EMPLOYMENT TRIBUNALS

Claimant: Ms M Kokomane

Respondent: Boots Management Services Ltd

Heard at: **Croydon (via CVP)** **On:** **4, 5, 6 and 7 September 2023 (via CVP), and 25 September 2023 (in chambers)**

Before: **Employment Judge Leith**
Ms J Forecast
Ms E Thompson

Representation
Claimant: Ms Godwins (Consultant)
Respondent: Mr Leonhardt (Counsel)

JUDGMENT

1. The complaint of harassment related to race is not well founded and is dismissed.
2. The complaint of victimisation is not well founded and is dismissed.
3. The complaint of unfair dismissal is well founded.
4. There is no *Polkey* reduction to the claimant's compensatory award.

REASONS

Claims and issues

1. The claimant claims harassment related to race, victimisation, and unfair dismissal.

2. The issues were agreed by the parties and annexed to the Case Management Order of EJ Pritchard on 10 November 2022. At the start of the hearing, we discussed the issues with the parties. The parties confirmed that the list of issues annexed to EJ Pritchard's CMO accurately captured the issues in dispute, as follows:

> **1. Time Limits/Jurisdiction**
> 1.1. The Claim for was presented on 16 July 2021. The Claimant contacted ACAS to commence Early Conciliation on 3 June 2021 and the Certificate was issued on 18 June 2021. Any acts or omission which took place before 4 March 2021 are potentially out of time.

1.2. With respect to the Claimant's race discrimination complaints under the Equality Act
2010 ("EQA"):

1.2.1. Does the Claimant prove that there was conduct extending over a period of time which is to be treated as done at the end of the period? Is such conduct accordingly in time?
1.2.2. Where any of the acts complained of are found to be out of time, why were the complaints not made to the Tribunal in time and, in any event, would it be just and equitable for the Tribunal to extend the time limit?

2. Race Discrimination
2.1. The Claimant is black African. She relies on racial grounds of her race and colour.

3. Harassment - s26 EQA
3.1. Did the Respondent engage in the following unwanted conduct::
3.1.1. On or around March 2019, Carola Suteu shouted at the Claimant and told her off.
3.1.2. On or around 17 June 2019, Carola Suteu, singled the Claimant out and told her off for shouting when she asked for control drug keys.
3.1.3. Between 17 June 2019 and 8 September 2020, Carola Suteu was hostile and unfriendly to the Claimant when the Claimant would ask her for help, in comparison to other customer advisers who she spoke to nicely when they would ask for help.
3.1.4. On or around 4 April 2020, Carola Suteu spoke to the Claimant aggressively and loudly accusing her of not calling into the store and telling her she would not get paid.
3.1.5. On or around 4 April 2020, Carola Suteu turned the heating up in the area where the Claimant was, despite knowing the Claimant suffers from asthma.
3.1.6. Between 1st and 8th September 2020, Carola Suteu pressured the claimant to fill in application form for voluntary redundancy.
3.1.7. On 9 September 2020, Carola Suteu told the Claimant that she didn't think the Claimant would be there in October 2020.
3.1.8. Between 20 October 2020 and 30 January 2021, Carola Suteu called the Claimant three times when the Claimant was signed off sick and had made a complaint about Carola Suteu.

3.2. Were the alleged acts set out at paragraphs 3.1.1 – 3.1.8 related to the Claimant's pleaded protected characteristic of race?

3.3. If so, did any such conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment?

3.4. If so, was it reasonable for the conduct to have that effect taking into account the Claimant's perception and the other circumstances of the case?

4. Victimisation s27 EQA

4.1. The protected acts relied on by the Claimant in which the claimant alleged discrimination because of race are:

4.1.1. Her written complaints on 5 April 2020 and 27 October 2020

4.1.2. The grievance hearing on 11 March 2021

4.2. Do the acts set out at paragraph 4.1 constitute protected acts for the purposes of s27(2) of EqA 2010, namely were any/all of them:

4.2.1. bringing proceedings under the EQA;

4.2.2. giving evidence or information in connection with proceedings under EQA;

4.2.3. doing any other thing for the purposes of or in connection with the EQA;

4.2.4. making an allegation (whether or not express) that another person has
contravened the EQA.

4.3. Did the Respondent subject the claimant to the following unfavourable treatment due to the protected acts:

4.3.1. Unfair desktop exercise

4.3.2. Refusal to refer the Claimant to occupational health on or around 17 May 2021

4.3.3. Unfairly selecting the claimant for redundancy and dismissing her

5. Unfair Dismissal

5.1. Was the Claimant dismissed for a potentially fair reason pursuant to s.98(1) ERA, namely redundancy and some other substantial reason? The Claimant submits that it was not a redundancy and was instead act of victimisation because of the complaints of discrimination she raised on 5 April 2020, 27 October 2020, 11 March 2021.

5.2. Did the Respondent act reasonably in all the circumstances, including its size and administrative resources, in treating redundancy as a sufficient reason for the Claimant's dismissal?

5.3. In particular:

5.3.1. Did the Respondent undertake such information and consultation with the Claimant as was reasonable?
5.3.2. Did the Respondent adopt fair and objective selection criteria?
5.3.3. Were the criteria fairly and objectively applied?
5.3.4. Did the Respondent make reasonable efforts to redeploy the Claimant?

5.4. If the Claimant's dismissal did not amount to a redundancy as defined, was the Claimant's dismissal fair for some other substantial reason, namely a business reorganisation carried out in the interests of economy and efficiency?

5.5. Was dismissal within the band of reasonable responses available to a reasonable employer?

6. Remedy
6.1. If the dismissal was unfair, should the Claimant's compensation be reduced on the basis that she may have been dismissed if a fair procedure had been followed? ('Polkey')

6.2. If the dismissal was unfair, what are the appropriate basic and compensatory awards?

6.3. If the Claimant was discriminated against, what is the appropriate remedy, including any compensation and injury to feelings (in accordance with the Vento guidelines as amended)?

6.4. Has the Claimant taken reasonable steps to mitigate her loss?

Procedure, documents and evidence heard

3. We heard evidence from:
   3.1. The claimant.
   3.2. Kevin Kemsley, the claimant's partner.
   3.3. Carola Sutea, Pharmacist and subsequently Pharmacist Store Manager of the Sheerness store (in which role she was the Claimant's line manager).
   3.4. Amanda Taylor, Store Manager of the Hempstead Valley store, who took the decision to dismiss the claimant.
   3.5. Jenny Phillips, Area Manager for Brighton and East Sussex, who heard the claimant's appeal against dismissal and her grievance appeal.
   3.6. Julie Brooker, Store Manager of the Sheerness store between April 2018 and November 2019 (and the claimant's line manager during that period).

4. All of the witnesses gave their evidence by way of pre-prepared statements, on which they were cross-examined.

5. We had before us an agreed bundle of 632 pages. We also had a core reading list, a cast list and a chronology.

6. A the end of the evidence we heard submissions from Mr Leonhart and Ms Godwins.

7. The hearing had originally been listed for four days. EJ Pritchard had directed that the hearing be extended to six days. Unfortunately, this appeared not to have been actioned, such that the case remained listed for four days.

8. At the start of the hearing, we agreed a timetable with the parties whereby we would spend the first morning hearing reading, then hear the evidence of Mr Kemsley and the claimant, concluding at lunchtime on day 2. The respondent's evidence would then take the remainder of day two and all of day 3 (if required), with submissions on the morning of day 4 and our decision being reserved.

