issues. Employment Judge Burns himself prepared a draft Schedule in advance of the hearing setting out what he saw as a fair summary of the claims for race discrimination, harassment and victimisation in the ET1. This Schedule was annexed to the Case Management Order of 27 January 2021 having been agreed by the parties at the Preliminary Hearing as representing the claims in the case.

3. On the first day of the Full Merits Hearing Employment Judge Heath shared with the parties a draft List of Issues he had prepared which were the legal issues he considered the tribunal had to decide together with the Schedule of claims. The respondent proposed minor amendments, and the amended List of Issues was agreed as being the issues which the tribunal had to decide. On the second and third days of the hearing the claimant indicated that she was pursuing some of her complaints solely as claims of harassment. On the fourth day of the hearing the claimant clarified that she was relying on all factual allegations in the Schedule as being both direct race discrimination and racial harassment, and so one further amendment was made to this List of Issues. The final List of Issues which the tribunal determined in this case is annexed to this decision.

Procedure

4. There has been something of a complex procedural history to this matter. We did not seek to enquire too deeply into these difficulties beyond what was necessary to ensure that a fair trial could happen expeditiously. Mr Bhatt set out in his Opening Note some recent difficulties, which included agreeing a List of Issues, agreeing a bundle and exchanging witness statements. On 24 September 2021 Employment Judge Norris made an Unless Order ordering the claimant to provide her witness statement by 6 October 2021. On 29 September 2021 Employment Judge Norris, in refusing the claimant's application to vary the Unless Order, directed that there was to be "*one, single, composite bundle of evidence, prepared in accordance with the Presidential Guidance and the Tribunal's previous Orders"* and that *"no separate Claimant bundle should be necessary because the Respondent's bundle should contain all the documents*".

5. At the outset of the hearing the claimant told us that she had prepared her own bundle and a witness statement that referred to page numbers in that bundle. We considered that proceeding with two different bundles would be against what Employment Judge Norris had directed, and would be a recipe for chaos. We therefore decided that we would use the 713 page bundle prepared by the respondent. The respondent had produced a copy of the claimant's witness statement which made references to the pages in this bundle, and so she was not disadvantaged.

6. The claimant produced a witness statement and gave oral evidence. For the respondent, four witnesses produced statements and all gave oral evidence. They were Mr A Crews-Orchard, Mr N Welbourn, Mrs C Harrison-Empson and Mr L Shepherd.

7. On the second day of the hearing the claimant made reference to having taken notes of a meeting on 17 June 2019. We asked her to disclose these to the respondent, which she did, and these were added to the bundle.

8. The respondent has made two applications for costs which (again, broadly speaking) concern the manner in which the claimant has approached case preparation. The first application, made on 25 January 2021 was adjourned generally by Employment Judge Burns on 27 January 2021. The second application was made 25 October 2021. The respondent had originally hoped that there would be sufficient time to consider this application at this hearing, but there has not been sufficient time, and this application is adjourned generally. We will say no more about these applications for costs, and we leave it to the respondents to write to the tribunal to indicate if they wish to pursue them.

The Facts

9. The respondent, trading as Ted Baker, is a well-known lifestyle brand in the UK offering clothing, watches, fragrance, and other accessories under the Ted Baker name.

10. The claimant is a Black woman with a Caribbean background.

11. The claimant applied for the role of Virtual Merchandising (VM") Administrator sometime early 2019. She set out her employment and work experience in her CV which she provided to the respondent. This included significant experience of administrative tasks including raising purchase orders (POs), processing orders, data entry and updating spreadsheets.

12. The respondent's VM team working in the London head office (known as the Ugly Brown Building, or UBB in King's Cross, central London) consisted of Mr Nicholas Welbourn, the global visual merchandising manager, Alastair Crews-Orchard, visual merchandiser, Whitney Morgan visual merchandiser. There were additionally three team members across the EU and two further team members in North America, all of whom reported to Mr Welbourn. One of the EU team members, Polly Pearce, regularly worked in the London office. There had been a VM Administrator in post for around three years prior to early 2019. VM is the presentation and positioning of stock in stores in shop windows and displays throughout stores, and it involves selecting and presenting products through the stores in the best way.

13. The claimant was one of about eight candidates who were shortlisted for interview for the VM Administrator role. Mr Welbourn and Mr Crews-Orchard interviewed the candidates and were very impressed with the claimant's performance at interview. She was personable, came across well and appeared to possess the skills needed for the role. She was offered the role.

14. The claimant's Statement of Particulars of Employment set out that the claimant's "*employment is subject to your satisfactory completion of a thirteen-week probationary period…The company reserves the right to extend this*

period should it be deemed necessary, at the entire discretion of the company. The company will assess and review your work performance and conduct during this time and reserves the right at any time during this period or on review of the period to terminate your employment. During your probationary period, the company or you may terminate your employment by giving one week's notice".

15. The respondent's probationary process is known as Settling In, and it sets out that the manager will conduct reviews with the staff member at four, eight and 13 weeks. At 13 weeks the probationer would either pass their probation, fail their probation or have their probation extended.

16. Pro-forma Settling In probationary review forms were used as part of the process. These forms contain:-

    16.1. Part A, which set out roles and responsibilities, with one box ("CelebraTED") for the probationer's manager to set out strengths and achievements, and a second box ("HighlighTED") for "*what's gone less well & areas of development*".

    16.2. Part B of the probationary review form ("*Walk & Talk like Ted*") is a table setting out a series of behaviours, a green, amber and red system demonstrating how well the behaviours have been demonstrated, and a box for the manager to set out brief feedback on how the probationer has demonstrated the behaviours.

    16.3. Part C contains boxes for comments on attendance and timekeeping, culture/team fit, performance overall during the period of review and an opportunity for the probationer to set out their first impressions, general feedback and comments.

    16.4. There is a final part of the form for the probationer to reflect on their probationary period and to set out their own strengths and achievements, what has gone less well, what support is required and finally an opportunity to give feedback and comments.

17. The claimant commenced employment with the respondent on 28 May 2019, the Tuesday after a bank holiday. The role was focused around the sourcing and procuring equipment and keeping track of day-to-day stock levels in communication with the respondent's warehouse team. The Administrator would need to know when orders need to be made and to communicate with suppliers about issues such as mannequins, clothing steamers and equipment to display product. The administrator is also responsible for raising purchase orders ("POs") and following up on those orders to make sure items had been delivered and paid for. The claminant's job description appeared in the bundle. Mr Welbourn, Mr Crews-Orchard and Ms Morgan's roles involved making regular visits to the respondent stores throughout the UK, whereas the Administrator role was based in the UBB in London.

18. Mr Welbourn, in conjunction with Ms Morgan and Mr Crews-Orchard, prepared an induction plan for the claimant setting out tasks and training over the course of her probation period. Over the course of the first two weeks of her induction she was largely shadowing Ms Morgan but was also allocated tasks of her own, especially during the latter half of her first week and during her second week. For example, in the second week on 4 June 2019 there is reference in her

induction to "complete top up handbag and sunglasses stands order with ACO [Mr Crews-Orchard]". As part of the claimant's induction plan she was taken to some Ted Baker stores, but her role was office-based and she did not attend stores as part of her work.

19. The field-based VM team at some point had a MS Team chat channel to discuss VM updates. It would not have included administrative matters and there was no need to include the claimant in this channel. She sat among the team and they discussed matters face-to-face.

20. The claimant first day at work was 28 May 2019 on this day Mr Welbourn was in Hamburg and not in the office. He returned to the office on Thursday, 30 May 2019 and was in the office the following morning before taking leave that afternoon. Mr Welbourn, however, was receiving feedback from Mr Crews-Orchard and Ms Morgan about how the claimant had been doing in her first few days of employment.

21. Mr Crews-Orchard and Ms Morgan more or less straight away into the claimant's employment became concerned about her performance level and whether she had the experience required for the positions. Also in her first few days she had been late for work. Mr Crews-Orchard was concerned about how she dealt with emails, her experience with Excel, her knowledge and skill levels with Microsoft applications and setting up meetings. He observed that the claimant was not taking notes at the beginning of her employment.

22. Each Monday morning the VM team would attempt to hold a weekly team meeting. When the claimant's predecessor had been in post the practice was adopted of the Administrator would start the meeting by outlining what their work for the week would be and then would leave the meeting. It was felt that it was not the best use of the Administrators time to attend the rest of the meeting which did not concern admin matters. This practice continued when the claimant was in employment.

