



# THE EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

**Ms J Henry**

**v**

**Tattu Manchester Limited**

**Heard at:** London Central

**On:** 20-22 June 2023

In chambers 13 July 2023

**Before:** Employment Judge Glennie  
Ms S Went  
Ms P Keating

## Representation:

**Claimant:** Mr K Newman

**Respondent:** Mr R Lyons

## JUDGMENT

1. The complaint of harassment related to sex is well founded.
2. The complaints of direct discrimination because of sex; direct discrimination because of sex or harassment related to race; and unlawful deduction from wages are dismissed.
3. If not agreed, remedies for the successful complaint will be determined at a further hearing.

## REASONS

1. By her claim to the Tribunal the Claimant, Ms Henry, made complaints of direct discrimination because of race and sex, alternatively harassment related to race or sex, and unlawful deduction from wages (which was resolved before the present hearing). The Respondent, Tattu Manchester Limited, disputes those complaints.
2. The Tribunal is unanimous in the reasons that follow.

**Preliminary and procedural matters**

3. The Tribunal decided to hear and decide the issues as to liability first.
4. Mr Newman had provided a document described as a witness statement, but agreed that its contents amounted to submissions rather than evidence, as he had not witnessed any of the events in question.
5. Mr Newman also made reference to a polygraph test undertaken by Ms Henry. On several occasions he asked witnesses whether they would be willing to undergo polygraph tests. After the evidence had concluded, and before submissions were made, Mr Newman applied for permission to rely on the polygraph report. This stated that Ms Henry had been asked 3 questions about her allegations, and that it could be said to 98% accuracy that there was no form of deception. Mr Newman submitted that the report was therefore relevant in that it confirmed that, in Ms Henry's mind, the incidents that she had been asked about definitely took place. Mr Lyons commented that the test could not identify whether someone had a mistaken belief about events, and that there was no information about any problems that might have been identified with this particular type of test.
6. The Tribunal decided not to admit the polygraph report in evidence for the following reasons:
  - 6.1 Taken on their own terms, the test results would be of little evidential value with regard to the issues that the Tribunal has to decide. It is suggested that the test results show that the Claimant has an honest belief in what she is saying about 3 relevant matters. What the Tribunal has to decide is what in fact happened (which is not the same question as what the Claimant honestly believes happened) and why it happened.
  - 6.2 It would be a considerable step to admit evidence of this nature. The Tribunal would have to be informed of, and evaluate, the science behind the test, the techniques involved, and how reliable it is. It would not be a matter of accepting at face value the statement that it is 98% reliable. The Tribunal members were not aware of any previous cases in which this has been done, or in which evidence of this nature was admitted. It would not be practicable to investigate such matters at this stage of this case.

**The issues**

7. The Claimant identifies herself as a black British female and identifies her comparator as any non-black employee, or a white or Asian male. The Tribunal understood this as meaning that the comparator would be a non-black employee, or a white or Asian employee, for the purposes of the protected characteristic of race, and a male employee for the purposes of the protected characteristic of sex.

8. There was an agreed list of issues, the essentials of which are as follows.
9. **Factual issues:**
  - 9.1 Did Joanna Huang tell the Claimant she was unattractive, that she was bland / boring and that she should liven up her voice.
  - 9.2 Did Ms Huang tell the Claimant that she was not doing well enough as a waiter or that she would never make it.
  - 9.3 Did Ms Huang single out the Claimant to clear a table when another server's table had empty plates on it.
  - 9.4 Did Ms Huang watch, check and criticise the Claimant every three minutes during her last week.
  - 9.5 Was there a formal meeting between Ms Huang and the Claimant on 2 April 2022 at which Ms Huang threatened the Claimant with demotion.
  - 9.6 Did Ms Huang repeatedly call the Claimant "Joyce".
  - 9.7 Did Ms Huang pick up on the Claimant's mannerisms and on the way she spoke to customers.
  - 9.8 Did Ms Huang tell the Claimant to do something, and then tell her to do the opposite.
  - 9.9 Did Ms Huang tell the Claimant she should wear make-up.
  - 9.10 Did the Claimant have more reviews than her colleagues.
  - 9.11 (The Tribunal considers these to be matters of background evidence, rather than an allegation as such). Did the Claimant's colleagues notice that she was being picked on and did they comment on this; did they think that Ms Huang treated black people differently; and did other black employees express experiencing similar treatment.
10. **Direct discrimination because of race:**
  - 10.1 If the factual allegations in paragraphs 9.1 – 9.8, and 9.10 are established, did these individually or collectively amount to less favourable treatment of the Claimant.
  - 10.2 If so, was that less favourable treatment because of race.