9. There was a delay in commencing the claimant's evidence as she had printed the wrong copy of her witness statement. We gave her time to print the correct copy and ensure she had read it so she could confirm its accuracy. The claimant's evidence therefore concluded one hour after lunch on day 2. Due to various other short delays, the respondent's evidence concluded at quarter to 12 on day 4. We took an early lunch then heard submissions after lunch. We reserved our decision, which we now give with reasons.

Factual findings

10. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

11. The claimant was employed by the respondent as a Customer Adviser. She started on 13 January 2001. She completed internal training over a period of years and also completed some external training modules in support of her work. She was initially employed at the Charing Cross Station store. On 29 Jan 2018 she transferred to the respondent's Sheerness store. At that point, the store was managed by Haley Usmar.

12. In April 2018, Julie Brooker became the manager of the Sheerness store. She remained in that position until November 2019.

13. Carola Suteu started working at the Sheerness store as a pharmacist in 2018. The Sheerness store generally only has one pharmacist on duty at any one time. The claimant was the only non-white member of staff employed at the Sheerness store on a full-time basis. There was, however, a non-white relief Pharmacist who worked at the store on occasion,

generally on a Saturday but also on occasions when Ms Suteu was running anti-coagulation clinics.

14. After Ms Brooker moved on, Ms Suteu acted up as Store Manager until formally appointed as Pharmacist Store Manager in 2020.

15. The claimant's evidence was that she continued to refer to Ms Brooker on store related matters by text message even after she had left the store. Ms Brooker's evidence was that that was not the case. The claimant's evidence was that she no longer has the phone with those text messages on because it was lost in South Africa. After Ms Brooker was asked about the point in cross-examination, the respondent made a further disclosure of records from Ms Brooker's phone to the claimant. We indicated that we would leave it to the parties to tell us if they wished to adduce those records, and that we would recall Ms Brooker if either party had questions from her arising them. Neither side sought, in the event, to adduce any further text messages in evidence, and Ms Brooker was not recalled. We prefer the evidence of Ms Brooker. We consider that, if the claimant's version of events had been borne out by the records on Ms Brooker's mobile phone, the claimant would have sought to adduce those records when they were disclosed.

16. Ms Suteu is Romanian. While she had experience as a Pharmacist Store Manager in Romania, the role in the Sheerness store was the first time she had held an in-store Pharmacist role in the UK. Previously she had been employed as a locum Pharmacist. She told the Tribunal that she had had to adapt her communication style, as she recognised that she originally came across as blunt. Her evidence was that she was keen to improve in that regard. That was borne out in other evidence before the Tribunal – for example, an email from Debbie Tyke gathered as part of the claimant's grievance investigation, in which Ms Tyke described how Ms Suteu could occasionally say things which came across as "harsh", which she ascribed to "a language thing". Ms Brooker's evidence was that she had cause to talk to Ms Suteu about her communication style, because she was perceived by colleagues as being direct and abrupt.

17. The claimant, in the course of cross-examination, was notably reluctant to accept the description of Ms Suteu as her manager. She was at pains to describe Ms Suteu as "trainee manager" or "temporary manager".

18. In 2018, the claimant's performance rating was "above performing". The claimant was nominated for a Quarterly Star award in January 2019. The claimant was also given an award for being a "Number 7 champion", relating to how she promoted the respondent's Number 7 product range. The claimant additionally received "Feelgood Moments", which are when a customer provides positive written feedback about a member of staff. During the time that Ms Brooker was managing the Sheerness store, the claimant received more such positive feedback from customers than any other colleague in the store.

19. The claimant told the Tribunal that she loved working for Boots.

March 2019

20. In or around March 2019, there was an incident between the claimant and Ms Sutea. The claimant's evidence was that that a customer was sitting outside the consultation waiting room to see Ms Sutea. Her evidence was that the area in question was narrow, and she had to pass through it with a roll cage full of stock. Her evidence was that explained this to the customer, and that Ms Suteu then shouted at her "MARY LEAVE MY CUSTOMER ALONE".

21. Ms Suteu's evidence was markedly different. Her evidence was that the claimant had dealt with a customer but given them wrong information. Her evidence was that the customer then returned to the store, and she give the customer the right information, then the claimant shouted at her.

22. Ms Suteu appeared, in her evidence, to be referring to an entirely different incident. She did not explicitly deny the event described by the claimant. The claimant's evidence regarding the point as she recalled it was clear and consistent. We find that there was an incident in March 2019 as described by the claimant.

Customer incident

23. On 7 March 2019, an incident took place between the claimant and a customer. The customer accused the claimant of thinking he was planning to steal from the store. The customer then made a further remark to the claimant as he left the store. Ms Brooker was present. There was some dispute over what was then said. The claimant's evidence was that the customer said "fucking black nigger go back to your country".

24. Ms Brooker recorded in the incident report form that what was said was "you black c***, you should not be in this country" [190]. She recorded this as a racially abusive comment. Ms Brooker's account, given to the claimant's grievance investigation on 17 March 2021, was that the customer said "go back to your own country you black …" (the omitted word being c**t) [354].

25. The substance of Ms Brooker's account in evidence to the Tribunal was the same.

26. There was then some dispute about what happened in the immediate aftermath of that incident.
    26.1. The claimant's evidence was that in the immediate aftermath of the incident another customer approached her saying that she "didn't deserve this", and that another colleague, Mandy, sent her upstairs. Her evidence was that she stayed upstairs on her own for

around 20 minutes crying, and that Ms Brooker never checked on her.

26.2. Ms Brooker's evidence (albeit set out in the evidence she gave to the grievance process rather than in her witness statement for these proceedings) was that she immediately reported the incident on the town radio, then found the claimant in the pharmacy and went to console her, after which the claimant went upstairs. Her evidence was that she passed the claimant tissues and gave her a hug.

26.3. Ms Brooker's evidence (again in the evidence she gave to claimant's grievance) was that a number of other things had happened in the store that day, and that she had gone out and bought cakes for everyone as the team were in low spirits generally.

27. We find that what occurred was somewhere in between what was described by the claimant and Ms Brooker. We find that Ms Brooker did report the matter to the police, and that she did seek the claimant out to comfort her. However, in the context of the day Ms Brooker described, we find that she was not as attentive to the claimant as the claimant would have expected, and that that came across to the claimant as a failure to take the issue seriously.

28. In terms of the discrepancy about what was said by the customer, we prefer Ms Brooker's version of events. Ms Brooker's version was recorded contemporaneously in the incident report, and her evidence regarding it was consistent. We do, however, find that Ms Brooker expressly recorded that the comments were racially motivated, and never sought to suggest otherwise.

29. The Police took some time to visit the store. When they did, we accept the claimant's evidence that they believed that the incident had taken place at Superdrug. However, we find that that was not as a result of an error on Ms Brooker's part. It is in our judgment inconceivable that Ms Brooker would have given the Police the wrong details for the store she managed. Rather, we consider it is considerably more likely that the Police simply made an administrative error when recording Ms Brooker's original report.

30. The claimant complained that Ms Brooker did not make a statement to the Police. Ms Brooker's evidence was that she was in the dispensary on the date the Police came in, and that the Police did not ask her for a statement. We accept Ms Brooker's evidence in that reghard. She was the one who had reported it, so if the Police had wanted it they would have asked to speak to her.

31. It was common ground that the customer was not banned from the store. Ms Brooker's evidence, which we accept, was that he left the store so quickly that she did not have time to tell him he was banned.

