Case No: 2200854/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss W Xie	**v**	E'Quipe Japan Limited

Heard at: Central London Employment Tribunal On: 14 July 2023
Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimant – In person
Respondent – Mr K Wilson, Counsel

RESERVED JUDGMENT – PRELIMNARY HEARING

1. The Claimant's claims of unfair dismissal, indirect discrimination, harassment and victimisation are dismissed on withdrawal.

2. The Claimant's claim of direct race discrimination stands no reasonable prospect of success and is dismissed.

3. The claim has therefore been dismissed in its entirety. No order is made against the Respondent or any third party regarding the production of the CCTV footage of 22 October 2022.

REASONS

Preliminary Hearing

1. This Preliminary Hearing ("PH") was held in public following a private Preliminary Hearing (Case Management) ("PHCM") conducted by Employment Judge Stewart on 31 March 2023. EJ Stewart listed the PH to consider strike out and/or deposit applications by the Respondent and then to deal with any case management orders that were necessary once the full scope of the claim had been established.

PHCM 31 March 2023

2. At the PHCM, the parties had been represented as they were before me, i.e. by the Claimant in person and by Mr Wilson for the Respondent.

3. The Claimant withdrew her claim of unfair dismissal because she did not have the necessary two years' service (it does not appear that claim was

dismissed on withdrawal and so it has been done in the judgment above). The Claimant had identified the following claims that were still being pursued and she was given time to take professional advice before this PH:

a. Indirect discrimination (race) contrary to section 19 Equality Act 2010 ("EqA");
b. Victimisation (section 27 EqA); and
c. Failure to take a duty of care.

4. However, EJ Stewart observed that some of the complaints pursued by the Claimant as indirect discrimination or victimisation might be better categorised as "direct" discrimination. She ordered the Claimant to say by 2 June 2023 what alleged acts of race discrimination she complains of and on what legal basis. The Respondent was to serve an amended response (if so advised) by 16 June 2023 and to confirm if they pursued applications and if so, what applications they pursued. At the same time, the Respondent was to prepare an updated list of issues and to say whether it was prepared to take part in Judicial Mediation, the Claimant having already said that she was.

5. The Claimant delayed until 8 June 2023 in sending through the information required but the Respondent was nonetheless able to prepare amended grounds of resistance and a revised list of issues in time for the PH.

Conduct of the PH

6. At the PH we discussed the claims that the Claimant pursues. The Claimant had set in the particulars out a number of complaints which the Respondent had identified as being direct discrimination or in the alternative harassment. I explained to the Claimant that the complaints did not appear to be "related to" a protected characteristic – in this case, race - in any way, which is something required for a harassment claim to be made out. The Claimant accordingly moved one complaint from the "harassment" section to direct discrimination and withdrew all the complaints of harassment. This meant that only claims of direct race discrimination fell to be considered by me at the PH.

7. I heard submissions from the parties. I also heard from the Claimant about her means, so that if I decided to make a deposit order, I could take them into account. I would also consider making a third party order for CCTV footage if necessary.

8. The PH had been listed for three hours, but did not start until 14.00. We finished the submissions at 16.20 and I indicated to the parties that there was insufficient time for me to decide the preliminary issues that afternoon, and I reserved my decision.

Background to the case

9. The following is taken from the parties' pleaded cases and what was said by the Claimant during the PH. I have reminded myself that for the purposes of considering the Respondent's applications, I am not hearing, much less making findings on, the evidence. Where there is a central core of disputed fact in relation to any element of the complaint, I have taken the Claimant's

case at its highest (I return to this point below).

10. For those reasons, the following paragraphs are not intended to be definitive findings of fact that could only be reached following a full hearing, but I give the background necessary to inform the decisions that I need to reach in relation to the Respondents' applications.

The Parties

11. The Respondent describes itself as a luxury cosmetics company trading under brand names Suqqu and Athletia. It has counters selling its products direct to the public in large department stores, including Harrods, Selfridges and Liberty.