23. Notetaking was to become something of a feature in this case. We heard evidence from Mr Welbourn and Mr Crews-Orchard, which we accept, that accurate notetaking was a crucial part of the administrator's role. A key part of the role involves sourcing and procuring equipment, keeping track of day-to-day stock levels and communicating with the warehouse and other parts of the respondent organsiation. It was a job with "a lot of moving parts" and a considerable amount of information needed to be noted down and followed up. From the start of her employment Mr Crews-Orchard, Ms Morgan and Mr Welbourn observed the claimant on a number of occasions without a notepad with her. On other occasions they saw her with a notepad but not taking notes when she should have been. At times they also observed her taking notes but subsequently not dealing with tasks, which led them to believe that any notes she may have been taking were inadequate.

24. Mr Welbourn felt concerned enough at the claimant's performance from what he had heard from his colleagues and himself observed in two half days at the end of her first week to seek HR advice on how to address matters. He wished to flag up his concerns about the claimant's performance with a view to working with her towards making improvements. He felt that having an early meeting with the claimant, rather than waiting until the four-week period under the Settling In process, would give the claimant a better opportunity to receive

feedback on her perceived shortcomings so that she could address them and stand a better chance of succeeding in her probation. The advice he received from Ms Riggs was to carry out a Settling In meeting at two weeks. He emailed the claimant on 3 June 2019 attaching a Settling In Review form.

25. Mr Welbourn was in the office for most of the claimant's second week of employment. During this week he had more of an opportunity to observe the claimant's performance. He had concerns about how she was carrying out basic administrative duties and her attention to detail (for example, on 6 June 2019 she emailed the wrong supplier). He also believed that she did not appear to be engaged in meetings.

26. The respondent's offices in the UBB do not contain many meeting rooms, and what few there are get booked quickly. It is therefore very common for workplace meetings to be held in public spaces, such as the coffee shop or restaurant area in the UBB.

27. On 7 June 2019 Mr Welbourn held what he assumed to be the first review meeting under the Settling In process with the claimant. He held this meeting in the coffee shop area. He had always held meetings with team members, including appraisal meetings, with staff in the coffee shop.

28. Mr Welbourn discussed with the claimant how she had been performing in her role. He commented that there had been some achievements, in that she had improved her timekeeping in her second week, that she had spent time with team members gathering more information about the respondent and how the team operated, had met some of the Special Projects team and that she was "*asking more questions about her tasks and now taking more notes*". The reference to "tasks" here would suggest that she actually was carrying out tasks in the first two weeks of her employment, and not simply shadowing Ms Morgan as was her evidence to us.

29. Mr Welbourn highlighted three areas in the HighlighTED section.

> *"Organisation: I need to see better more concise notetaking and accuracy in tasks. Follow-up on all email correspondence and follow through to completion on all tasks.*
>
> *Proactivity: I would like to see Charmaine taking ownership, initiative over the tasks in her induction plan, showing what she has fully completed and identifying what she feels she can complete next.*
>
> *Efficiency: All tasks and duties need to be completed more quickly and with better accuracy. Taking care to ensure all messages are sent to the correct people/company/supplier and contain the same people who were on the original thread".*

30. In part B all behaviours were marked Red "rarely demonstrates.

31. In part C Mr Welbourn commented on the claimant's improved timekeeping and attendance, that she would be able to spend time to get to know the wider team better and commented on her overall performance "*I feel we are off to a slower start within this initial two week period, as there are a lot more detailed tasks to come that need absolute accuracy and efficiency in completing*".

32. In the part of the form for the claimants to fill out she indicated under HighlighTED "*Remembering VM products and where you purchase from. Remembering what each supplier do".* Her general impressions were *"Alot to remember and learn. As well as lerning my job and learning about VM*" (sic).

33. Mr Welbourn during this meeting covered the areas in which she highlighted on the settling in form, including notetaking, accuracy and attention to detail.

34. The respondent, and Mr Welbourn in particular, recognise that a formal Settling In meeting should not have been held after two weeks, but rather after four weeks. However, Mr Welbourn's intention was to bring shortcomings to the claimant's attention at an early stage to give her a better chance to address them. The most appropriate way to have dealt with things would have been to have scheduled an informal 1-1 meeting to deal with exactly the same issues that he dealt with on 7 June 2019. However, this was not the advice that he had received from HR at the time.

35. On 14 June 2019 Mr Welbourn emailed the claimant proposing a "catch up on Monday morning" to run through the claimant's 7 June 2019 Settling In form, which he attached. He forwarded this email and attachment to Ms Morgan shortly afterwards. The reason he did so was because the claimant had spent a fair amount of time with Ms Morgan during her first couple of weeks with the respondent. She had been the claimant's "buddy" and would have a good overview of how the claimant had been performing, having been involved in her induction process and having given her a lot of day-to-day support. Mr Welbourn forwarded this email and the Settling In form to gain Ms Morgan's perspective and to give her the opportunity perhaps of correcting points, and not to embarrass or shame the claimant.

36. Mr Welbourn had a meeting with the claimant on 17 June 2019, again in the coffee shop. This was not a Settling In meeting under the probationary process, but an informal meeting between a manager and a probationer whom he had concerns about. He wished to discuss how she had been progressing against the points which had been discussed two weeks previously. The informal nature of this meeting is suggested by the email setting it up on 14 June 2019 which referred to a "catch up".

37. The claimant's evidence in her witness statement is that Mr Welbourn conducted the meeting in a loud, aggressive and condescending manner. She says "*the meeting was contrived and planned for which me Morgan and Alistair Crews-Orchard to hear the meeting*". In her witness statement she sets out what appear to be direct quotes from Mr Welbourn and herself from that meeting. These include "*It takes you bloody half the day to complete a task*". In cross-examination the claimant mentioned that she had taken minutes of this meeting, but had not disclosed them. She disclosed three handwritten pages the following day which were a series of the exact quotes which she had put in her witness statement.

38. While we accept that attending a meeting in a public area where one's shortcomings were being raised is not an easy experience, we do not accept that Mr Welbourn somehow staged this meeting to embarrass the claimant in front of her colleagues. We do not accept that he conducted the meeting in anything other than a professional manner. While Mr Welbourn has no specific memory of this meeting we consider it improbable, from an assessment of the

evidence as a whole (including our concerns about the claimant's credibility), that he would have acted in the manner suggested by the claimant.

39. The claimant asserts in her witness statement that on 20 June 2019 an Asian man with a strong Indian accident was talking loudly to members of staff in the coffee shop. She said that Nicholas Welbourn said *"I cannot even understand him what he is saying"* and *"Hahahaha who talking like that?*" At page 83 of the bundle, page 5 of the claimants Schedule of Loss, *"On the 20th June 2019, Nicholas told me was having trouble with his mobile phone, he then rang his network provider at his desk. He expressed to me, he was speaking to a person from the customer service team, he stated he was talking to a male with a strong accent and sounded African. He stated the following about the individual "I cannot even understand him what he is saying" this matter was not investigated by the Respondent*."

40. When she was cross-examined about this apparent discrepancy, the claimant said that she had produced the first three pages of her schedule of loss, but could not account for pages 3 to 12 of that document, which was headed "Schedule of Loss - Explained guideline". The claimant could not account for who had produced this part of the Schedule of Loss or why they should add something to her document. It is to be noted that pages 3 to 12 Schedule of Loss are written in the first person singular and clearly set out aspects of the claimant's case.

41. We struggled to follow the claimant's reasoning, and we find that she disavowed pages 3 to 12 of her Schedule of Loss when she realised that an inconsistency in her account was being put to her. We do not accept the claimant's evidence, and we find that she was not telling the truth to the tribunal about this document.

42. Mr Welbourn cannot recall making such a comment, and Mr Crews-Orchard cannot remember overhearing such. Given the inconsistency in the claimant's evidence and our view on her credibility in relation to her explanations about the inconsistency we do not find that this comment was made by Mr Welbourn.

43. On 28 June 2019 Mr Welbourn held the four-week Settling In review meeting with the claimant. Again this was in the coffee shop. We considered that the Settling In probationary review form for this meeting accurately summarises what was covered in that meeting.

44. Mr Welbourn had seen some progress in the past two weeks as the claimant had started to settle into her role and gain a better understanding of what is required. He commented that she was settling into the team and had a stronger understanding of her role and how VM works and some of the processes.

45. However, in "HighlighTED" he set out further concerns with organisation, proactivity, and efficiency. Under organisation he again set out problems with notetaking and suggested the claimant uses clearer more structured notes to plan her own time and agenda. He highlighted that following up and replying to emails was an issue, and the claimant should take ownership of replies and offering solutions to queries. He also set out the planning and timing duties was an issue. Under proactivity, Mr Welbourn set out that the claimant should take further ownership of her role, duties and tasks and plan her own time and identify follow-up. Under efficiency, attention to detail was again flagged up.

Investigating information and asking for help before replying to emails, spreadsheets and email content were considered to be issues of concern. He pointed out "*the VM Admin role requires self starting, self motivation and initiative. I feel these could all be improved upon and should be areas of focus in the coming four weeks*".