11. **Harassment related to race:**

11.1 If the factual allegations in paragraphs 9.1 – 9.8 and 9.10 are established:

11.1.1 Did these amount to unwanted conduct.

11.1.2 If so, was that conduct related to race.

11.1.3 If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her

12. **Direct discrimination because of sex:**

12.1 If the factual allegation in paragraph 9.9 is established, did this amount to less favourable treatment of the Claimant.

12.2 If so, was that less favourable treatment because of sex.

13. **Harassment related to sex:**

13.1 If the factual allegation in paragraph 9.9 is established:

13.1.1 Did this amount to unwanted conducted.

13.1.2 If so, was that conduct related to sex.

13.1.3 If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

**Evidence and findings of fact**

14. The Tribunal heard evidence from the following witnesses:

14.1 Ms Henry, the Claimant.

14.2 Mr Jervanni Andrews, who is employed by the Respondent as a server.

14.3 Ms Dovile Kacinskaite, who at the time of the relevant events was employed by the Respondent as a manager.

14.4 Ms Joanna Huang, who is employed by the Respondent as a deputy general manager.

14.5 Mr Andrew Carter, who is employed by the Respondent as a trainer.

- 14.6 Mr Jan Kavka, who at the time of the relevant events was employed by the Respondent as a restaurant manager.
- 14.7 Ms Juliette Henry, who is the Claimant's mother and was called on her behalf.
15. The Tribunal also read witness statements from Ms Naomi Johnson and Ms Kushaiah Henry on behalf of the Claimant and Ms Mandy Liu on behalf of the Respondent. We did so on the basis that we would give the evidence of these witnesses, who were not called, such weight as we considered appropriate.
16. There was an agreed bundle of documents, and page numbers that follow in the reasons refer to that bundle.
17. In early 2022 the Respondent was planning to open a new restaurant in Denmark Street WC2. The Claimant applied for a job, was interviewed by Ms Huang, and was accepted. She started work on 7 March 2022 along with the other new recruits. The first 2 weeks of employment consisted of training, the restaurant not having opened at this point.
18. The Claimant missed a few days of the training course because of a family emergency, but was able to catch up, at least to some extent, with what she had missed. Her evidence was that she took the final test to enable her to work as a server on 18 March 2022, and passed that test. Mr Carter in his evidence expressed the view that there had been an "error of judgement" on someone's part in passing the Claimant or appointing her to the server role. He stated that she should have started as a "runner", meaning that she would have brought food from the kitchen to the guests in the restaurant, but would not have been involved in taking their orders (which is done by a server). It was not, in the event, necessary for the Tribunal to reach a decision on this point, as it did not bear directly on the issues to be decided and it was agreed that the Claimant was in fact appointed to the role of a server.
19. There was a "soft opening" of the restaurant between 26 March and 7 April 2022. This involved friends and family being invited to the restaurant, an "industry night" and a limit being placed on the numbers eating on any given evening. Mr Kavka stated, and the Tribunal accepted, that customers are generally forgiving during the opening period for a restaurant, as they realise that mistakes are likely to occur.
20. The first incident (factual issue 1 above) of which the Claimant complains was said to have occurred on the first night, 26 March 2022. Before turning to the evidence about this, the Tribunal will refer to the evidence given about Ms Huang's management style by witnesses other than the Claimant herself.
21. In paragraphs 9 and 11 of his witness statement Mr Carter described Ms Huang as being "almost military in her approach" and as bringing what he