12. At the relevant time, it is common ground that the Claimant, who describes herself as Chinese, was an undergraduate student at university. She was engaged as a Beauty Consultant on the Respondent's counter in Harrods, from 4 March 2022. The Claimant was on a zero-hours contract, working two or three shifts a week, mainly at weekends. She received training, including on the Respondent's products and on a facial massage technique called Gankin.

13. The Respondent requires all staff to pass tests after a probation period of six months. The Claimant was dismissed with effect from 5 December 2022, ostensibly because she had failed the end of probation tests (including the Gankin massage) in August 2022 and again at the beginning of December 2022.

Incident on 22 October 2022

14. On 28 October 2022, the Respondent received a complaint known as a Letter of Concern ("Letter") from Harrods. The Letter alleged that a Harrods manager had received a complaint from a customer on 22 October 2022, alleging that the Claimant had given poor service and shown a lack of respect; there had been an argument between the Claimant, the Harrods manager and the customer following which the Claimant had refused to serve the customer, so the Harrods manager did so instead.

15. It is the Respondent's case (which the Claimant does not challenge) that a Letter of Concern is intended to signify that there has been conduct or behaviour which does not conform to Harrods' expectations. If an individual receives three such Letters in a rolling 12-month period, they may have their credentials to work within Harrods withdrawn. The Respondent had never previously received a Letter in nine years of trading within Harrods. On any view, this was therefore a serious matter.

16. The Claimant's version of events of 22 October 2022 alleges that three female customers of Arabic appearance came to the counter around 18.30 when the Claimant was scheduled to start her rest break. The Claimant says she told a colleague, Fernando, that the customers would want testers after trying on the products she had brought at their request. Then she went for her break. When she returned at around 19.00, Fernando told her that the customers had asked for her and would return for their products. Fernando's shift finished and he left around 19.30.

17. The Claimant says that shortly after Fernando left, a group of Chinese customers approached the counter and told the Claimant some friends of theirs were coming to get some products. The group of Arabic customers returned and the Claimant asked them to wait because she was serving the Chinese customers. The Chinese customers' friends arrived and the Claimant served them first. This led to one of the Arabic customers accusing the Claimant of being rude because they were waiting.

18. It appears the situation became heated. The Claimant refused to serve the Arabic customers, who agreed that the Claimant should call a manager. The Chinese customers left without making a purchase. A Harrods manager, Analia, walked past. The Claimant told her what had happened and that she was refusing to serve the Arabic customers. She maintained that refusal, by her own admission, but Analia insisted. The Claimant says that one of the Arabic customers said something insulting and made a rude gesture suggesting that the Claimant was stupid and/or mad.

19. This incident is the subject of CCTV footage which was retained by Harrods. In light of the findings and conclusions below, I do not consider it necessary for the footage to be produced.

Complaints

20. The Claimant says she spoke to the Respondent's account manager on her counter, Ms Ramanauskaite, on 24 October 2022. Ms Ramanauskaite had heard about the incident and the Claimant complained about the customer's conduct towards her. On 31 October 2022, the Claimant also complained to the Respondent's Area Manager Ms Isca about the incident of 22 October 2022.

21. On the same date, the Respondent received two further complaints about the Claimant's conduct (rudeness towards a customer or customers), this time on 29 October 2022.

Shift cancellation

22. On 1 November 2022, the Claimant was informed that her shifts for November had been cancelled. She was told that they had been given to contracted staff but later discovered that in fact agency staff, including another zero-hours worker, were working them.

23. The rota issued at the end of November also showed that the Claimant would have no shifts in December.

Meeting on 9 November 2022

24. On 9 November 2022, the Claimant had a meeting with Ms Isca about the incident on 22 October 2022. The Claimant says that Ms Isca blamed her for taking a tea break and said that if she had not done so, the incident would not have happened. Ms Isca refused to step in to raise a complaint to Harrods on behalf of the Claimant about the customer's conduct. The Claimant says this was a failure in the Respondent's duty of care.