32. Ms Brooker's evidence was that the customer never returned to the store. The claimant's evidence was that she did, and that she had reported it to Ms Brooker. Ms Brooker denied that.

33. We find that the customer did not return, at least on any shift when the claimant was working. We reach that finding for the following reasons:

    33.1. We find that claimant did not ever inform Ms Brooker that the claimant had returned to the store. The claimant's evidence about telling Ms Brooker he had returned was vague about when or how she had done so. We prefer Ms Brooker's evidence that it had never been reported to her that the customer returned.

    33.2. If the customer had returned, we find that the claimant would have raised it with Ms Brooker – not just because the customer in question had racially abused her, but also because he was a suspected shoplifter. The evidence we heard was that the claimant was a diligent employee, and it is in our judgment implausible that she would have stayed silent if the customer had returned to the store.

Dual control policy

34. The respondent operates a "dual control" policy in respect of certain cash-handling tasks. Where the dual control policy applies, the task can only be done with two colleagues present: one performing the task and the other observing them.

35. It was alleged that on 3 April 2019 there was a breach of the dual control policy, at a time when only the claimant and Ms Suteu were present in the store. The claimant's evidence was that she understood that Ms Suteu had reported the incident. We accept that that was the claimant's genuine belief. Ms Brooker's evidence, albeit given for the first time in the course of cross-examination, was that it was reported by another colleague, Mandy Lyall. Ms Brooker's evidence was that she could not recall how Ms Lyall came to be aware of the issue, since she was not in store at the time.

36. Ms Brooker asked another store manager, Dorney Porter, to investigate. The claimant was invited to an investigatory meeting on 8 April 2019. The notes of that interview were in evidence before us. The evidence of Ms Brooker and Ms Suteu was that Ms Suteu was also invited to an investigatory meeting, although the notes of that meeting were not in evidence. In any event, it is common ground that no formal disciplinary action was taken against either the claimant or Ms Suteu, although both of them appeared to broadly accept that the policy had not been followed.

37. We accept Ms Brooker's evidence that the incident was reported to her by Ms Lyall, rather than by Ms Suteu. The claimant, understandably, had no direct knowledge of who reported the incident to Ms Brooker. We consider that it is inherently improbably that Ms Suteu would have self-reported the

incident – not least because, as the more senior member of staff, she would potentially have been more culpable for the breach.

38. On 11 April 2019, the claimant raised a grievance about Ms Brooker's handling of the racist insult incident ("the First Grievance").

39. Ms Suteu's evidence was that shortly after the dual control policy incident was raised, the claimant said to her "Don't worry, I will take care of Julie". That evidence was not in her witness statement. It was given for the first time in cross-examination. We did not find Ms Suteu's evidence on that point to be credible. If such a comment had been made, we consider that it would have occurred to Ms Suteu before the point where she was being cross-examined and would have been mentioned in her witness statement (if not earlier). It is also inconsistent with the claimant's (incorrect) belief that it was Ms Suteu who had reported the matter. Given that, it is implausible that she would have tried to reassure Ms Suteu that she would "take care of" Ms Brooker.

40. The First Grievance was investigated by Janice Luckhurst, who was the Store Manager of another store. The claimant explained to Ms Luckhurst that the outcome she sought was an apology.

41. The outcome of the grievance investigation was not in evidence before us. However, Ms Brooker did send the claimant a letter of apology following the grievance process, which was in evidence before us. The letter said this:

> "I am writing this letter to you to express my regret at the situation you found yourself in on 15th March 2019 with the extremely unpleasant shoplifter. This person was reacting out at being caught out, and gave you the brunt of his temper. I can imagine how this would make you feel and I do hope you never have to experience this again.
>
> I take on board your comments that you feel the aftercare has not been what you thought it should. I take pride in being accessible and available to my team should anyone need to come and talk to me about a situation. I hope you feel this is the case and know in the future I will be there to support you."

42. Ms Brooker's evidence was that she felt uncomfortable providing the letter of apology as she didn't think she had done anything wrong in the way that she handled the incident and that she had given the claimant appropriate support.

<u>CD Key incident</u>

43. On 17 June 2019, there was an incident between the claimant and Ms Suteu. The claimant required the Controlled Drug key as part of the cashing

up process. She called out “CD Key”. Her evidence is that she also said “please”; Ms Suteu’s evidence is that she didn’t. It was common ground that Ms Suteu was in the pharmacy talking to a colleague at the time. Ms Suteu characterised the way the claimant made the request as “shouting”. The claimant denies that she was shouting. Her evidence was that she used the same tone of voice as other, white British colleagues, used in asking for the CD keys at the end of the day. Ms Suteu’s evidence was that other colleagues did not shout or call across the store when she was talking to someone else.

44. There was some dispute also over Ms Suteu’s response. Ms Suteu’s evidence was that when she gave the claimant the keys, she told her that she (the claimant) needed to ask for things nicely and not shout across the store. Her evidence that was that she did not shout when doing so. The claimant’s evidence was that Ms Suteu shouted at her angrily and aggressively “Mary stop shouting”.

45. We deal with our findings on this point in our conclusions.

46. The claimant raised the matter with Ms Brooker. Ms Brooker discussed it with Ms Suteu, who reflected on it. Ms Brooker’s evidence was that Ms Suteu then apologised to the claimant for the way she had handled the incident.

47. Ms Suteu’s evidence in her witness statement was that after the CD Key incident, she was nervous about speaking to the claimant alone, and would try to ensure that she had a witness present whenever she spoke to her. During the course of cross-examination, she suggested that that was the case only for a few days. We prefer the evidence in her witness statement. We find that, as a result of the way she perceived that the claimant had misinterpreted her actions in respect of the CD Key incident, she was wary of the claimant. The claimant’s evidence was that she and Ms Suteu only spoke to each other when they really needed to. We find that both the claimant and Ms Suteu were wary of each other at that stage, and that they both sought to minimise their interactions. We find that that state of affairs continued for the remainder of the claimant’s time at the Sheerness store.

4 April 2020

48. The claimant commuted to work by train. She was due to work on Saturday 4 April 2020 (having agreed to work that shift to allow a colleague, Ms Lyall, to have the day off as it was her birthday). The claimant was due to start work at 8.30am. On that day, the train timetables had been changed due to COVID. The train the claimant would normally have taken did not run. The next train was half an hour later and would not get the claimant to work on time.

49. The claimant attempted to telephone the store on two occasions to let them know that she would be late for work. The calls were not answered. The

claimant did not attempt to contact Ms Suteu via her personal mobile phone, although she did know the number.

50. On arriving at the store, the claimant informed Ms Suteu of the reason why she was late. The claimant's evidence was that Ms Suteu spoke to her aggressively and in a raised voice, and said that she would not be paid. Ms Suteu denied that – her evidence was that she felt that the claimant was aggressive towards her.

51. Ms Suteu's evidence in the course of cross-examination was the lateness wasn't the claimant's fault, but that she should have let the team know the day before that she would be late. Ms Suteu's evidence in cross examination was that she doubted that the change to the train times had only happened that morning. However, she accepted that she had not taken any steps to find out when the train timetable and changed and if it had been a pre-planned change. We note, of course, that 4 April 2020 was in the very early part of the first COVID lockdown.

52. Ms Suteu completed a lateness record log for the claimant. The form was in evidence before us. 4 April 2020 was the first entry on the log. There was only one further entry, on 11 April 2020. Ms Suteu's evidence in her witness statement was that the claimant was "constantly late". When asked in evidence how many times the claimant had been late prior to 4 April 2020, Ms Suteu said that she could not remember.