46. In the part B section the claimant was scored two Reds and five ambers ("Sometimes demonstrates"). Brief comments were made largely about proactivity and taking ownership of her role.

47. In part C the claimant's attendance and timekeeping was unproblematic and it was commented that she was settling well into the team and the company. As a general comment Mr Welbourn said "*Charmaine has started to pick up on some areas of the VM Admin role, and is integrating well into the team. I would have hoped to have seen some areas picked up sooner, and hope to see some further improvement in the coming weeks. 8 week review 2nd August. It is key to Charmaine success to see the above action points taken on board and acted upon by this next review*".

48. In the part the claimant filled out she set out a number of achievements but under HighlighTED set out "*Forgetting small details of task. Forgetting names of staff. Trying to remember different VM equipment".* Her general feedback was *"I have received more support since last review and tasks have been explained more detailed. Still learning and feel I have learnt a lot in the last four weeks, hope to continue to grow*".

49. The claimant alleges that on 28 June 2019 she overheard Mr Welbourn "randomly state" about a colleague, Mr Costa a Spanish man who lived in Paris, "*His talking English is good, but his written English is terrible*". The claimant says Mr Costa speaks and writes English well and that Mr Welbourn continually criticises "*non-British Caucasian people*". Mr Welbourn cannot recall making this comment about Mr Costa, but says that he has colleagues throughout the world and may have conversations at times about other people's communication skills in the context of how to communicate with them. The claimant has presented this incident without context. We consider that if such a comment had been made by Mr Welbourn, it would have been in the context of a discussion about someone's ability to communicate and not an expression of disrespect. Similarly, the claimant alleges that Mr Welbourn made the comment about an Asian woman "*Oh yeah her English is very good considering*". Again, it is presented without context and Mr Welbourn cannot remember it. We accept that possibly a similar observation about a colleague's communications skills was made by Mr Welbourn.

50. On 2 July 2019 the claimant emailed Ms Riggs to ask for a confidential meeting to discuss how she was getting on at the company. The meeting took place and a printed copy of this email, with what we assume are Ms Riggs' handwritten notes on it, appears in the bundle. We find that these handwritten notes, brief as they are, reflect what was discussed between the claimant and Ms Riggs. We find that the claimant indicated to Ms Riggs that she *"likes Ted so far - finds work difficult - slow to pick up*". She also "*needs clarification of process*". The claimant showed Ms Riggs her Settling in documents and Ms Riggs reviewed them with her commenting "*all looked fine – balanced…. Agrees with areas Nic [Welbourn] has flagged committed to improvement*". "*Nic not confident she will pass – KR explained Nick needs to manage X activations and that probation*

two-way process. KR confirmed emp subject to satisfactory completion of Settling In – contract".

51. On 9 July 2019 it is alleged by the claimant that Mr Welbourn made fun of an Indian man's accent and food commenting "*His English is terrible*" and asking "*Whose food is smelling like that?*" Mr Welbourn denied saying such things. This is a situation where there was another conflict of evidence between the claimant and Mr Welbourn and no additional evidence or context to help resolve this conflict. We consider Mr Welbourn a more reliable witness, for reasons we deal with later, and find that he did not say such things.

52. On 15 July 2019 the claimant says that there was a conversation with Mr Welbourn about a colleague called Mr Dowdye who was coming to help the team with purchase orders. The claimant says she asked what Mr Dowdye looked like and Mr Welbourn responded that he was a "Big Black guy". The claimant says that Mr Dowdye is not particularly big, and that Mr Welbourn was adopting a negative racial stereotype which presents Black men as intimidating, and often gives unwarranted emphasis on their size. Mr Welbourn's evidence is that he did have a conversation with the claimant and was asked to describe colleague a colleague, Mr McLarty, who is Black and 6'6" tall. He accepts that he said that Mr McLarty was a "Big Black guy" but that this was merely descriptive.

53. We find that the claimant specifically asked what a colleague looked like (she made this clear in her subsequent grievance appeal hearing) and that Mr Welbourn gave what he felt was unproblematic description of the person he assumed they were talking about.

54. On 23 July 2019 Ms Morgan and Mr Crews-Orchard were organising a Caribbean themed party. The question of decorations arose and the claimant alleges that Mr Welbourn suggested getting "*Rasta hats with a big spliff*" as decorations. The claimant's case, which we accept, is that associating Caribbean culture with cannabis is a disrespectful negative stereotype. The claimant accepted in cross examination that she is a person who is very prepared to complain when she perceives herself to have been wronged. The claimant did not complain about this alleged comment in a detailed 22 page grievance which she was to make in just over a week from this alleged incident. We find that if this comment had been made it is highly likely that the claimant would have complained about it while it was fresh in her mind. She only made the complaint when she appealed against the grievance findings. On balance we find that this comment was not made.

55. On 2 August 2019 the claimant held an eight week review under the Settling In process. Unknown to Mr Welbourn the claimant was covertly recording this meeting. The full transcript of this meeting was in the bundle.

56. From the transcript it is clear that early in the meeting Mr Welbourn raised with the claimant that she potentially could fail her probation, but that there were five weeks to go. Mr Welbourn gave a number of examples of how the claimant's performance was not to the required standard. It is right to point out, from reading the transcript, that the claimant interrupted Mr Welbourn on a number of occasions as he was trying to set out examples.

57. Mr Welbourn raised the claimant's inefficiency with emails and described how she had asked questions about emails rather than reading through the chain to find relevant information.

58. He described an instance with a bank application form where all of the information was on a form and Mr Welbourn had to read through all of the information and tells the claimant where to put it on a document. Mr Welbourn had to deal with this issue three times.

59. He described an issue on a "basic spreadsheet" where information had to be copied from one form onto another. Mr Welbourn had to go through the spreadsheet four times to get it right, taking an inordinate amount of time.

60. He took issue with the claimant's notetaking again and specifically asked her to read out her notes from Monday, the day when the important Monday morning meeting takes place. The claimant commented "*I don't really make notes Monday in the day as I know what I'm going to do*". She then read out notes not from the previous Monday but the one before that.

61. He gave examples of basic administrative issues. He gave an example of typing information rather than copying and pasting it into a form. He gave another example of manually adding things up in Excel (when the application can do that automatically).

62. In broader terms Mr Welbourn commented that the claimant appeared not to have the right type of administrative experience. He said that these issues were happening on a day-to-day basis. He had concerns over basic administrative tasks which the claimant was not performing to standard. He commented that the claimant's 13 week review was due on 23 August but said "*but I have to be honest with you at this moment in time it is looking like you won't be passing the probation*". He also confirmed to the claimant that he had had concerns about the her performance after two weeks, but had sought to support her.

63. A Settling In probationary review form was filled in which is broadly consistent with the issues raised in the transcript of the meeting.

64. On 8 August 2019, in what would have been week 11 of the claimant's 13 week induction, Mr Welbourn wrote to Ms Riggs saying that the claimant had been defensive during the eight week review meeting and showed little desire to improve. He said the last week had proved challenging and "*I now feel like we are counting down to the 13 week review. Her comment to me last week was "well, you've made up your mind", so I feel like she has mentally passed the point of no return. I wanted to ask if it would be at all possible to terminate her probation ahead of the 23rd? I just wanted to have had the conversation. Let me know your thoughts*".

65. On 15 August 2019 the claimant submitted a grievance. It was 22 pages long and divided into seven sections, "*1. Misuse of the Ted Baker review process. 2 Contradictory and Undermining Line Managerial Operations. 3. Non-Constructive Use of Language and Resources in Formal Probationary Reviews. 4. Catalogue of Performance and Achievement – Period of 11 Weeks. 5. Abuse of Process 6. Discriminatory Actions and Approaches Non-Compliance to the Equality Act 2010. 7 Overarching Impact of Injurious Conduct*". The claimant set out at various points in this letter under the heading *"Here is the transcript of some of the notes I made after the meeting*" what

appear to be verbatim transcripts of what was said during her 2 August 2019 meeting with Mr Welbourn. One of these passages is five pages long.

66. On 15 August 2019 Mrs Harrison-Empson, who was then the Head of Global Retail Operations was asked by HR to investigate the grievance. Mrs Harrison-Empson had a face-to-face conversation with Ms Riggs to discuss her suitability to hear the grievance. Mrs Harrison-Empson did not have any line management responsibility for Mr Welbourn, but the VM team had recently come under the responsibility of the Retail team. Mrs Harrison-Empson would have been the person Mr Welbourn would have come to if he needed support during the transition. No such contact had occurred between them. Mr Welbourn and Mrs Harrison-Empson had a professional working relationship and had occasion to speak with each other about professional matters but did not have a social or personal relationship. It was therefore decided that Mrs Harrison-Empson was a suitable person to hear the grievance.