25. The Respondent says that at this meeting, the Claimant said that she was unable to work any shifts for the time being as a result of changes to her university schedule.

Training and testing

26. The Claimant had been given feedback in August 2022 after she failed her tests. The Respondent says that she postponed the retakes because of the changes to her university schedule referred to above. She received further Gankin training from the Respondent's trainer, Ms Begum, in the middle of November 2022, and again was given written feedback.

27. The Claimant re-did the tests for Gankin and product knowledge on 1 December 2022. The Claimant says that Ms Begum informed her that she had failed the Gankin test but could still pass if she passed her product knowledge test. However, on 5 December, the Claimant was told she had also failed that test and, consequently, her probation.

28. The Respondent says that in fact although the Claimant carried out the steps of the Gankin massage in the correct order in the December re-take (something she had got wrong in a previous test) she got some of the product in Ms Begum's mouth and the massage was "not comfortable".

Issues in the case

29. The Claimant says that she was treated less favourably than a person who did not share her nationality would have been treated in not materially different circumstances by:

    a. Ms Isca removing the Claimant's November shifts on 1 November 2022;
    b. Ms Isca not allowing the Claimant to take a tea break;
    c. Ms Isca refusing to help the Claimant make a complaint to Harrods about the incident on 22 October 2022;
    d. Ms Isca not allocating the Claimant any shifts in December 2022;
    e. Ms Isca and Ms Begum failing the Claimant in her Gankin test;
    f. Ms Isca and Ms Begum failing the Claimant in her product knowledge test, resulting in the Claimant's dismissal.

30. In the particulars produced following the PHCM with EJ Stewart, the Claimant had sought to make out the claim by saying that she believed Ms Isca's conduct was direct discrimination against her because she is Chinese and the customers involved in the incident on 22 October were Arabic. She relied on the fact that Harrods is owned by the Qatar Investment Authority, which in turn is owned by the state of Qatar, i.e. it is Arab-owned.

31. I explained at the PH that such a claim would face very significant challenges because all the Claimant appeared to allege was a different in status and a difference in treatment. Without even considering what the Respondent's stated case in in relation to each of the above matters and taking the Claimant's case at its highest, there appeared to be nothing linking the above allegations to race (the Claimant's or anyone else's).

32. However, the Claimant then said she bases her allegations of race discrimination on what she described during the PH as an "anti-Chinese culture" as evidenced, she says, by the following:

a. In or around September 2022, Ms Ramanauskaite told another colleague that "Chinese customers are easy";
b. Ms Isca required a Chinese colleague who was leaving the Respondent to work a shift and refused to change it, which she did not do for two other colleagues, one of whom was white and the other from the Philippines, when they left;
c. When Ms Isca discussed the complaints made against the Claimant by the Arabic and Chinese customers, she spent more time on the complaint made by the Arabic customers and less on the one by Chinese customers;
d. No action was taken against a Japanese colleague against whom a complaint was made by a Chinese customer. That colleague remains employed by the Respondent and is now an Account Manager.

33. The Claimant said she did not raise these issues while she was working for the Respondent. She says that in relation to allegation b), she was told "vaguely" about this by the Chinese colleague ("Bell") in question. I do not consider that this is something on which any reliance can be placed. The Claimant does not dispute the Respondent's assertion that out of a total of 63 staff, 17 – i.e. more than a quarter - are Chinese. That percentage is very significantly above the representation of people of Chinese origin in the UK population as a whole.