53. The lateness log form recorded that Ms Suteu had offered to pick the claimant up on her way to work. The claimant's evidence was that she would have been uncomfortable travelling in the car with Ms Suteu due to the need to maintain social distancing.

54. The lateness log form should be signed by the employee. Ms Suteu sought to discuss the form with the claimant and ask her to sign it. She did so in the pharmacy dispensing area. That is Ms Suteu's work area. The claimant's pleaded case was that while the claimant was in the dispensing area, Ms Suteu turned the heating up in that area. Her evidence in cross-examination was that Ms Suteu always had the heater on, and she accepted that Ms Suteu did not increase the heat on that day or while the claimant was there. The claimant's evidence was that when Ms Suteu asked her to step into the dispensing area to complete the lateness log, she refused. She did not suggest that there was any compulsion to go into the dispensing area, or that she asked Ms Suteu if they could do it somewhere else.

55. Ms Suteu subsequently spoke to Dorney Porter about the 4 April 2020 incident, to ask her to investigate it. Ms Porter set out her recollection of their discussion to Jeanette Campbell when she was investigating the claimant's later grievance. Ms Porter's evidence to Jeanette Campbell was that having heard Ms Suteu's version of events, she advised her that she believed it had been handled wrongly. She told Ms Suteu that the claimant

was owed an apology. In cross-examination, Ms Suteu demonstrated a marked unwillingness to accept Ms Porter's view. Her evidence was that Ms Porter was not aware of the details of the incident. However, the only person who had told Ms Porter anything about the incident was Ms Suteu herself.

56. We find that Ms Suteu did address the claimant aggressively on 4 April 2020, and that she told her that she would not be paid for the late arrival. We reach that conclusion for the following reasons:

    56.1. Although Ms Suteu's evidence was that she did not blame the claimant, it was apparent from her answers in cross-examination that she did regard the claimant as being at fault. In particular, Ms Suteu had assumed that the claimant ought to have known about the change to the train times the night before, although she had not taken any steps to find out whether that was in fact the case.

    56.2. Ms Suteu was defensive about her behaviour, to the extent that she was unwilling to accept Ms Porter's view that she had acted inappropriately.

    56.3. We also bear in mind that she attempted to overplay the issue with the claimant's timekeeping by describing her, in her witness statement, as "constantly late". There was no foundation for that description.

57. Regarding the temperature in the dispensing area, the claimant's own evidence in Tribunal was that the heating was not turned up as had been alleged in the claim. That allegation was consequently unsustainable.

Second grievance

58. On 5 April 2020 the claimant raised a grievance ("the Second Grievance"). In that grievance, she referred to suffering bullying, harassment and victimisation from Ms Suteu. She expressly referred to Ms Suteu treating her differently to any of the rest of the staff. She did not, however, suggest at any point within the grievance letter that she was being discriminated against because of her race. Nor did she suggest that she attributed Ms Suteu's treatment to her race.

59. The respondent wrote to the claimant on 9 April 2020 explaining that the Second Grievance would not be dealt with immediately due to the impact of COVID-19.

Voluntary redundancy

60. The COVID-19 pandemic had a significant impact on the respondent's operation. It was identified that the Sheerness store was overstaffed at Customer Adviser level (as were a number of other stores). The respondent ran a voluntary redundancy exercise, which opened for applications on 1 September 2020 and closed on 8 September 2020. Ms Suteu met with

each of the Customer Advisers in the Sheerness store to inform them about the exercise. She was accompanied to each of the meetings by Ms Brooker. At the end of the meeting with the claimant, Ms Suteu gave the claimant a form to complete if she wanted to express an interest in voluntary redundancy.

61. On the same day, Ms Brooker discussed with Ms Suteu the possibility that some Customer Adviser colleagues could be transferred to the respondent's Sittingbourne store, which was understaffed at the time.

62. The claimant's evidence in her witness statement was that Ms Suteu asked her "repeatedly day after day" for the completed VR form, and applied pressure on her to return it. In cross-examination her evidence was Ms Suteu reminded her to return the form for the first time two or three days before it was due to be returned. Ms Suteu's evidence was that she did not pressurise the claimant, and she simply informed her of the deadline.

63. We find that Ms Suteu did remind the claimant to complete the form given the tight deadline, but that she did not pressure the claimant to opt into Voluntary Redundancy.

64. The claimant returned the form on 7 September 2020, indicating that she was not interested in voluntary redundancy.

Annual leave request

65. On 9 September 2020, the claimant asked for two days holiday in October 2020, to attend a wedding. The claimant's evidence was that Ms Suteu told her "I don't think that you will be here. Kirsty and Kim will be here as they both live in Sheerness and you live in Sittingbourne". Ms Suteu's evidence was that when the claimant asked her for those days off, she knew she would not be able to authorise them as another member of staff had already booked them off. Her evidence was that she told the claimant that she may move to another store, in which case she might be able to get those days off. Her evidence was that the context for her saying that was that the Sittingbourne store was understaffed and that she thought the claimant may be redeployed to that store.

66. We find that Ms Suteu told the claimant "I don't think you will be here" or words to that effect. The claimant's evidence regarding the exchange has been consistent throughout. That is the same form of words that she used in the internal grievance meeting. We consider that Ms Suteu had in mind the possibility that the claimant may transfer to the Sittingbourne store, and that she may therefore be able to have her chosen holiday dates. But she did not explain any of that in the (brief) conversation. She simply said to the claimant "I don't think you will be here".

67. The claimant became upset. She left the store and was subsequently signed off sick. Her fit note gave the reason for absence as "stress at work".

She telephoned Ms Brooker and informed her that she had walked out of the store.

Sickness absence

68. On 11 September 2020 the claimant wrote to Ms Suteu sending her a copy of her fit note. The letter was addressed to "Boots Pharmacy Sheerness Manager", but the salutation was "Dear Carola". The letter did not suggest that the claimant was uncomfortable being in contact with Ms Suteu. It concluded by saying "I will keep in contact with you to inform you of my current situation."

69. On 14 September 2020, the claimant wrote to the respondent asking if she could be considered for voluntary redundancy. She was told that she could not, as she was past the deadline.

70. On or around 20 October 2020 Ms Suteu telephoned the claimant. The purpose of the call was to keep in touch with her, and to remind her of the details of the respondent's Employee Assistance Programme. The claimant told Ms Suteu that she did not want to talk to her, and that if she wanted to discuss anything with her she should put it in writing.

71. On 27 October 2020, the claimant emailed the respondent's HR department regarding the Second Grievance. The email said this:

> I am writing to inform you of the continuous harassment from my temporary manager in my store. I sent a grievance in writing to a local store manager Janice Luckhurst who gave the responsibility of dealing with this to another manager at another store. The response I received in April 2020 was that at the moment Boots is not dealing with any grievances due to covid and that after this is over Boots will continue with grievances. I have currently been signed off of work by my Doctor with Stress related to work. The same Pharmacist / Temporary Manager has been bullying and harassing me for almost a year and NOTHING has been done about this. I was asked by my previous manager Julie Brooker if I wanted my grievance heard while I am off sick or when I return to work. I am unable to heal from dealing with stress at work so I choose to discuss the grievance once I was strong enough to return to work. I understand that Boots has a duty of care to check on my well being whilst I am currently signed off from work. Could you please ask Carola the temporary manager from Sheerness store 0883 to not call me again as I was almost ready to return to work until I received a call from Carola the temporary store manager. This straight away undone all of the healing that I and my Doctor and a counselor had achieved. I have copies of my previous raised grievances if you need to request them from me. I look forward to hearing from you.