described as “law and order to the restaurant floor”. Mr Kavka said in paragraphs 7-9 of his statement that Ms Huang was “very strict” and “demanding, adamant that we could not cut corners”. He said “I can see how she might be seen as stern and unapproachable, but that was simply not the case”. Both he and Mr Carter said that they did not believe that Ms Huang would treat anyone differently because of race or sex. Ms Liu made similar observations in her witness statement. Ms Kacinskaite said in paragraph 9 of her witness statement that Ms Huang “likes discipline, and always wants 100% out of you”; and in paragraph 17 that “she was scrupulously fair, and treated everyone the same”. Mr Andrews described Ms Huang as “very draconian” in paragraph 7 of his statement, and said “Joanne will annoy you every day until you get better”. In his oral evidence, he said that he found Ms Huang “a bit strict but helpful” and said that she pushed him to do better.

22. The Tribunal found that there was a consensus among these witnesses about Ms Huang’s management style, and we found that her general approach was as they described it.
23. Issue 1 alleges that Ms Huang said that the Claimant was unattractive, that she was bland / boring and that she should liven up her voice. In paragraph 4 of her witness statement, the Claimant said that Ms Huang told her that her voice was bland and boring, and that she should liven up her voice. When cross-examined, the Claimant stated that Ms Huang did not say that she was unattractive, but made some comment about her appearance. Ms Huang’s evidence in paragraph 11 of her witness statement was that the Claimant was so polite, and that she was sure that she did not tell her to liven up her voice. When cross-examined, Ms Huang said she never commented on how the Claimant spoke.
24. The Tribunal noted that the Claimant’s evidence about this incident differed somewhat from the way it had been put in the issues and considered that it might be that she had conflated in her recollection how she felt about more than one perceived incident. The incident as described in the Claimant’s evidence was less serious than as described in the issues: the evidence did not involve Ms Huang saying that the Claimant was unattractive, and (in the Tribunal’s judgement) there is a difference between saying that someone is bland and boring and saying that they sound bland and boring.
25. The Tribunal found it unlikely that Ms Huang had never commented on how the Claimant spoke, as she herself said that she could be perceived as being “a bit on the quieter side sometimes”, and this was the sort of thing that a manager might comment on to a server who was dealing with members of the public. Mr Carer’s evidence was that he did not believe that Ms Huang would call anyone unattractive or boring, but that he could see her asking someone to liven up their voice, and that it would be normal to pick up on mannerisms and to advise on how to speak to customers. As a matter of probability, we found that Ms Huang did say something to the effect that the Claimant’s voice sounded bland or boring, and that she should try to liven it up.