Law

34. The following is a very brief summary of the provisions relevant to the preliminary issues before me, though I have considered the authorities referred to in submissions:

a. If a Tribunal considers that all or any part of the claim has no reasonable prospect of success, it may strike out that part of the claim under Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. I remind myself that it might be premature to determine prospects of success without hearing the evidence[1].
b. Where the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring the Claimant to pay deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument, having first made reasonable enquiries into their ability to pay the deposit and having regard to such information when setting the amount (Rule 39).
c. When considering the prospects of success, it must be recognised that direct evidence of a decision to discriminate is rare and the reality is often far more nuanced (*Swiggs v Nagarajan* (Nicolls LJ))[2].
d. A leading authority on the question of strike out in discrimination cases remains *Anyanwu v South Bank Students' Union*[3], which makes it clear that discrimination cases are often fact-sensitive and should, as a general rule, only be decided after hearing all the

[1] *Morgan v Royal Mencap Society UK EAT 0272/15*
[2] *[1999] IRLR 572 HL*
[3] *[2001] IRLR 305*

evidence. I must take for these purposes the Claimant's case (where based on undisputed facts) at its highest[4]. If I conclude that any part(s) of the claim cannot succeed on that basis, I may decide to strike out that part or parts.

Conclusions on strike out/deposit

35. The Claimant was ordered to send by 2 June 2023 a list in chronological order of every act of race discrimination on which she relied. She did not mention any of the examples of "anti-Chinese culture" on which she now seeks to rely. Even if the Tribunal allowed the admission of these further particulars into evidence, and even if the Tribunal was to accept that each of those incidents took place as alleged, it does not appear at all likely that they would, taken together or singly, demonstrate an anti-Chinese culture.

The Claimant's November and December shifts ((a) and (d) above)

36. It is accepted that the Respondent, through Ms Isca, did not give the Claimant any shifts in November or December 2022. I do not consider that the Claimant has any reasonable prospect of showing that this is because of race. Indeed, the Claimant herself seemed very uncertain at the PH that this was even what she was alleging. I explained to her that in a direct race discrimination claim, she is comparing herself to an actual or a hypothetical colleague who does not share her race but is in otherwise not materially different circumstances from her. She said that she believed the complaint she made "could be part of the reason" and that if she wasn't Chinese, she did not know what would have happened. Then she said that if she was not Chinese, she would have been treated "better".

37. The Claimant was on a zero-hours contract and was not working regular hours. She included in the bundle for the PH an email from Ms Isca dated 26 September 2022 saying that Ms Isca would give the Claimant "shift on Saturday only". On 1 November there was another email saying that Mr Isca had a contracted team member able to work weekends and so the Claimant's shifts were cancelled for November.

38. It was explained in the grounds of resistance that the Respondent was waiting for store approval from Harrods for a new permanent employee who was to work weekends. Although that approval had not been received before the original rota for November was circulated in which the Claimant was allocated five shifts, the rota was changed on 2 November and the Claimant was allocated no shifts. The permanent employee then did not take up the job and the Respondent covered their shifts with agency staff.

39. Even if the Respondent did not come up to proof on this aspect of its evidence, I am mindful that there is no dispute that at this point on or around 2 November 2022, the Claimant was facing a number of allegations against her from Harrods' customers including through the Letter dated 28 October 2022, and in return had made complaints of her own. I consider it very likely that the Claimant will be unable to show that a person who was not Chinese and was on a zero-hours contract in similar circumstances would have been treated more favourably than she was by being given a shift on 5 November.

[4] *Mechkarov v Citibank NV [2016] ICR 1121*

40. The Claimant has also not refuted that she told Ms Isca on 9 November that she was unavailable for shifts because of changes to her university schedule. That appears to be a complete answer to the reason why she was not allocated shifts after 9 November 2022; she made herself unavailable. It seems very unlikely that even without any confusion over the permanent employee starting, a person who was not Chinese and was in not materially different circumstances from the Claimant would have been given four further shifts in November and December.