72. The respondent then started to progress the Second Grievance. Jeanette Campbell was appointed to hear it. On 3 December 2020 Ms Campbell emailed the claimant to confirm that due to the COVID restrictions in place at the time, she could not hear the grievance in person. She offered to do it via Teams. The claimant refused that request and indicated that she wanted to wait until they could meet in person.

Compulsory redundancy process

73. The respondent did not achieve sufficient redundancies via the voluntary redundancy programme, so in January 2021 a formal compulsory redundancy process commenced. Store managers were sent a pack of documents so that they could announce the proposals to affected staff. The Sheerness store needed to lose 40 hours of Customer Adviser time, out of a total of 77 hours. Ms Suteu asked her Area Manager, James Grieves, if Jeanette Campbell could raise the matter with the claimant since the claimant did not want to talk to her. Amanda Taylor, a Store Manager at another store, was appointed to deal with the consultation process with the claimant.

74. Ms Suteu completed a desktop scoring exercise for each of the affected members of staff in her team, including the claimant. The scoring exercise required managers to score employees from 1 to 4 for four selection criteria – "Customer", "Commercial", "Operations", and "Behaviours". Under each criterion there was a heading "what good looks like", followed by a number of bullet points describing the criterion in more detail. The scoring sheet noted that the score had to be supported by evidence. It described 1 as "not effective" and 4 as "excellent" but gave no description of the internal gradations between those two extremes. The score for each criterion was than multiplied by 3, and a figure derived from the employees' disciplinary record was subtracted, to give a final score.

75. Ms Suteu completed the claimant's scoring exercise on 18 January 2021. Her evidence, which we accept, was that at that point she did not know that the claimant had raised a grievance about her. She scored the claimant as follows:

    75.1. Customer – 3
    75.2. Commercial – 2
    75.3. Operations – 2
    75.4. Behaviours – 2

76. There was no downward adjustment as the claimant had a clean disciplinary record. That gave the claimant a score of 27 out of 48. Ms Suteu set out in the commentary on the form an explanation of why she scored the claimant as she had. She had noted "Y" or "N" against each of the bullet points under every heading. The comments noted that there were some areas where the claimant excelled, receiving good feedback from customers. However, there were other aspects of the role where the

claimant was weaker – for example, under each of the sub-headings for "Operations" Ms Suteu had noted "N" against every bullet point on the claimant's score sheet.

77. Ms Suteu scored the other two affected members of staff 39 and 42.

78. On 30 January 2021 Ms Suteu attempted to telephone the claimant. She kept a contemporaneous note. When she introduced herself, the claimant hung up. She tried again, and the claimant blocked her number. When she tried on a third occasion, from the pharmacy phone, the claimant did not answer.

79. The claimant attended a consultation meeting with Ms Taylor on 22 February 2021. The respondent had a script or template for carrying out the meetings. Part of the first consultation meeting would ordinarily have involved a discussion of the claimant's desktop selection scoring. The claimant indicated that she did not think that Ms Suteu was the appropriate person to complete the desktop exercise. It was agreed that Ms Brooker would carry out the claimant's desktop scoring exercise instead.

80. The script for the meeting said this regarding redeployment:

> "If you are unsuccessful in securing a role we will seek to avoid redundancies wherever possible and will look to support you to find suitable or alternative roles where they exist, as a means of mitigating redundancies and retaining skills and talent in our business"

81. The claimant was given a "Employee Redundancy Information Pack", which included a link to the respondent's Redeployment Portal. The portal contained roles that the at-risk employees could apply for. The notes of the meeting indicated that the claimant told Mrs Taylor that she was willing to travel to Sittingbourne, Gillingam or Chatham. Mrs Taylor did not discuss any specific opportunities with the claimant, other than giving her the pack with the portal link.

82. Ms Taylor's evidence was that she had recent experience of being put at risk of redundancy. In her case, a role had been found for her without her having to apply through the redeployment portal.

83. The claimant's evidence was that she did log into the portal but that there were no suitable vacancies for her there when she did so.

84. Ms Brooker completed the claimant's desktop selection scoring exercise on 23 February 2021. She scored the claimant as follows:

    84.1. Customer – 3
    84.2. Commercial – 3
    84.3. Operations – 1

84.4. Behaviours – 1

85. That gave a total score of 24 out of 48. Ms Brooker set out in the commentary an explanation of why she scored the claimant as she did. Ms Brooker did not score the other two affected member of staff at Sheerness, or any other member of staff at any store. She did not discuss the scores with Ms Suteu, and she was not involved in any calibration process.

86. The next stage in the process would have been for the second redundancy consultation meeting to have taken place. The claimant informed Mrs Taylor that she did not want the second redundancy consultation meeting to take place until after her grievance had been dealt with.

Second Grievance investigation

87. On 11 March 2021, Jeanette Campbell met the claimant to discuss the Second Grievance. The notes record her saying this: "I asked CD key Carola I knew to do things fast, CD [illegible] by doing this always handed over quick, I called out for CD & Carola responded stop shouting, not aloud [*sic*], black girl/woman we are known to be loud but that she said I am loud, no problem, again CD key please stop shouting" [331]. When the claimant was asked about those words in the course of cross-examination, her evidence was that she couldn't remember saying that in the grievance meeting. The claimant did not suggest in her witness statement that this was an allegation of discrimination. Her witness statement did not assert that she made an allegation of discrimination in the meeting on 11 March 2021.

88. Ms Campbell also met with Ms Suteu, and gathered statements from a number of other colleagues. On 9 April 2021 MS Campbell wrote to the claimant to give the outcome of the Second Grievance.

89. The first part of the claimant's grievance was a complaint about the way her grievance had been dealt with. Ms Campbell upheld that part of the grievance, on the basis that it had not been considered in a timely manner.

90. The second part of the claimant's grievance was the allegation of bullying, harassment and victimisation by Ms Suteu. Ms Campbell set out the evidence she had gathered. She then concluded as follows:

> "Having considered all the information, I do not uphold the allegation of bullying, harassment and victimisation by Carola. My findings are that Carola has followed company policy as required and as a newly appointed Store Manager she has also sought feedback and advice from an experienced manager. I do accept that there have been occasions whereby Carola believes she is trying to be open and supportive and that this has caused upset and confusion in the way this has been communicated.

> You shared with me during our meeting that you did not want anyone else to feel this way and therefore I will be making a recommendation to Carola's line manager to provide additional training and development on leadership style and communication skills going forward."

91. There was no suggestion in the grievance outcome letter that Ms Luckhurst had treated the grievance as a complaint of discrimination.

92. The third part of the claimant's grievance was that the racial abuse by a customer was not dealt with by Julie Brooker. Ms Campbell noted that it had been investigated at the time by Janice Luckhurst. Ms Campbell concluded that that aspect of the claimant's grievance was not uphold.

93. Ms Campbell recommended that the claimant be referred to Occupational Health, and that Janice Luckhurst facilitate a meeting between the claimant as Ms Suteu to discuss ways to improve working relations.

94. The claimant appealed the outcome of the Second Grievance. Her appeal was stated to be on the basis that her grievance was not investigated fully or to a satisfactory level. Her appeal did not refer to discrimination, or to her race.