26. The Claimant worked a further 5 shifts in all in the restaurant. Factual issue 2 relates to the second shift that she worked. The allegation is that Ms Huang told the Claimant that she was not doing well enough as a waiter (i.e. a server) and that she would not make it. The Claimant's evidence about this in her witness statement was that Ms Huang said that she was not doing well enough and needed to check on her tables more often, and that she needed to get her act together, otherwise she did not see her making it as a waiter. When cross-examined, the Claimant said that she did not believe that she was not up to standard, and that Ms Huang would say that she was not on top of her tables when she was. She also stated that guests were giving her positive reviews when Ms Huang was criticising her.
27. The Tribunal also noted that Ms Kushaiah Henry said in her witness statement that the Claimant told her that Ms Huang had said that "she would never make it there at Tattu".
28. Ms Huang's evidence, in paragraph 11 of her witness statement and in cross-examination, was that she would never say things like this, but would take a positive approach to observed deficiencies in a server's performance, saying things like "we can do this".
29. Mr Kavka's evidence in paragraph 5 of his witness statement was that it was clear that the Claimant was having problems as she had fewer tables to manage than the other servers, and in paragraph 6 (confirmed in cross-examination) that, although polite to customers, she was not proactive and had to be told what to do. Mr Carter stated in paragraph 11 of his witness statement was that he could imagine Ms Huang saying that a server was not doing well enough.
30. The Tribunal found that Ms Huang made some criticisms of the Claimant's work, probably including in terms to the effect that she was not doing well enough, and that she would have to do better if she was going to make it as a server with the Respondent. Given Mr Kavka's evidence, the Tribunal found it probable that she would have done so.
31. The Claimant continued in her witness statement that over the next 4 shifts Ms Huang was telling her things like she was not doing well enough and that she should do things that she had in fact already done. She added that she would not have minded if Ms Huang was doing this to everyone, but it was only her. (This did not form one of the issues to be decided).
32. Factual issue 3 was an allegation that Ms Huang told the Claimant to clear another server's table. The Claimant did not identify the particular shift concerned. Both Ms Huang and Mr Kavka said that it would be quite normal to ask a server to clear another's table if necessary. The Tribunal accepted that evidence: a manager would not leave a table uncleared of used plates, cutlery, etc on the basis that only the server responsible for that table could be expected to clear it. The Tribunal further considered

that this would only amount to an allegation, or would only give cause for complaint, if the server were asked unnecessarily.

33. The Claimant's evidence that the server responsible for this table was "doing absolutely nothing" at the time and had been "walking around doing nothing at several points during the day and Joanne said nothing to them". Ms Huang agreed in her oral evidence that it would not be normal to ask a server to clear another's table in such circumstances (although in saying this, she was clearly not conceding that this was what had happened).
34. The Tribunal found it improbable that Ms Huang would have required the Claimant to clear another server's table if that person had been present and unoccupied. There would be no reason to do so, and it would cause uncertainty and possibly resentment on the part of the other server as well as the Claimant. The Tribunal accepted that Ms Huang asked or told the Claimant to clear another server's table, but not that when she did so, the other server was, to Ms Huang's knowledge, in the vicinity and unoccupied. We considered that it was more likely that, if the Claimant had noticed that the other server was not working at the time, Ms Huang had not.
35. Factual issue 4 involved an allegation that Ms Huang watched, checked and criticised the Claimant "every 3 minutes during her last week". It was not obvious what the reference to the last week meant, given the small number of shifts that the Claimant worked between 26 March and 5 April 2022. In any event, the Claimant's evidence about this in her witness statement (at page 4 of the witness statement bundle) was that she was watched, checked on and criticised every 5 minutes during 12 hour shifts, but also (at page 3) that Ms Huang pulled her to one side about 7 times in one day to tell her to check on tables. When cross-examined about this, the Claimant said that Ms Huang would check on her every 5 minutes during a half-hour period.
36. Ms Huang was not cross-examined about this, and her evidence relevant to the point was in paragraph 16 of her witness statement, where she denied picking on the Claimant. The Tribunal concluded that the descriptions of being checked every 3 minutes or every 5 minutes were figures of speech rather than literal allegations. If Ms Huang had checked on the Claimant every 3 or 5 minutes for an entire 12-hour shift, she would have had little opportunity to do anything else. We found it implausible that this could have been what happened.
37. Conversely, the Tribunal found it plausible that Ms Huang might have checked on the Claimant 7 times in the course of a shift, or frequently (not perhaps literally every 5 minutes) in the course of a half-hour period, as described by the Claimant elsewhere in her evidence. We concluded, as a matter of probability, that it was something of this order that occurred. We also found that this would not be unusual for a manager who wanted to maintain high standards to monitor a new employee to this sort of level, especially if the manager believed that there were issues that needed to be addressed.