67. At 9.38am on Friday 16 August 2019 the claimant was invited to a grievance investigation meeting on 20 August 2019 to be chaired by Mrs Harrison-Empson. She was told of her right to be accompanied by a colleague or trade union representative. The claimant initially intended to be accompanied by a trade union rep, but after an exchange of emails with HR elected to attend alone.

68. On 20 August 2019 the claimant attended a grievance meeting chaired by Mrs Harrison-Empson with Ms Monk from HR taking notes. The meeting lasted around two hours. The claimant covertly recorded this meeting. At one point in the meeting Mrs Harrison-Empson observed that the transcript of the claimant's reviews, presumably those set out in her grievance letter, were incredibly detailed and asked how the claimant was able to document such detail. The following exchange took place:

> *CHE (Mrs Harrison-Empson): How are you able to document such thorough and detailed?*
>
> *CH (Claimant): Because I took notes and I also remember a lot of things that was said, so that is exactly why.*
>
> *CHE: Right, okay, do you use a recording device?*
>
> *CH: No*
>
> *CHE: No, okay so the transcript is based from your notes?*
>
> *CH: Yes*
>
> *CHE: In your transcript from your review 2 August, are you able to share those notes so I can look at them?*
>
> *CH: Erm, I think I discard them because I put it in this letter, I might have, you know what I think I got it at home.*
>
> *CHE: They are useful for me if you did that would be great.*
>
> *CH: Yes, I probably got it at home I can send it to you.*

69. Before the hearing Mrs Harrison-Empson had read the claimant's Settling In documentation and read the grievance letter. At the start of the meeting she explained the purpose of the meeting would be to work through the grievance letter and give the claimant a chance to provide any further information. During the course of the grievance hearing she went through the seven areas of the claimant's grievance in turn, asking the claimant questions and giving her the opportunity to reply and add any information she wished.

70. The claimant's 13 week review meeting under the Settling in process was due to take place on 27 August 2019, but on 22 August 2019 the review was postponed while the grievance was investigated.

71. On 27 August 2019 Mrs Harrison-Empson conducted a grievance investigation meeting with Mr Welbourn with Ms Monk again acting as notetaker. This meeting took around two hours as Mrs Harrison-Empson took Mr Welbourn through each of the claimant seven points grievance.

72. Mrs Harrison-Empson considered that she wished to hear from Ms Morgan and Mr Crews-Orchard to gain their perspectives. She had realised that the VM team was a small one and she wished to establish whether other team members had witnessed any unfair treatment and to get a feel for the relationships in the team. Mrs Harrison-Empson did not provide anyone with a copy of the claimant's grievance letter. She explained to those she spoke to during the course of the grievance investigation that all matters had to be kept confidential and not discussed with anyone else. On 3 September 2019 Mrs Harrison-Empson conducted grievance investigation meetings with both Mr Crews-Orchard and Ms Morgan. She conducted these meetings separately.

73. On 4 September 2019 Mr Welbourn and Mr Crews-Orchard visited the respondent's warehouse in Derby. It had originally been on the claimant's induction plan to visit Derby on 3 July 2019. The primary purpose of this visit was to meet the warehouse team. However, the warehouse team had visited London prior to 3 July 2019 and the claimant's visit to Derby did not take place. It was within the claimant's job description to make quarterly visits to the Derby warehouse, but Mr Welbourn and Mr Crews-Orchard were more involved in the operational elements of VM, and administrative support was not needed and the extra cost of the claimant attending on 4 September 2019 was not warranted at this point.

74. On 6 September 2019 Mrs Harrison-Empson sent her grievance outcome letter to the claimant. The latter is seven pages long and Mrs Harrison-Empson addressed the claimant seven grievance headings in turn.

75. Mrs Harrison-Empson found that the claimant had not been set up to fail and had been given an induction plan, a clear job description, support from Mr Welbourn and the rest of the team, and regular feedback. However, she observed that where possible Settling In reviews should take place in the meeting room or private space, and if this was not possible, off-site.

76. Mrs Harrison-Empson found that Mr Welbourn did not undermine the claimant by responding to her emails, but that he would sometimes "chip in" to support the claimant by showing what reply was expected or when prompt response was needed.

77. The claimant's complaint about non-constructive use of language in the probationary review reviews was not upheld. Mrs Harrison-Empson concluded that there was a balance of feedback both in terms of areas of development and positive feedback.

78. Mrs Harrison-Empson did not uphold the claimant's complaint in respect of her performance in probation. She did not consider it was unreasonable of Mr Welbourn to identify areas of improvement, and she made reference to the example of her inefficient work using a stock tracker.

79. Mrs Harrison-Empson found that Mr Welbourn had paid an invoice using his company credit card contrary to established procedure. However, she found that there were valid business critical reasons for this exception to the rule. Mr Welbourn was reminded that where possible purchase orders should be raised and that if this was not possible Director approval should be sought. She also found no evidence that Mr Welbourn had "refused" to upload probationary documents properly, but he was reminded that this should be done in a timely fashion.

80. Mrs Harrison-Empson found that Mr Welbourn had used the word "Black" to describe a team member and had not used the term with the intention of being derogatory. However, she acknowledged the need to reinforce what types of communication can take place within the workplace. She explained that Mr Welbourn would benefit from training and coaching about this.

81. Mrs Harrison-Empson did not find that the claimant had been excluded from Monday meetings, had not done any more than glanced over at her screen for the purposes of training and support, had not read through the notebook and had not bullied her.

82. In conclusion, Mrs Harrison-Empson set out that she did not find discrimination in relation to race or gender. As a positive step forward she suggested a mediation meeting to be arranged to support the claimant's ongoing relationship with Mr Welbourn. She also mentioned that an organisation called the Retail Trust might be able to offer some support and information. She informed the claimant of her right to appeal under the respondent's grievance procedure.

83. On 10 September 2019 claimant was absent through sickness. 7 AM that morning she texted Mr Welbourn to say that she had been having chest pains and pains in her spine, and would be going to hospital. Mr Welbourn hoped she was okay and asked to be kept updated. At 4:03 PM he texted her again to ask how she was getting on and hoped she was feeling okay. At 8:23 PM the claimant set out that she had gone to hospital where she had been told her lungs were inflamed and she was put on strong painkillers and said she was having difficulty breathing and would not be in the following day. The following morning Mr Welbourn responded that this was not a problem and asked for an update by the end of the day. The claimant said she would be seeing a lung specialist the following day. Mr Welbourn thanked her for letting him know and asked her to drop him a note the following day. The following day he asked if she could bring a copy of the hospital appointment when she was back in for the respondent's records. The claimant responded that she could take a picture of medical letters. Mr Welbourn said this was fine and that she could send it over or bring it in. The claimant texted that she had been signed off work until

Monday and sent a photograph of her fit note, and a further picture of an x-ray appointment. Mr Welbourn thanked her for letting him know. He later texted to say that he would complete a return to work interview the following Monday and made aware that as a probationer she would not be entitled the company sick pay.

84. Around the beginning of September Mr Welbourn began to prepare for the claimant's 13 week review. In early September he asked Mr Crews-Orchard and Ms Morgan to inform him of examples of poor performance over the last couple of months. They prepared a list of eight examples relating to mistakes with booking meetings, booking careers, mistakes and emails, failing to order a steamer, sending inaccurate missing information to a colleague, mistakes in emails, mistakes in VM equipment order processes and an instance where the claimant had used an incorrect shipping docket.

85. On 11 September 2019 Mr Welbourn prepared paperwork for a 13 week review. He set out examples of poor performance in 21 bullet points.

86. On 16 September 2019 the claimant returned to work. The same day she submitted an appeal against the grievance outcome. Her eight-page grievance appeal letter sets out the seven headings he had used in her grievance letter, and added a further heading "*breach of confidentiality*".

87. Mr Shepherd, the respondent's Chief Information Officer and one of its statutory directors, was appointed to hear the appeal. On 25 September 2019 the claimant wrote to HR setting out that she had found evidence that Mr Shepherd was in a "*close personal and professional relationship to the Grievance Investigator*". She asked that the appeal officer be changed. She later clarified that Mrs Harrison-Empson and Mr Shepherd worked together.

88. On 8 October 2019 Ms Raeburn, the Retail Operations Coordinator, sent out an email to a large number of recipients, including the claimant and Mr Welbourn, asking for any points anyone wish to be included in a weekly publication to be sent by 2 PM that afternoon. One minute later Mr Welbourn forwarded this email to the claimant and asked if she was able to capture the last seven days post headlines from the blog and send them over to Ms Raeburn. The claimant replied "*Yes, no worries, this is what I've been doing every week. I only send it to her directly*". In the claimant's witness statement she gives this as an example of being "bombarded" with emails from Mr Welbourn.