Second redundancy consultation meeting

95. On 17 April 2021, Ms Taylor emailed the claimant to indicate that she wanted to plan the second consultation meeting for the following week.

96. On 23 April 2021, Ms Taylor emailed the claimant about going ahead with the second consultation meeting. She explained that the consultation meeting could take place although the claimant was still off work sick, and that it could take place either by telephone, video, or in the claimant's absence if she gave her written consent.

97. On 30 April 2021, Ms Taylor wrote to the claimant to invite her to the second consultation meeting, to take place by video on 7 May 2021. She explained that the desktop exercise completed by Ms Brooker would be discussed at the meeting. She noted that the respondent needed to lose 40 hours from a pool of 77 hours at Customer Adviser level within the Sheerness store.

98. Meanwhile, Jenny Phillips was appointed to hear the Second Grievance appeal. On 1 May 2021, she wrote to the claimant to invite her to an appeal meeting on 12 May 2021 (again via video).

99. The claimant did not attend the second consultation meeting. Ms Taylor attempted to contact her by telephone at the appointed time, without success. She emailed the claimant late than afternoon asking for her availability for a meeting over the following two weeks.

100. On 10 May 2021, the claimant's solicitors wrote to Ms Taylor. They indicated that the claimant was not well enough to attend a consultation meeting.

101. On 14 May 2021, Ms Taylor wrote to the claimant to invite her to the second consultation meeting, to take place by video on 18 May 2021.

102. There was an exchange of correspondence between the claimant's solicitors and Ms Phillips. The claimant's solicitors requested that the claimant be referred to Occupational Health. Ms Phillips concluded that it was better to conclude the redundancy process first, and that an Occupational Health referral would be made at the end of the process if the claimant remained employed.

103. On 14 May 2021, Ms Phillips invited the claimant to a grievance appeal hearing on 26 May 2021.

Third redundancy consultation meeting

104. The claimant did not attend the redundancy consultation meeting on 18 May 2021. She did not submit any written representations. On 20 May 2021 Ms Taylor wrote to the claimant to inform the claimant that she had been provisionally selected for redundancy. She invited her to a third consultation meeting on 22 May 2021. The letter indicated that the claimant may be served with notice of redundancy following that meeting.

105. The claimant did not attend that meeting. On 22 May 2021, Ms Taylor wrote to the claimant giving her notice of termination, with her termination taking effect on 30 May 2021. The letter informed the claimant that she had a right of appeal, and that if she wished to appeal she should do so in writing to Ms Philips. The notice of redundancy letter was silent about which score was used. Ms Taylor's evidence was that it was Ms Suteu's score that was used to decide that the claimant would be dismissed as it was higher than Ms Brooker's (although both scores were of course some distance lower than the next lowest scoring employee).

106. Ms Taylor's evidence, in her witness statement, was that she was aware at the time that there were vacancies at the Sittingbourne store. She caveated that slightly in her oral evidence. Her oral evidence was that she was aware that the vacancy existed during at some point during her involvement in the redundancy process (which was from February to May 2021).

Second Grievance appeal

107. Ms Phillips was unable to hear the Second Grievance appeal on 26 May 2021, as she was unwell.

108. In the interim, the claimant appealed her dismissal. Ms Phillips indicated that she would hear the grievance appeal and the dismissal appeal together.

109. Within her grounds of appeal, the claimant raised various issues with Ms Brooker's scoring.

110. Ms Phillips wrote to the claimant on 14 June 2021 inviting her to an appeal meeting on 24 June 2021. The meeting covered both the dismissal appeal and the Second Grievance appeal. The claimant was accompanied to the meeting by her partner, Mr Kemsley. A notetaker attended to take notes of the meeting. The claimant was sent a copy of the notes, and she confirmed she was happy with them.

111. After the appeal meeting with the claimant, Ms Phillips interviewed a number of colleagues. On 5 July 2021 she wrote to the claimant giving her the outcome of her appeals. The claimant relied upon three grounds of appeal. Ms Phillips explained her outcome on each of the three grounds of appeal as follows:

> "1. The grievance was not investigated thoroughly."

111.1. Ms Phillips partly upheld this element of the appeal in that she concluded that further investigations should have been carried out in that Ms Campbell should have spoken to the team at the Sheerness store. However, having carried out that further investigation herself, she reached the same conclusion, which was that Ms Suteu had not treated the claimant differently.

> "2. Unfair and discriminatory desktop assessment carried out by Ms Julie Brooker."

111.2. Ms Phillips concluded that the desk top exercise was scored fairly and that all processes were followed in line with company guidance. She therefore did not uphold that part of the claimant's appeal.

> "3. Treated unfairly by the refusal to provide you with occupational health to support your return to work, after making a written request in February 2021."

111.3. Ms Phillips noted that it had been felt best to conclude the redundancy consultation process before considering an OH referral. She noted that adjustments had been made to facilitate the claimant's involvement in the redundancy consultation process. She therefore did not uphold that part of the claimant's appeal.

112. Ms Phillips concluded that the claimant's termination should be upheld.

113. The claimant notified ACAS under the early conciliation process of a potential claim on 3 June 2021 and the ACAS Early Conciliation Certificate was issued on 18 June 2021. The claim was presented on 16 July 2021.

Law Equality Act 2010

114. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:

114.1. In the terms of employment;

114.2. In the provision of opportunities for promotion, training, or other benefits;

114.3. By dismissing the employee;

114.4. By subjecting the employee to any other detriment.

Protected characteristics

115. Race is a protected characteristic (s.9 EqA 2010)

Harassment

116. Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **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) A also harasses B if—
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
> (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.
> (5) The relevant protected characteristics are—
> age;

disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

117. General harassment (s. 26(1)) therefore has three elements:
    117.1. Unwanted conduct;
    117.2. That has the proscribed purpose or effect; and
    117.3. Which relates to the relevant protected characteristic.

118. "Unwanted" is essentially the same as "unwelcome" or "uninvited". Where conduct is offensive or obviously violates a claimant's dignity, that will automatically be regarded as unwanted (*Reed and anor v Stedman* [1999] IRLR 299). A failure to complain at the time is unlikely to undermine a claim based on inherently unwanted conduct.

119. Comments and behaviour must be looked at in context in order to determine whether they were unwanted (*Evans v Xactly Corporation Ltd* EAT 0128/18).

120. The test for whether the treatment had the proscribed effect has both a subjective and an objective element. That is, the Tribunal must consider the subject effect the conduct had on the claimant and must also consider whether it was objectively reasonable for the conduct to have had that effect. In the case of *Pemberton v Inwood* [20187] ICR 1291, Underhill LJ gave the following guidance:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances — sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

121. When considering whether treatment had the proscribed effect, we must look at the effect of the incidents in the round.

122. The words "related to" in section 26(1)(a) is as broad test, which requires and evaluation by the Employment Tribunal of the evidence in the round (*Hartley v Foreign and Commonwealth Office Services* [2016] 5 WLUK 652).

123. In considering whether conduct is "related to" the relevant protected characteristic, a finding about the motivation of the putative harasser is not the necessary or only possible route to the conclusion that the conduct related to the characteristic in question. However, there must be some feature or features of the factual matrix which leads the Tribunal to the conclusion that the conduct in question is related to the particular characteristic in question (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslam & Heads* (UKEAT/0039/19).