38. Issue 5 concerned a meeting on 2 April 2022. The allegation is that Ms Huang threatened the Claimant with demotion. In her witness statement at page 6 of the witness statement bundle the Claimant stated that, although Ms Huang called the meeting, in the event it was with Ms Kacinskaite. The Claimant covertly recorded the conversation and produced transcripts of parts of it. This showed Ms Kacinskaite saying “maybe you need just a couple of trips as a runner....just to see the food....” In cross-examination the Claimant stated that Ms Kacinskaite had said “a couple of shifts”, which the Tribunal considered amounted to much the same thing. The Tribunal concluded that, quite apart from not having been said by Ms Huang, this did not amount to a threat of demotion. It was a suggestion that the Claimant could do a couple of shifts as a runner, on a temporary basis, in order to firm up her knowledge of the food on offer.
39. In factual issue 6, the Claimant complained that Ms Huang repeatedly called her “Joyce”, which was the name of the only other black female server. In her witness statement the Claimant said that this happened twice, on different dates. When asked about this in cross-examination, the Claimant agreed that she and Joyce did not look alike. She said that she understood that people could get names wrong, but that when she corrected Ms Huang, the latter smirked at her. The Claimant’s mother, Ms Juliette Henry, stated that the Claimant had told her about being called Joyce.
40. Ms Huang denied ever calling the Claimant “Joyce”, and said that she did not know why the Claimant might say that she did. In paragraph 14 of her witness statement she said that she made a point of familiarising herself with everyone’s name, but that there was a server named Sophia whom she kept calling Sylvia by mistake. She said that she had apologised to Sophia and the matter became a joke between them.
41. The Tribunal found that Ms Huang had called the Claimant “Joyce” on two occasions. It was a little surprising that Ms Huang was so certain that she had never got the Claimant’s name wrong, when she had done this in relation to Sophia. The Tribunal did not, however, consider that Ms Huang had made this error in any way intentionally. We concluded that the most likely explanation was that she believed that she had not done this because she did not realise at the time, or did not remember doing it.
42. Issue 7, picking up on the Claimant’s mannerisms and the way in which she spoke to customers, did not seem to add anything to allegation 1, and the Tribunal made no separate findings in relation to it.
43. In issue 8 the Claimant alleged that Ms Huang would tell her to do something, and then would tell her to do the opposite. It was not easy to identify the evidence that related to this. In the final paragraph on page 3 of her witness statement the Claimant made a different, although somewhat similar complaint, that Ms Huang would tell her to do things that she had already done. In the penultimate paragraph on page 4 of her witness

statement the Claimant said that Ms Huang told her not to chat to particular customers, when she was expected to speak and not just to serve the food.

44. Ms Huang did not directly address this point in her evidence. The Tribunal accepted that there was an occasion when she told the Claimant that she was chatting too much with particular guests, and that this might have seemed ironic to the Claimant given the general encouragement to interact with those being served, and Ms Huang's comment to the effect that she should try to liven up her presentation. We did not, however, consider that this was anything out of the ordinary: a manager might well say on one occasion that a server was sounding too bland and on another that they were chatting too much, with a view to establishing the level of interaction that was expected.
45. The Claimant's evidence about issue 9 was in the second paragraph on page 6 of her witness statement. This was that on a particular occasion, Ms Huang said that she looked tired and unpresentable, and that next time she should wear some makeup. In cross-examination the Claimant said that this was not to do with race, but with sex, and that telling someone to apply things to their face was, in her view, sex discrimination. Ms Huang's evidence in paragraph 15 of her witness statement was that she did not say this and would never do so, adding that she recalled from a course that it could be discriminatory to say that girls should wear make-up. In cross-examination Ms Huang said that she had never made any comment like this to the Claimant.
46. Ms Kushaiah Henry said in her witness statement that she recalled the Claimant coming home from a shift and telling her that Ms Huang had told her to wear makeup from now on as she was looking tired. Mrs Juliette Henry gave similar evidence. Ms Naomi Johnson said in her witness statement that another manager, Ms Liu, had advised her to wear a bit of make-up.
47. The Tribunal found some corroboration for the Claimant's account in these other pieces of indirect evidence. Her sister and mother both said that she had reported Ms Huang's alleged comment to them. Ms Johnson's evidence suggested that observations about make-up were not unknown amongst the Respondent's managers.
48. The Tribunal concluded as a matter of probability that Ms Huang made a comment in the terms alleged by the Claimant.
49. Issues 10 and 11 were not allegations of discrimination, but rather background matters that the Claimant relied on in support of her complaints. Issue 10 concerned reviews: the Tribunal concluded that this was not a reference to the Claimant being placed under greater scrutiny than her colleagues (which would largely be covered by issue 4 in any event), but rather that it reflected the Claimant's evidence that she received more positive reviews from guests than did her colleagues, such that it was improbable that Ms Huang had good reason to criticise her performance.