89. On 16 October 2019 the claimant attended a grievance appeal meeting with Mr Shepherd and Ms Tzouvanni of human resources. Before the meeting Mr Shepherd reviewed the claimant's original grievance outcome letter and her appeal letter. He formed the view that the complaints were predominantly about Mr Welbourn, together with some complaints about how the original grievance had been handled. He determined that he needed to interview the claimant and Mr Welbourn. He also had a discussion with Mrs Harrison-Empson.

90. Mr Shepherd started the meeting by confirming its purpose and asking if there was any reason why Ms Tzouvanni or he should not be present. The claimant said there was not. Mr Shepherd stated that no recordings of the meeting should be made without prior consent, and confirmed that the respondent was

not recording the meeting. He enquired about the claimant's health as he had noticed that she had been off sick.

91. This was a lengthy meeting in which Mr Shepherd went through some general questions before focusing on the eight points of appeal which he addressed in turn. Mr Shepherd asked numerous questions about all the grounds of appeal, and gave the claimant the opportunity to respond and put forward any information she chose.

92. At one point the claimant referred to Mrs Harrison-Empson asking the claimant whether she had recorded Mr Welbourn and her having responded "no". She went on to allege that Mrs Harrison-Empson was showing bias by the fact that he had gone on to ask Mr Welbourn whether he believed he was being recorded. Mr Shepherd went on to ask why the claimant believed Mrs Harrison-Empson would ask such a question and the claimant responded "*because of the detail of the transcript*". Mr Shepherd asked whether she was taking notes during the meeting of 2 August 2019 and she responded "*I was taking notes yeah as well as, I am very good at remembering conversation, we have had the same conversation so he has more or less written the same points so you are hardly going to forget what has been said anyway*". He went on to confirm that she had written the transcript in her notebook, some at the meeting and the rest at home.

93. On 31 October 2019 Mr Shepherd had an appeal investigation meeting with Mr Welbourn, again with Ms Tzouvanni present. Mr Shepherd took Mr Welbourn through all of the claimant's grounds of appeal, asking numerous questions in the course of a 40-minute meeting.

94. On 4 November 2019 Mr Shepherd's grievance appeal outcome letter was sent to the claimant. Mr Shepherd dealt with the grounds of appeal in turn.

    94.1. Mr Shepherd was sympathetic to the claimant's criticism of the probation process, saying the process should have been made clear to her, and that the 7 June 2019 meeting should have been a 121 meeting rather than a Settling In review meeting. Nonetheless, he pointed out the intent was good to see how the claimant was settling in. He indicated that Mr Welbourn accepted that such a meeting should not be held in an open environment, and that he would be given training on the process. Overall Mr Shepherd found that Mr Welbourn tried to meet the claimant and provide feedback on her progress.

    94.2. Mr Shepherd did not find the claimant had been undermined by Mr Welbourn responding to emails on her behalf, or in any other way.

    94.3. Mr Shepherd said that Mr Welbourn had given examples and details of areas to improve upon.

    94.4. Mr Shepherd found that Mr Welbourn had briefed the claimant on work and expected it to be done quickly without too much conversation. He set out that in future if Mr Welbourn had a brief it should be sent by email to be clear and avoid confusion.

    94.5. Mr Shepherd found that Mr Welbourn had used the company credit card for exceptional reason.

94.6. Mr Shepherd acknowledged that a colleague had been described by Mr Welbourn as a "big Black guy". He pointed out that training was being rolled out on discrimination and equality, which Mr Welbourn had received. It would further be ensured that Mr Welbourn receive feedback that language in the office is extremely important and that he may not have intended to offend but that was how his language was received.

94.7. Mr Shepherd acknowledged that the atmosphere in the team had become uncomfortable but that Mr Welbourn had not intended to intimidate the claimant. Mr Shepherd outlined that there was no requirement for the claimant to go to Derby as she had met the warehouse team, but this should have been explained to the claimant.

94.8. Mr Shepherd concluded that the claimant's name had been presented during the investigation and that too much information was shared. However, the intent was to gather as much evidence possible and team members would have needed to provide feedback to the Mr Welbourn support the claimant development.

95. Overall, Mr Shepherd did not uphold the claimant's appeal and found there was no evidence of discriminatory behaviour due to race. However, he found that there was behaviour which could be perceived to have excluded the claimant, and Mr Welbourn would be encouraged to promote a more inclusive approach in future. He also found that there were some procedural improvements which could be made, and this would be passed on to the HR team. His finding was that the points at issue were the result of the claimant's "*misinterpretation of language, management style and communication approach*".

96. Mr Shepherd went on to propose the claimant engaged in a mediation process to support their working relationship. He also took up a point made by the claimant during the grievance appeal meeting that she would be interested in moving to another department. He shared several administrative roles which were open within the respondent organisation, and he pointed her towards the Ted Baker website where there were further recruitment opportunities. If the claimant was interested in any of the roles, Mr Shepherd offered to introduce the claimant to the hiring manager. He pointed out that she would need to be assessed against the criteria of the role. He said that if he did not hear from the claimant within the next seven days he would assume she wished to stay within her current role. He concluded by saying that his decision was intended to facilitate a positive outcome to resolve the matter and offered to talk to her about his decision if she wished.

97. On 11 November 2019 the claimant emailed Mr Shepherd setting out three options for her continued employment with the respondent. The first was remaining in her current role with confirmation that she was no longer on probation with a change seating plan. The next option was starting a new role, having had a "taster day", but not being subject to a probation period. The final option was improving the current working environment, which involved mediation, further training for the claimant and for Mr Welbourn and further meetings with Mr Shepherd every six months. The claimant said her preference would be to remain in her current role providing changes were made.

98. Mr Shepherd did not consider that it would be fair to ignore the probationary period, as Mr Welbourn had genuine concerns about the claimant's

performance which needed to be addressed. It would also not be fair to assign her a new role without probation. Mr Shepherd was concerned that the claimant's preference was to stay in her current role, as he considered that the claimant's grievance had indicated the strong possibility of a relationship breakdown. The question of performance management was also critical. Mr Shepherd himself thought that a fresh start for the claimant would have been the best approach, but it was not his decision to make. On 14 November 2019 Mr Shepherd emailed the claimant to say that as she was remaining in her current role he needed to hand matters back to Mr Welbourn to pick up on the probation questions he had raised.

99. On 22 November 2019 Mr Welbourn invited the claimant to an end of probationary review meeting, making clear her right to be accompanied. Mr Welbourn had taken HR advice on the content of his meeting notes, and was advised be specific about examples of poor performance.

100. On 27 November the claimant submitted a grievance alleging that her contract had been breached because her probation had not been extended. On 28th of November she submitted a grievance against Mr Shepherd.

101. On 29th November Mr Welbourn held the probation review meeting with the claimant. Also in attendance was Ms Love from human resources.

102. The claimant again covertly recorded this meeting. The meeting started with a dispute about whether the claimant's probation had been extended. Mr Welbourn went on to deal with the substance of the probation. The transcript suggests there was a certain amount of tension in this meeting, with the claimant continually pressing for examples of poor performance, and when such were provided, such as stock process not being managed, she sought to lay the blame elsewhere. She pressed for an example of inefficiencies and Mr Welbourn referred to information within a purchase order the previous day being incorrect. The claimant sought to deflect blame here. Mr Welbourn and Ms Love assured the claimant that she would get further detail within the letter. Mr Welbourn said that the claimant was not meeting the required standard and that he had made the decision to terminate the claimant employment. The claimant responded that Mr Welbourn had made his decision two weeks into the role. The claimant was given one week's notice but was told she would be paid for a week in lieu of notice.

103. On 29 November 2019 the claimant wrote to the chief executive asking for reinstatement into her role. She followed this up with a further letter on 3 December 2019 indicating she would seek injunctive relief in the courts for breach of contract.

104. On 4 December 2019 Mr Welbourn wrote to the claimant confirming the termination of her contract of employment. The letter first dealt with the extension of the probationary period. It went on to detail how on 2 August 2019 the claimant was informed of concerns about her performance following previous reviews and that improvement needed to be seen in three specific areas of her work. He set out that there had not been sufficient improvement since that meeting and gave recent examples of poor performance relating to reiterating information which has already been passed on to her, items becoming out of stock, errors with purchase orders, errors with new store opening costs, and errors in orders. He set out support he had provided in the

induction period with ongoing feedback and coaching from the team and from other colleagues. He concluded that she had not met the required standard for the role and had not passed a probationary period.

105. As set out at the beginning of these Reasons, the claimant commenced Early Conciliation with ACAS and presented her claim to the tribunal.

The Law

Employment provisions

106. Part 5 of the Equality Act 2010 provides as follows: -

Section 39(2)

An employer (A) must not discriminate against an employee of A's (B)—

…

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 39(4)

An employer (A) must not victimise an employee of A's (B)—

…

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 40(1)

An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's

Direct discrimination

107. In respect of direct discrimination, Section 13(1) of the Equality Act provides as follows:

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.