Victimisation

124. Section 27 of the Equality Act 2010 provides as follows:

> **Victimisation**
>
> (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.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
> (4) This section applies only where the person subjected to a detriment is an individual.
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

125. The first stage is that the Claimant must have done a protected act (or the employer must believe that the claimant has done, or may do, a protected act).

126. Protected acts are as defined in s.27(2). For the purposes of section 27(2)(d), it is not necessary that a complaint expressly mentions the Equality Act. However merely making reference to a criticism, grievance or complaint without suggesting that it was in some sense an allegation of

discrimination or otherwise a contravention of the Act is not sufficient (*Beneviste v Kingston University* EAT 0393/05).

127. The EAT in the case of *Fullah v Medical Research Council* UKEAT 0586/12 held that a complaint saying that the claimant had been "physically, verbally and psychologically bullied and harassed, discriminated and victimised both directly and indirectly; and I was at a loss to understand why" was not a protected act, as the claimant did not mention race.

128. The EHRC Code describes a detriment as follows:

> "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment"

Burden of proof

129. Section 136 of the Equality Act deals with the burden of proof as follows:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

130. The section prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International PLC* [2007] EWCA Civ 33).

131. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

132. If the claimant satisfies that initial burden, the burden shifts to the employer at stage 2 to prove one balance of probabilities that the treatment was not for the prescribed reason.

133. The Court of Appeal gave guidance to tribunals the application of the burden of proof provisions in the case of *Igen v Wong* [2005] EWCA Civ 142 (the guidance was given in the context of the Sex Discrimination Act, but subsequent authorities have confirmed that it remains good law):

> "(1) Pursuant to section 63A of the SDA, 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 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 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 section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(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 section 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.

Unfair dismissal

134. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

135. Section 98 of the 1996 Act deals with the fairness of dismissals. The employer must show that it had a fair reason for dismissal within subsection 98(2).

136. Redundancy is a potentially fair reason for dismissal under section 98(2). Redundancy is defined in section 139 of the 1996 Act as follows:

> For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.

137. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

138. In redundancy dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decision of the EAT in *Williams v Compare Maxam Limited* [1982] IRLR 83. In order to act reasonably, an employer must give as much warning as possible of impending redundancies to employees, consult them about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as reemployment to a different job.

139. It is not for the Tribunal to decide how an employer should manage its business. In determining whether it was appropriate for an employer to make cuts in a particular area of its business, the Tribunal must consider whether the decision taken by the employer fell within the range of reasonable responses open to a reasonable employer.

140. Where an employee complains about unfair selection, all the employer has to prove is that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned (*Buchanan v Tilcon Ltd* [1983] IRLR 417). This is the case even where employees are scored by different managers (*First Scottish Searching Services Ltd v McDine and anor* UKEAT 0051/10).

Polkey

141. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed. Further guidance was given in the cases of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.

142. In undertaking the exercise of determining whether such a deduction ought to be made, the Tribunal is not assessing what it would have done. Rather, the Tribunal must assess the actions of the employer before it, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 at para 24.

Conclusions

143. We deal first with the complaint of harassment. There are eight factual allegations relied upon

3.1.1. On or around March 2019, Carola Suteu shouted at the Claimant and told her off.

144. The evidence regarding this incident diverged significantly. We consider on balance that Ms Suteu did shout at the claimant in an incident in or around March 2019 which the claimant perceived as being "shouting at her and telling her off", as the claimant describes, because:

144.1.1. The claimant had a clear recollection of the incident, involving a roll cage.

144.1.2. Ms Suteu's evidence appeared to be about a different incident. She did not explicitly say that the roll cage incident didn't occur.

144.1.3. There was a weight of evidence that Ms Suteu could come across as harsh in her interactions with colleagues (although not specifically towards the claimant).

145. We conclude also that this constituted unwanted conduct. The claimant reasonably perceived that she was being shouted at and told off. At that point, Ms Suteu was not the claimant's manager. We consider that being shouted at and told off by a colleague in that way was unwanted.

146. It was suggested to Ms Suteu or to us that it had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant ("the

requisite purpose"). We do, however, find that it the effect of creating a hostile, degrading and humiliating environment, because:

146.1. We accept that it had that effect subjectively for the claimant.

146.2. We consider that, objectively, it was reasonable for the claimant to have perceived it in the way that she did, given that she was being shouted and told off.

147. We will consider the question of whether the conduct was related to race in the round.

3.1.2. On or around 17 June 2019, Carola Suteu, singled the Claimant out and told her off for shouting when she asked for control drug keys.

148. It is common ground that Ms Suteu did rebuke the claimant for the way she requested the Controlled Drug keys on 27 June 2019. We find that the claimant was not being singled out at the time as she was the only one requesting the keys at the time. We consider that the way the claimant requested the key, and Ms Suteu's response, was context-specific.

149. We find that the general practice within the store was not to go over to the pharmacy and ask for the keys, but to call out for them. The claimant's evidence was that she did so in the same tone of voice and at the same volume as other colleagues. However, what we consider was more significant was that the claimant was, by her own evidence, interrupting a conversation between Ms Suteu and another colleague. We find that the claimant was told off not so much for the tone of voice that she used, but rather for (knowingly) interrupting Ms Suteu's conversation.

150. We consider that the claimant was unwanted, in the sense that no one wants to be told off or rebuked in front of colleagues.

151. It was not suggested that the conduct had the requisite purpose. In terms of the effect of the conduct, we accept that the claimant believed she was acting appropriately. In that context, we accept that subjectively, Ms Suteu's reaction had the effect of creating a hostile and humiliating environment for the claimant. Objectively, however, we consider that it was not reasonable for the treatment to have that effect. The claimant was interrupting a conversation. The nature of what she was doing was different to what her colleagues had done in the same situation. It was not objectively reasonable for her to see the interaction in the way that she did, given that she had knowingly interrupted the conversation between Ms Suteu and her colleague.

152. It follows that this allegation does not succeed.

3.1.3. Between 17 June 2019 and 8 September 2020, Carola Suteu was hostile and unfriendly to the Claimant when the Claimant would ask her for help, in

comparison to other customer advisers who she spoke to nicely when they would ask for help.

153. We have found as fact that both the claimant and Ms Suteu actively avoided talking to each other during that period. We do not consider that Ms Suteu's conduct towards the claimant could reasonably be described as hostile or unfriendly, although we find that it was in contrast to the way that she interacted with other colleagues during the period in question.

154. We have considered whether the conduct was unwanted. Given that both the claimant and Ms Suteu were actively avoiding each other, we do not consider that Ms Suteu's conduct was unwanted. There was a mutuality of the behaviour in question. In reaching that conclusion, we bear in mind also the claimant's apparent unwillingness to recognise Ms Suteu as her manager. The claimant did not regard Ms Suteu as her manager, and did not want to interact with her. While it may have been poor management practice to allow that situation to develop and continue, in the context we do not regard Ms Suteu's conduct in avoiding interacting with the claimant as unwanted.

155. It follows that this allegation does not succeed.

3.1.4. On or around 4 April 2020, Carola Suteu spoke to the Claimant aggressively and loudly accusing her of not calling into the store and telling her she would not get paid.

156. We have found that Ms Suteu did speak to the claimant aggressively and loudly on 4 April 2020, and did tell the claimant that she would not get paid.

157. We consider that Ms Suteu's conduct was unwanted. No one wants to be spoken to be their line manager in the way that we have found Ms Suteu spoke to the claimant on that occasion.