On this point, the Tribunal found it likely that guests would have tended to give positive reviews because they knew that the restaurant was newly opened and the staff were new. We did not have the material to enable us to make a finding about whether the Claimant received more good reviews than her colleagues or, if she did, why this may have been so.

50. Issue 11 alleged that other employees commented that Ms Huang seemed to pick on the Claimant; and said that she treated black people differently and/or that other black employees said that they had experienced this. The Claimant gave evidence to this effect in the final two paragraphs on page 5 of her witness statement. In the final paragraph on page 6 she stated that Mr Andrews had said that he believed that he was being held back from being a server because he was black, but “he denies this now as I believe he still works there and does not want what he said to interfere with his work life by admitting to this....”
51. Mr Andrews’ evidence was contrary to this. In paragraph 6 of his witness statement he said that the Claimant had asked him whether he thought that Ms Huang was racist, and that he had replied that he did not think so, and that he had not heard anyone else say that she was. He continued that he asked another colleague whether she thought there was any racism, and she replied no; following which he told the Claimant that it was more likely to be her standard of work that was drawing attention from Ms Huang. In his oral evidence Mr Andrews said that he told the Claimant that it was implausible that Ms Huang was being racist towards her as “I hadn’t experienced any racism and no one else I knew who was black working there had complained of this.”
52. On 9 December 2022 Mr Andrews sent an email to Mr Carter (at page 165) in which he wrote:

“To my recollection, Jahnayde had stated she believed that Joanne may be racist due to some issues she believed she was experiencing. I stated otherwise as neither other members of staff nor I had such a belief, or experienced anything of the sort to give way to such a belief. I informed Jahnayde that most likely she wasn’t doing things correctly or something of the sort”.
53. The Tribunal accepted Mr Andrews’ evidence on this issue. Although it was possible that he was giving an untrue account in his email to Mr Carter and in his evidence to the Tribunal, we found this unlikely. The Tribunal considered that it was improbable that he would have invented a detailed account of this nature and that someone who wanted to deny what the Claimant had said in order to keep out of trouble would be more likely to have said very little more than a simple denial. We considered that, as a matter of probability, the Claimant’s evidence on the point was honest, but that her recollection of the conversation with Mr Andrews was coloured by her own belief about Ms Huang.

54. One other matter raised in the course of the evidence concerned whether the black members of staff had fared worse than others according to the “talent matrix” which recorded training outcomes and how the individuals concerned were regarded. In her oral evidence the Claimant said that the scores appeared to show a bias against black people, but agreed that the scores had nothing to do with the comments to her that were the subject of her claim. The Tribunal considered that this concession was correctly made by the Claimant, in particular because there was no evidence that Ms Huang had had no input into, or influence over, the content of the talent matrix.
55. On 7 April 2022 C was booked for a shift but did not attend, as evidenced by an emails to her from Ms Kacinskaite and Ms Liu at page 141. On 8 April 2022 the Claimant sent an email to Ms Liu and Ms Kacinskaite giving her resignation in the following terms:

“First and foremost I’d like to give my utmost apologies for the lack of communication on my side for the past 2 days. [The Claimant then referred to a recent bereavement and continued] I have been thinking about my work environment for a couple of weeks now and as you know I had brought up the fact I felt as though I was being bullied at work by a manager and even cried to Dover [Ms Kacinskaite] over this. I honestly just think that at this time Tattu is not a place that I want to continue working....as I need somewhere I feel as though I can be happy and my authentic self. Overall, I have loved working for Tattu and it is a great company but there are obviously some things I am not happy with which have led to me feeling like this at work and on top of things going on in my personal life it was just all too much, I would like to hand in my resignation. I wish all the best for you and everyone at Tattu and hope that you find wat you are looking for in a server. Thank you for everything you and all the management team have done for me, I genuinely appreciate it and have learnt so much from all of you.”

### **The applicable law and conclusions**

56. Section 136 of the Equality Act 2010 contains the following provisions about the burden of proof:

(1).....

*(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.*

57. In **Efobi v Royal Mail Group [2021] ICR 1263** the Supreme Court confirmed that the two stage approach identified in relation to the previous anti-discrimination legislation in **Igen v Wong [2005] ICR 931** and

**Madarassy v Nomura [2007] ICR 867** remained valid under the Equality Act. At the first stage, the burden is on the claimant to prove, on the balance of probabilities, facts from which the tribunal could properly conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had occurred. At this stage, a difference in protected characteristic and a difference in treatment alone would not, without more, be sufficient. There would have to be something else (which might not in itself be very significant) to provide the basis of such a finding. If such facts were proved, the burden moved to the respondent at the second stage to explain the reasons for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic had played no part in those reasons.

58. In **Efobi** Lord Leggatt JSC, with whom the other justices agreed, referred to and approved Lord Hope’s observation in **Hewage v Grampian Health Board [2012] UKSC 37** to the effect that it is important not to make too much of the effect of the burden of proof provisions. Lord Hope said:

“They 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 another.”

59. Section 13 of the Equality Act provides as follows about direct discrimination:

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

60. Section 26 of the Equality Act makes the following provisions about harassment:

*(1) A person (A) harasses another (B) if –*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) The conduct has the purpose or effect of –*

*(i) Violating B’s dignity, or*

*(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B*

*(2) .....*

*(3) .....*

*(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.*

61. A given act cannot be both direct discrimination and harassment. It is usually best to consider harassment first as the requirement that the act be “related to” the protected characteristic is less stringent than the direct discrimination requirement that it be “because of” the protected characteristic.
62. The Tribunal therefore first considered factual issues 1 to 8 as allegations of harassment related to race. We accepted that, in each case (save for issue 5, which was not established on the facts) the conduct concerned was unwanted by the Claimant.
63. Tribunal then considered whether, given the findings that we have made, the facts are such that, in the absence of an adequate explanation, the conduct was related to the Claimant’s race. We found that we were able to answer this question by reference to the conduct as a whole. We found nothing in the facts that could form a proper basis for a finding that the conduct was in any way related to the Claimant’s race. We accepted that the Claimant genuinely believed, and believes, that it was.
64. The Tribunal concluded, however, that the facts found in relation to issues 1, 2, 4, 7 and 8, showed that Ms Huang had made critical observations about the Claimant’s work, including her way of speaking to customers, or had perhaps implied criticism through monitoring the Claimant’s work. Another manager might have been less critical, or expressed their criticisms in a different way: but the facts showed only that Ms Huang had been critical, and not that there was any reason to find that the Claimant’s race played any part in this. The facts found showed only that Ms Huang criticised aspects of the Claimant’s work, and that the Claimant is black. There was no “something else” that could form the basis for a finding that the criticisms were related to the Claimant’s race.
65. On issue 3, the Tribunal has found that Ms Huang did something unremarkable in asking or telling the Claimant to clear a table at a time when, if the server nominally responsible for it was unoccupied, Ms Huang was unaware of that. There was no basis on which the Tribunal could properly find that this was in any way related to the Claimant’s race.
66. On issue 6, the Tribunal has found that Ms Huang called the Claimant “Joyce” on two occasions, and that this was an unintentional error. Although it is the case that there was another server named Joyce who was also black, the Tribunal did not consider that this could mean that the conduct was related to race: it was simply a mistake.
67. Alternatively, should the Tribunal be wrong in finding that the complaints fail at the first stage of the **Efobi** test, it also finds that the Respondent has satisfied it that the conduct was not in any way related to the Claimant’s race. With regard to issues 1, 2, 4, 7 and 8, the Tribunal finds that the conduct reflected Ms Huang’s approach to the standard of work she