108. Section 23(1) of the Equality Act deals with comparisons, and provides:-

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

109. The burden of proof provisions (also applicable to harassment and victimisation) are set out in section 136 Equality Act 2010:-

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

110. When considering direct discrimination, the tribunal must examine the "reason why" the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (*Amnesty International v Ahmed [2009] IRLR 884*). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an "effective cause" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372*).

111. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the Equality Act 2010) were given by the Court of Appeal in *Igen v Wong [2005] IRLR 258*:

> *"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*
>
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) 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 sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) 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. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

112. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council [2006] ICR 1519*). The Supreme Court has observed that provisions "*will require careful attention where there is room for doubt as to the facts*

necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other" (Hewage v Grampion Health Board *[2012] UKSC 37*).

113. The Court of Appeal has emphasised that "*The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"* (Madarassy v Nomura International plc *[2007] IRLR 246*). "Something more" is needed for the burden to shift. Unreasonable behaviour without more is insufficient, though if it is unexplained then that might suffice (Bahl v Law Society *[2003] IRLR 640*).

Harassment

114. Section 26(1) Equality Act 2010 provides: -

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

115. Section 26(4) Equality Act 2010 sets out factors which tribunals must take into account: -

> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> > *(a)the perception of B;*
> >
> > *(b)the other circumstances of the case;*
> >
> > *(c)whether it is reasonable for the conduct to have that effect.*

116. Section 212 Equality Act 2010 provides that conduct amounting to harassment cannot also be direct discrimination.

117. The Court of Appeal in Richmond Pharmacology v Dhaliwal *[2009] IRLR 336* stated:-

> *"an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so….We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or*

transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

118. The Court of Appeal again emphasised that tribunals must not cheapen the significance of the words of section 26 Equality Act 2010 as "*they are an important control to prevent trivial acts causing minor upsets being caught up by the concept of harassment*" (*Land Registry v Grant [2011] ICR 1390*).

119. A single incident may be sufficient to create an "environment" for the purposes of section 26, provided the effects are of a sufficient duration (*Weeks v Newham College of Further Education UKEAT 0630/11*).

Victimisation

120. Section 27 Equality Act deals with victimisation and provides: -

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

121. A person suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.* An unjustified sense of grievance is not sufficient (*Barclays Bank plc v Kapur (No. 2) [1995] IRLR 87* and *EHRC Employment Code*, paragraphs 9.8 and 9.9).

Limitation

122. Section 123 Equality Act 2010 governs time limits and provides: -

(1)… proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

123. Tribunals are to have regard to section 33 Limitation Act 1980 when considering whether it would be just and equitable to extend time (*British Coal Corporation v Keeble [1997] IRLR 336*). This provides a broad discretion for the court to extend time having regard to the prejudice which each party would suffer as a result of the decision to be made, but is not to be applied as a checklist (*Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*). Factors the tribunal may consider might be:-

a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

c. the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;

d. the conduct of the claimant over the same period;

e. the length of time by which the application is out of time;

f. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;

g. the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

124. The burden is upon the claimant to persuade the tribunal that it is just and equitable to extend time, and there is no presumption that the tribunal should extend time (*Robertson v Bexley Community Centre [2003] IRLR 434*).

Conclusions

Credibility

125. As is clear from our findings of fact, the claimant lied to Mrs Harrison-Empson and to Mr Shepherd about the fact that she had covertly recorded meetings. It is right to say that she was also covertly recording the meetings with those individuals while she was telling those lies.

126. The claimant also sought to persuade us that she had not prepared or had anything to do with, and effectively knew nothing about pages 4 to 12 of her Schedule of Loss [81-90]. She accepted pages 1 to 3 of this document were prepared by her, but could not explain why the rest of the document has sequential numbering, and she could not explain who had produced pages 3 onwards of the document or how this part had come into existence. This was despite the fact that page 3 onwards clearly goes into considerable detail of her financial position and is expressed in the first person singular. It is notable that the claimant sought to distance herself from this part of the document when inconsistencies between it and other ways in which she was putting her case were put to her by Mr Bhatt. We consider that the claimant was not telling the truth to the tribunal when she disavowed page 3 onwards of the document, and that she did so because she realised that some of the contents were inconsistent with the case she was running.

127. We have concerns about the provenance of notes of 17 June 2019 meeting that the claimant produced during the course of the hearing, but we make no findings about these matters, and this has not affected our assessment of her credibility.

128. These matters have inevitably had some impact on how we assess the claimant's credibility in relation to disputed events. However, we did not take the view that just because the claimant has proved unreliable on the above matters that this meant we rejected her evidence wholesale. We carefully assessed the evidence in respect of each disputed event.

129. Additionally, the claimant did not specifically put to any of the witnesses that the reason for any of their actions was because of race or complaints about discrimination. We do not consider that this fatally undermines her case, as Mr Bhatt suggests, and we bear in mind that the claimant was a litigant in person with no in depth knowledge on how to present a case.

Issue 1 – Being excluded

Team events

130. As we have found, the reason why the claimant did not attend the whole of the team meetings was that it would not have been a good use of her time. We accept the evidence of the respondent's witnesses that the claimant's predecessor would update the team at the beginning of the Monday team meeting about administrative matters and leave. This was the format that was used when the claimant came into post. The claimant was not excluded because of her race. Her non-attendance at part of the meeting did not relate to her race. Her non-attendance at part of the meeting after her grievance had nothing to do with her having made a discrimination complaint. We do not uphold her claims of direct discrimination, harassment or victimisation.

Store trips

131. The claimant attended some stores as part of her induction plan, but her role was office-based and there was no need for her to attend stores. The reason why she did not attend stores in August and September was because that was not part of her work. It was not because of her race nor related to her race and not because she had complained of discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Trips to Derby

132. It was part of the claimant's induction plan to attend Derby warehouse. The main purpose was to meet the staff. However, the Derby staff visited London in the first few weeks of the claimant's induction, and the primary reason for the trip to Derby therefore fell away. We accept that there would have been a need in due course for the claimant to visit Derby had she been confirmed in post. However, during her six months with the respondent there was no real need for her to visit. The fact that she did not visit had nothing to do with her race and nothing to do with the fact that she made a complaint of discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Team chat

133. We have found that there was a VM-related MS Team channel for the field-based VM team. The fact that the claimant was not on this channel was not because or or related to her race or the fact that she had made a discrimination complaint. It was a channel for the field-based team and any discussion with the claimant could be done face-to-face. We do not uphold her claims of direct discrimination, harassment or victimisation.

<u>Issue 2 – 4 probationary reviews</u>

134. We have not found that the claimant was subjected to 4 probationary review meetings. The meeting of 17 June 2019 was an informal catch-up meeting. It is right to say that holding a two-week Settling In meeting on 7 June 2019 was not in accordance with the Settling In procedure. The reason why Mr Welbourn held a meeting at all was that he was concerned with the claimant's performance, based on what his other team members were telling him and what he himself observed. The reason why he used the Settling In paperwork for this meeting was that human resources had advised him to. The claimant in cross examination accepted that it is right that a manager should bring performance concerns to a worker's attention to allow them address concerns. The claimant relies on Lisa Smith as a comparator who did not have a two-week probation. We had no evidence from the claimant about her circumstances, Mr Welbourn did not manage Ms Smith and knew nothing of her circumstances. On the evidence we have had we are satisfied that Mr Welbourn held the meetings he did with the claimant, and in the manner he did, was for genuine probation and performance-related reasons. This was nothing to do with race. We do not uphold her claims of direct discrimination, harassment or victimisation.

<u>Issue 3 - not conducting reviews fairly</u>

135. An induction process was set up in order to induct the claimant into the respondent's employment. An induction plan was created which contained an

element of shadowing, carrying out tasks and training. Within the process regular reviews were held which focused on both achievements and development areas and also gave the claimant an opportunity to feed in her input. On our findings, Mr Welbourn held legitimate concerns about the claimant's performance during the course of her probation. He flagged these up with the claimant during the process and on an ad hoc basis. We do not accept the claimant's suggestion that she was not told what the problem was. It is clear on the face of the Settling In documentation that problems with notetaking, attention to detail, organisation and other issues were flagged up with her. On some of the Settling In forms she accepted these issues.

136. We do not accept the claimant's suggestion that the respondent failed to provide additional training or an improvement plan. Her induction plan and the Settling In process itself was the support mechanism. An improvement plan would be more appropriate if a poor performance procedure had been initiated after she had been confirmed in post. Furthermore, it is difficult to see that training for reading emails attentively or filling out spreadsheets would have been appropriate to somebody in the role of an admin officer.