41. In the further particulars, the Claimant had said that "*because I am Chinese and I made a complaint against Arabic customers, so she [Ms Isca] withdrew all my shifts to treat me in less favour*". She has not pointed to any reliable facts asserted in the pleaded case or indeed elsewhere that would support the allegation that Ms Isca treated her less favourably because of either the Claimant's own or the customers' race.

The Claimant not being allowed a tea break

42. The Claimant does not in fact allege that she asked to take a tea break but was refused permission. Instead, she says that Ms Isca told her at the meeting on 9 November 2023 that she should not have taken her tea break while she was serving the customers and without carrying out a full handover. The Claimant worked no further shifts before her dismissal.

43. The Claimant therefore has no prospect of success in showing that this happened at all, whether because of race or otherwise.

Refusing to help the Claimant make a complaint to Harrods

44. The allegation appears to be based on a false premise that the Respondent owed a duty of care to the Claimant to help her raise a complaint to Harrods. The Tribunal would have no jurisdiction to hear a claim for a breach of such a duty even if one existed. The Claimant has changed this to an assertion that the reason why the Respondent refused was that she is Chinese.

45. Again, the Claimant's comparator here is a person who is not Chinese against whom complaints have been made to Harrods and about whom Harrods has sent a Letter of Concern to the Respondent. The Claimant has no reasonable prospect of showing that the Respondent would have assisted such an employee in making a complaint to Harrods, to whom the Respondent is reliant for the grant of concession facilities within the store.

Failing the Claimant's Gankin and product knowledge tests ((e) and (f) above)

46. It is common ground that the Claimant had failed the tests in August, i.e. well before the incident of 22 October 2022. It is not disputed that she failed them again in December 2022. The issue is the "reason why".

47. The feedback from Ms Begum on 16 November 2022 (which the Claimant has included in her bundle for the PH) covers nine areas in which improvements are suggested. Overall, said Ms Begum, the Claimant needed to practice. She went on to say, "*I can't see that there has been much study on the techniques and each time I am not to show how to do from the beginning [sic]. I need [the Claimant] to invest on the self-practice and have advised to practice on herself as well as air practice to memorise*

steps and on someone else to get to a level of learning the whole sequence".

48. The Claimant has not suggested Ms Begum knew about the 22 October incident or that any of this feedback given by Ms Begum in November was unjustified or was negative because of race, and she has not denied that during the Gankin massage in December 2022 she got some of the product she was using in Ms Begum's mouth. The Claimant has also not advanced any reason why Ms Begum might discriminate against her because of race, nor given any facts to support such an assertion.

49. As to the knowledge tests, the Claimant may be justified in complaining that she was not given standard answer sheets following her failure in August 2022 from which she could learn and improve. The Respondent says firstly that the Claimant's original product knowledge test was incorrectly scored so that she received a higher mark than she should have done, and I have no doubt that this could well have given the Claimant false confidence in her ability to pass the test with little additional work and/or little adjustments to two of the answers in particular (questions 8 and 9). Secondly, the Respondent says (and the Claimant does not deny) that the Claimant cancelled product knowledge training on 10 November 2022.

50. Even if that is disputed, looking at the answers to questions 8 and 9 which again the Claimant has put in the bundle from both August and December 2022, these questions expressly require the person taking the test to include key ingredients and technology to show their knowledge. The Claimant has included very few key ingredients, on the face of her answers. In the answer to question 3, while the Claimant appears to have incorporated some of the feedback given from her previous answer, she has failed to correct typographical errors and her answer remains extremely brief.

51. Therefore the assertion that the reason why the Claimant failed her tests was because she "as a Chinese individual made a complaint against Arabic customers", as alleged in the further particulars, stands no reasonable prospect of success.

Conclusion of these proceedings

52. In light of my findings and conclusions above, there are no complaints that can be pursued against the Respondent and the claim proceeds no further.

Employment Judge Norris
Date: 13 August 2023
JUDGMENT SENT TO THE PARTIES ON

14/08/2023

FOR THE TRIBUNAL OFFICE