required, and her management style, and was not related to race. On issue 3, the Tribunal finds that Ms Huang told the Claimant to clear a table simply because it needed to be cleared, and that this was not related to race. On issue 6, the Tribunal has found that Ms Huang made a mistake on two occasions, and finds that this is the complete explanation for the two incidents.

68. These findings mean that the complaints of harassment related to race fail. Further to this, the Tribunal also made the following findings as to whether the conduct had the purpose or effect of harassing the Claimant:

68.1 Our findings mean that we also find that Ms Huang did not have the purpose of harassing the Claimant.

68.2 The Tribunal accepts that the Claimant perceived that the conduct complained of in factual issues 1-4, 6, 7 and 8 created a hostile or offensive environment for her, in that she perceived that she was being picked on for reasons related to her race. We did not consider that it was reasonable for the conduct to have this effect. We have accepted that it reflected Ms Huang's expectations about the standard of work required, rather than anything personal to the Claimant. We also found that it was not reasonable for the mistake about the Claimant's name to have the effect of harassing her. Had it happened many times, it might have been reasonable for the Claimant to perceive this as creating a hostile or offensive environment, but given that it happened twice and in the context of everyone being new to each another, it was not reasonable to interpret it as other than a mistake.

68.3 Taking these matters into account, and our findings about the conversation between the Claimant and Mr Andrews in which he said that he did not believe that Ms Huang was racist, the Tribunal concluded that the conduct did not have the effect of harassing the Claimant. This finding also means that the complaint fails.

69. The Tribunal reached a different conclusion about factual issue 9, which was relied on as a complaint of harassment related to sex, or direct discrimination because of sex. In this case, the Tribunal made direct findings in the **Hewage** sense (although the outcome would have been the same via the two stage test). Having found that Ms Huang made the comment alleged by the Claimant, we accepted that this was unwanted by the Claimant. We then considered whether this amounted to conduct related to sex. We concluded that saying that an individual looked "tired and unpresentable" was not related to sex, as that could equally be said to a man. In the Tribunal's judgement, saying that next time, the individual should wear some makeup, is a sex-specific comment, in that (although it is not unknown for men to wear makeup) it is not a comment that would ordinarily be made to a man.

70. The Tribunal did not consider that Ms Huang made the comment with the purpose of harassing the Claimant. As to its effect, we found that the Claimant perceived the comment as creating a humiliating environment for her, in that it meant that she should try to “improve” her appearance with the use of makeup. We also found that it was reasonable that the comment had this effect: it would tend to undermine the Claimant’s self-esteem.
71. The Tribunal therefore found that the complaint of harassment related to sex arising under factual issue 9 was well founded.
72. That finding excludes a finding of direct discrimination because of sex. In relation to the unsuccessful complaints of harassment related to race, the finding that the conduct was not related to race equally means that it cannot have been because of race, with the result that the complaint of direct discrimination because of race fails.
73. The parties are invited to agree on remedy for the successful complaint in the first instance, and to inform the Tribunal whether they have been able to do so. If they are not able to reach agreement, they should provide dates to avoid for a remedy hearing and apply for any relevant further case management orders.

Employment Judge Glennie

Dated: .....14 September 2023.....

Judgment sent to the parties on:

14/09/2023

For the Tribunal Office