137. We do not accept the reviews were not carried out properly or fairly or that the claimant was not told about the problem or not provided additional support. The reason why the respondent carried out the probation process the way it did had nothing to do with the claimant's race, and it did not relate to her race nor to the fact that she made a complaint. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 4 – input from Ms Morgan

138. We have found that the reason Mr Welbourn sought input from Ms Morgan into the review process on or around 14 June 2019 was legitimately to get her perspective. She had been the claimant's "buddy" and was someone who the claimant had worked closely with. It is understandable that Mr Welbourn would, prior to the meeting on 17 June 2019 at which he was discussing performance concerns, loop Ms Morgan in to check whether the concerns were accurate. The reason why he did this was nothing to do with the claimant's race, and it was not related to it. We do not uphold her claims of direct discrimination or harassment.

Issue 5 – 17 June 2019 meeting in public place

139. The claimant's discomfort in having her manager discuss poor performance with her in a public place is entirely understandable. This was recognised in the grievance and grievance appeals and communicated to Mr Welbourn. However, the reason why he carried out meetings in the coffee shop was that the respondent did not have many meeting room and it was something of custom and practice to carry out meetings, including all appraisals, in the coffee shop area. It was not because of the claimant's race. It did not relate to her race. We do not uphold her claims of direct discrimination or harassment

Issue 6 - excessive emails and requiring claimant to send third-party emails to Mr Welbourn

140. The claimant gave as the only example of this aspect of her claim the email Mr Welbourn forwarded from Ms Raeburn on 8 October 2019. We prefer the evidence of Mr Welbourn that he did not send excessive emails, and when

he required to be copied into third-party emails, this was an appropriate process for someone in their probationary period who was struggling with some aspects of the role. We do not find that Mr Welbourn's actions were because of the claimant's race or related to it or because she had raised a complaint of discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 7 - Mr Welbourn reading the claimant's notes and criticising them

141. We accept Mr Welbourn's evidence that he had never read the claimant's notes. We accept that he had legitimate concerns that the claimant was often not taking notes when she should have been, and such notes as she was taking appeared to be inadequate based on her not following up correctly on certain aspects of her work. His concerns, to some extent, were vindicated when he asked her to read out the notes during the 2 August 2019 meeting when she read out the wrong notes. Any criticism he may have articulated about the notes was due to the legitimate concerns he had, and was not because of or related to her race and was nothing to do with her raising a complaint of discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 8 - texts on sick leave.

142. Our impression of the text exchange was that Mr Welbourn may have been a little sceptical about the claimant's absence, it coming so soon after the 2 August 2019 where he had been clear that failure of probation was a distinct possibility without significant improvement. His actions may have been very slightly on the zealous side, but not overbearing. We do not consider his approach was because of the claimant's race. It did not relate to her race and also was not because she had made a grievance. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 9 - Mrs Harrison-Empson determining the claimant's grievance

143. Mrs Harrison-Empson makes clear in her witness statement that she specifically addressed with Ms Riggs from HR her suitability to hear the grievance, given VM had just come under her management remit. She is clear that she had nothing more than a professional relationship with Mr Welbourn, and this no doubt led HR to greenlight Mrs Harrison-Empson's continued involvement in the grievance. Ms Riggs no longer works for the respondent did not give evidence, but there is simply no evidence that Mrs Harrison-Empson's appointment to hear the grievance was because of the claimant's race or related to it or was because she had complained about discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issues 10 and 11 – Mrs Harrison-Empson not investigating the grievance properly and ignoring the claimant's points

144. The claimant put in a 22-page grievance. Mrs Harrison-Empson read the grievance, invited the claimant to a meeting which lasted some two hours during which she asked the claimant numerous questions and gave her every opportunity to put forward her concerns. As a result of what she heard, she took the decision to take evidence from Mr Welbourn, Mr Crews-Orchard and Ms Morgan. It is also right to say that in her grievance decision Mrs Harrison-Empson did not entirely absolve Mr Welbourn from all criticism.

145. The claimant's cross examination of Mrs Harrison-Empson largely took the form of going to a small detail within the transcript of the two hour grievance meeting with herself and asking why Mrs Harrison-Empson had not dealt with that point. It is entirely understandable that in the course of a 22 page grievance and two hour-long grievance hearing that not every single matter cropping up will be dealt with in the outcome letter. The claimant has not pointed to any omission that was significant.

146. A reasonable reading of the grievance letter, the grievance transcript and the grievance outcome shows that Mrs Harrison-Empson went through each of the claimant's complaints in turn and went carefully through the evidence. The transcript makes clear she posed numerous pertinent questions. Mrs Harrison-Empson gave the claimant every opportunity of articulating her complaints, she thoroughly investigated those complaints and made appropriate reasonable findings based on the evidence she heard. It is not that she ignored the claimant's points, she merely did not uphold most of them.

147. The way that Mrs Harrison-Empson went about investigating the grievance and the way she approached the evidence was not because of the claimant's race and not related to. Also was not because the claimant had made a complaint of discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 12 - Mrs Harrison-Empson telling Ms Morgan and Mr Crews-Orchard of the grievance

148. The reason why Mrs Harrison-Empson told Ms Morgan and Mr Crews-Orchard of the grievance was that she wanted to gain a better understanding of the issues the claimant's grievance raised. She did not tell them that the claimant had raised a grievance against Mr Welbourn, though it would be extremely surprising if they had not put two and two together. Mrs Harrison-Empson's approach was entirely understandable; the two individuals had worked closely with the claimant and with Mr Welbourn and would have been well placed to comment on the allegations the claimant raised. The claimant's race had nothing to do with Mrs Harrison-Empson's decision to involve the colleagues, and was not related to it. It also was not because the claimant had raised discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 13 and 14 - Mr Shepherd ignoring the claimant's appeal points and not responding more positively to her relocation plus

149. Mr Shepherd, like Mrs Harrison-Empson, approached the grievance in a thorough and painstaking manner. He read the claimant's grievance, and at her grievance appeal meeting took her through each of her appeal points in turn, asking numerous questions and giving her the opportunity to elaborate on her concerns. His outcome letter covers the appeal points, and like Mrs Harrison Empson, is sympathetic to some of the issues the claimant raised. It is not that he ignored the claimant's points, but simply that he did not uphold all of them. The reason why he determined the grievance the way he did was not because of claimant's race and was not related to it. It was also nothing to do with the fact that she had raised discrimination.

150. In terms of Mr Shepherd's suggestions for the outcome of the grievance, we do not consider that he was not positive to the claimant's requests. He offered her mediation with Mr Welbourn if she chose to remain in his team, and he pointed her towards some potentially suitable vacancies and offered to introduce her to the recruiting managers. What he could not do, and we consider that this was entirely reasonable, was that he could not simply dispense with the probationary period on behalf of these recruiting managers. The claimant had not passed her probation in the role she had been recruited to, and her manager had identified significant performance concerns. Simply to disregard all of this and slot her into a confirmed permanent role would not have been within his gift, nor would it have been appropriate. Mr Shepherd's approach in this regard was not because of the claimant's race, was not related to it and was not because the claimant had complained discrimination. It is difficult to see how anybody else in these circumstances would have been treated any differently. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 15 - Dismissing the claimant

151. The reason why Mr Welbourn dismissed the claimant was because he considered that she had not shown sufficient improvement to pass her probationary period. He had identified concerns with her performance more or less from the moment she had started. These concerns were brought to her attention in an ad hoc manner, in a 121 on 17 June 2019, and formally in the Settling In process. It is clear from Mr Crews-Orchard's evidence and from the document prepared by Mr Crews-Orchard and Ms Morgan in September 2019, that Mr Welbourn was not alone in his concerns about the claimant's performance.

152. In early September, after the claimant's grievance (which had caused the Settling In process to be postponed) was decided, Mr Welbourn prepared a list of the claimant's achievements and areas of concern. It is clear that he still had major concerns in a number of areas (accuracy, attention to detail, errors in correspondence, not checking information, not completing documents, not completing tasks, errors in orders etc.).

153. The Settling In procedure did not continue while the claimant appealed her grievance, but Mr Welbourn did not see improvement in late November 2019, and on 29 November 2019 attempted to outline his concerns to the claimant. The transcript of this meeting suggests that it was a difficult one, but, as we have found, the claimant was given recent examples of poor performance. These were elaborated on in the dismissal letter.

154. As we have found, the reason why Mr Welbourn dismissed the claimant was because of these concerns and was not to do with, or related to, the claimant's race or the fact of her complaint of discrimination. We do not uphold her claims of direct discrimination, harassment or victimisation.

Issue 16 - Comments by Mr Welbourn

"Big Black guy" comment

155. We accept the claimant's evidence that there is a negative stereotype held by some that Black men are intimidating, and an unwarranted focus on a Black man's size could play into this stereotype. However, it is clear from the

transcript of the grievance appeal meeting that the claimant's own case is that she had asked what a particular colleague looked like. We accept Mr Welbourn's evidence that he was describing a colleague who was a Black man, and who was around 6'6" tall. We accept that Mr Welbourn was giving what he believed was a straightforward description of the colleague. He was not treating the claimant less favourably that he would have treated anyone else, and, as Mr Bhatt submits, there is no suggestion of associative discrimination. We do not uphold the complaint of direct race discrimination.

156. This comment was conduct related to race. We can accept that it was unwanted conduct. We accept that Mr Welbourn's intent was not to violate the claimant's dignity or create an intimidating, hostile etc envirnonment for her. Also, we do not find that the conduct had that effect. We have regard to the claimant's perceptions, and we do not dismiss them. As we have indicated, we accept her evidence about stereotyping. However, we have regard also to the fact that it was a transitory comment; a description of a colleague which was accurate, if brief. We look to the guidance in *Grant* and *Dhaliwal* in finding that it does not objectively reach the level of gravity to be considered harassment. We do not uphold the claimant's claim of harassment.

Rasta hats and spliffs

157. Our findings are that this comment was not made. We do not uphold any claims in respect of this comment.

"I cannot even understand him what is he saying?"

158. We have found that this comment was not made, and we do not uphold any claim in respect of it.

"His English is terrible" and "*Whose food is smelling like that?"*

159. We have found that Mr Welbourn did not say this and we do not uphold any claim in respect of it.

"*Oh yeah her English is very good considering*" and *"His talking English is good but his written English is terrible*".

160. We find that there is a possibility that Mr Welbourn may have made an observation about a colleague's ability to communicate, rather than any disrespectful comment. If such a comment was made, it was not because of the claimant's race, or because she had made a complaint about race discrimination. It was not related to race, but to the ability to speak English well. If that does bear any relation to race, then it I would not be reasonable to regard it as amounting to harassment having regard to the claimant's perception and all the relevant circumstances. We do not uphold any complaints in respect of this comment.

<u>Comparators</u>

161. The claimant made reference to various comparators. It is not entirely clear what use she made of them, but we will just make some brief conclusions in respect of them.

Lisa Smith

162. We heard no evidence about Lisa Smith, who was a white woman. There was an assertion that she did not have a two week probationary review. We have made findings and conclusions about the reason why the claimant had a meeting after two weeks.

Alex Russell

163. The evidence the claimant gave in her witness statement was that Alex Russell, the previous administrator, had raised issues about purchase orders that were not paid by the Finance team. There is an assertion in the Schedule of Claims that she mishandled purchase orders. Mr Welbourn's evidence was that she did not mishandle purchase orders, and this was not challenged. It does not appear that the claimant is comparing like with like. Even if her assertion is accepted at its highest, there still remains the fact that she herself was dismissed because her probation was not confirmed in circumstances where a variety of concerns were raised, in addition to problems with purchase orders.

Nicholas Welbourn

164. The assertion here is that the grievance process found fault with Mr Welbourn and he was not dismissed but rather offered additional training, whereas the claimant was found to be at fault and was dismissed.

165. Again, the claimant is not comparing like with like. There were findings during the grievance process that Mr Welbourn could have handled the Settling In process better (as he admitted in his grievance interview) and needed support in this area. He had also paid an invoice with the credit card in an emergency and it was appropriate to remind him of proper protocol here. It was also appropriate to remind him (without a finding of fault) that care needs to be taken in using language.

166. On the other hand, the claimant was in her probationary period, and her manager had consistently been identifying areas of concern with her work. Mr Welbourn not being dismissed and offered training does not shed any light on the way the claimant was treated.

Overall conclusion

167. In the circumstances we do not uphold any of the claimant's claims under any of the three heads. That being the case, we do not need to go on to consider issues in relation to time.

_____

Employment Judge **Heath**

28 November 2021_____

Date

Case No: 2201446/2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29/11/2021

FOR EMPLOYMENT TRIBUNALS

ANNEXE

LIST OF ISSUES

1. Direct race discrimination (Equality Act 2010 section 13)

1.1 The claimant is a Black woman with a Caribbean background

1.2 Did the respondent do the following things:

1.2.1 [See schedule below]

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says s/he was treated worse than [*see below schedule of comparators*] and additionally relies on hypothetical comparators.

1.4 If so, was it because of race?

1.5 Did the respondent's treatment amount to a detriment?

2. Harassment related to race (Equality Act 2010 section 26)[1]

2.1 Did the respondent do the following things:

2.1.1 [See schedule below]

2.2 If so, was that unwanted conduct?

2.3 Did it relate to race?

[1] The Claims for direct discrimination and harassment are in the alternative as where an act constitutes harassment it is not a detriment (see s212(1) Equality Act 2010).

2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the claimant do a protected act as follows:

3.1.1 The protected act is the grievance dated 15/8/2019]?

3.2 Did the respondent do the following things:

3.2.1 [*All acts in schedule after 15/8/19]*

3.3 By doing so, did it subject the claimant to detriment?

3.4 If so, was it because the claimant did a protected act?

3.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

4. Time limits

4.1 The discrimination and victimisation complaints, other than the claim relating to dismissal (for which time has been extended), were not made within the time limit in section 123 of the Equality Act 2010?. The Tribunal will decide:

4.1.1 Was there conduct extending over a period?

4.1.2 If so, were the claims made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

4.1.3 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

4.1.3.1 Why were the complaints not made to the Tribunal in time?

4.1.3.2 In any event, is it just and equitable in all the circumstances to extend time?

Schedule

Direct Race Discrimination and/or Harassment on the Grounds of race

The Claimant relies on the following alleged matters as less favourable treatment because of her race for purposes of her direct claim and/or as unwanted conduct related to race for purposes of her harassment claim:

1. Being excluded from team events namely

• In-store trips for example to Ted Baker Regent Street in August and September 2019 that Nicholas and other colleagues went on

• Trips to XPO logistics and its Derby warehouse

• Team group chat on Microsoft teams

2. Being subjected by Nicholas Welbourn ("Nicholas") to 4 probationary review meetings on 7th June 17th June, 28th June and 2nd August 2019

3. Nicholas not conducting the reviews properly by not fairly assessing the Claimant, not telling the Claimant what the problem was and not providing additional training or an improvement plan

4. Nicholas obtaining input from Whitney Morgan into the review process on or about 14/6/2019

5. Nicholas conducting the 17 June 2019 review meeting in a public open-plan coffee shop in view of other staff observing the proceedings

6. Nicholas sending the Claimant excessive emails and requiring the Claimant to send him emails she had sent to third parties.

7. Nicholas reading the Claimant's notes and being overly critical of them

8. While the Claimant was on sick leave 10-14/9/2019, Nicholas sending 7 texts to the Claimant asking about her condition and when she would return

9. Clare Harrison-Empson being allowed to determine the Claimant's grievance dated 15/8/2019 about Nicholas, despite her having a close relationship with Nicholas.

10. Clare not investigating the grievance properly

11. Clare ignoring the Claimant's points.

12. Clare telling the Claimants co-workers Whitney and Alastair that the Claimant had raised a grievance against Nicholas

13. Leon Shepherd in determining the Claimant's appeal against the grievance outcome, (on or about 16/10 2019) ignoring the Claimant's points again,

14. Leon Shepherd not responding more positively to the Claimant's request that she be relocated to another team.

15. Dismissing the Claimant on 29/11/2019

16. Comments by Nicholas Welbourn

- Describing a staff member who works at the Respondent a "big black guy" – 15 July 2019.

- "We should get a big Rasta hat with a big spliff" - 23 July 2019 at a Caribbean themed party.

- "I cannot even understand him what he is saying" – 20 June 2019.

- "His English is terrible" and "whose food is smelling like that?" – 9 July 2019, referring to "Asian partners of the Respondent".

- "Oh yeah her English is very good considering" – 20 June 2019, referring to an Asian female.

17. Comment by Alastair Crews; "His talking English is good but his written English is terrible" – 28 June 2019, referring to a colleague working in Paris.

Note ; For purposes of her direct race discrimination claim the Claimant relies on the following actual comparators

Lisa Smith – white woman - started a few months before Claimant but never had a 2 week probationary review whereas the Claimant did on 7th June

Alex Russell a white woman. – because she mishandled purchase orders and was not dismissed, whereas the Claimant was dismissed following criticism of the way she was handling purchase orders

Nicholas Welbourn a white male - because he was found at fault during the grievance process and offered additional training but the Claimant was not offered additional training and dismissed

Nicholas Welbourn and Alistair Orchard-Crews – both white males - taken to Derby warehouse whereas Claimant was not despite it being her job to check the stock levels

Otherwise she relies on hypothetical comparators

Victimisation claim

The protected act is the grievance dated 15/8/2019

The claimed detriments are any and all of the above acts/omissions which took place after 15/8/2019