158. It was not suggested that the conduct had the requisite purpose. However, we do find that it had the requisite effect, in that the claimant reasonably found it to be intimidating and hostile. We consider that, objectively, it was reasonable for Ms Suteu's conduct to have that effect – both because of the way that Ms Suteu spoke to the claimant, and the threat to withhold pay.

159. We will consider the question of whether the conduct was related to race in the round.

3.1.5. On or around 4 April 2020, Carola Suteu turned the heating up in the area where the Claimant was, despite knowing the Claimant suffers from asthma

160. We have found as fact that this simply did not happen. It follows that this allegation does not succeed.

3.1.6. Between 1st and 8th September 2020, Carola Suteu pressured the claimant to fill in application form for voluntary redundancy.

161. We have found that Ms Suteu reminded the claimant to return the form during the second half of that period; that is, the period closer to the deadline date. We have found that in doing so, Ms Suteu was not pressurising the claimant.

162. We do not consider that the conduct was unwanted. The claimant did not tell Ms Suteu that she didn't want to be reminded about the deadline for submitting the form. Nor did she tell Ms Suteu that she regarded the reminders as pressurising her. We accept that Ms Suteu had no expectation that her reminders would be unwanted or would have been taken in the way that they were by the claimant.

163. It follows that this allegation does not succeed.

164. We would in any event have concluded that Ms Suteu's conduct, as we have found it to be, was not objectively capable of having the requisite effect. Given the relatively short timescale for return of the voluntary redundancy forms, we consider that reminding an employee to return the form within the timescale could not reasonably be regarded as having that effect.

3.1.7. On 9 September 2020, Carola Suteu told the Claimant that she didn't think the Claimant would be there in October 2020.

165. We have found as fact that this did happen.

166. We consider that it did constitute unwanted conduct. The context of the interaction was that the claimant was asking to take some annual leave. Being told by her line manager that she did not think the claimant would still be at the store in a month's time was clearly and obviously unwanted.

167. We conclude also that the conduct had the requisite effect. It would be upsetting for any employee to be told by their line manager that they may not be there in a month's time. We are satisfied that the claimant was genuinely (and understandably) aggrieved. Objectively, we consider it was reasonable for Ms Suteu's remark to have that effect on her.

168. We will consider the question of whether the conduct was related to race in the round.

3.1.8. Between 20 October 2020 and 30 January 2021, Carola Suteu called the Claimant three times when the Claimant was signed off sick and had made a complaint about Carola Suteu.

169. We have found that Ms Suteu telephoned the claimant on 20 October 2020. That was the telephone call during which the claimant asked Ms Suteu not to call her again. Prior to that, Ms Suteu could not have known that the claimant did not want her to call.

170. Thereafter, on 30 January 2021 Ms Suteu attempted (unsuccessfully) to call the claimant three times in quick succession. The claimant did not respond as she was aware that it was Ms Suteu who was trying to call her.

171. We conclude that the attempted telephone calls were unwanted conduct. The claimant had asked Ms Suteu not to telephone her. Of course, Ms Suteu was the claimant's line manager. But the request for Ms Suteu not to contact her came in the context of the claimant being off work due to work related stress, brought to a head by the interaction with Ms Suteu over the annual leave.

172. We also conclude that the attempted telephone calls had the requisite effect. It was clear that the claimant was upset by the calls, and she referred to them worsening her stress. We consider that it was objectively reasonable for them to have had that effect. The claimant had asked Ms Suteu not to call her, and that request had been disregarded. While some three months had passed since the request had been made, nothing had changed such as to indicate that the claimant was ready to speak to Ms Suteu again.

173. Again, we will consider the question of whether the conduct was related to race in the round.

Was the conduct related to race?

174. For those allegations we have meet the other limbs of the test, we now consider whether they were related to race.

175. The claimant's case was that she was rebuked about the CD Key incident because of a trope about black women being particularly "shouty". In respect of the CD Key incident, we have found that the reason Ms Suteu spoke to the claimant in the way that she did was not primarily because she perceived the claimant to be shouting. Rather, it was because the claimant knowingly interrupted her conversation. In our judgment, that did not suggest that there was any preconception about the claimant based on her race.

176. It was not suggested that any of the other alleged acts of harassment had an inherent connection to the claimant's race. The claimant's case was that Ms Suteu treated her differently to her colleagues.

177. The consistent evidence before the Tribunal was that Ms Suteu's communication style could come across to colleagues as direct, abrupt and harsh. With that in mind:

177.1. The way Ms Suteu rebuked the claimant in the CD key incident was consistent with what we heard about Ms Suteu's communication style. That is, she spoke harshly to the claimant, in a situation where she perceived (rightly) that the claimant had behaved improperly.

177.2. So too was the way Ms Suteu rebuked the claimant on 4 April 2020. Once again, she spoke harshly to the claimant, in a situation where the claimant was late for work, and where she believed (albeit without grounds to do so) that the claimant was culpable.

177.3. In respect of the incident on 9 September 2020, regarding the request for annual leave, the issue was that Ms Suteu did not explain her comment or put it into context. This is again, in our judgment, symptomatic of what was described as her bluntness.

178. Of course, this is not a complaint of direct discrimination. We are not looking to compare the claimant's treatment to that of a comparator in materially the same circumstances. But we consider that the way that Ms Suteu communicated with the claimant in those incidents was not, as the claimant sought to suggest, markedly different to the way behaved towards other colleagues.

179. In respect of the attempted telephone calls on 30 January 2021, we consider that that was simply poor judgement by an inexperienced manager.

180. Taking a step back and looking at all of the allegations in the round, we do not consider that there is evidence from which we could properly infer that Ms Suteu's treatment was related to the claimant's race.

181. The claimant's complaint of harassment related to race fail and are dismissed.

4. Victimisation s27 EQA

182. The claimant relies upon two protected acts:

4.1.1. Her written complaints on 5 April 2020 and 27 October 2020

183. Neither the letter of 5 April 2020 nor that of 27 October 2020 suggested that the claimant was being treated differently on the grounds of her race. Neither mentioned discrimination. The claimant complained about Ms Suteu's treatment, but she did not within either letter, in our judgment,

say anything that could reasonably be construed as alleging a breach of the Equality Act 2010 (either expressly or impliedly). It follows that they are not a protected act, either individually or cumulatively.

4.1.2. The grievance hearing on 11 March 2021

184. The claimant did not give any direct evidence about what she regarded as having been a complaint of discrimination within that meeting. The notes recorded that the claimant made reference, in complaining about the CD Key incident, to a trope about black women being "loud". The claimant did not, in her evidence, suggest that that was a complaint of discrimination.

185. The grievance outcome letter did not suggest that the claimant had made a complaint of discrimination. The claimant appealed the outcome of her grievance, but she did not suggest in her appeal that she had made a complaint of discrimination which had not been addressed. If she had made a complaint of discrimination in the grievance meeting, we would have expected her to have raised that on appeal – not least because by the time of the appeal hearing, the claimant was legally represented.

186. We have carefully looked at the comment in the hearing on 11 March 2021 in the round, alongside the remainder of the meeting minutes. We are not satisfied on the evidence before us that the claimant did make allege in the grievance meeting that there was a breach of the Equality Act 2010. We conclude that there was no protected act in the hearing on 11 March 2021.

187. As we have found that the claimant did not do a protected act, it follows that the complaint of victimisation fails and is dismissed.

Unfair Dismissal

188. We first consider whether the respondent had a fair reason for the dismissing the claimant. We are satisfied that the reason for the dismissal was redundancy. The respondent had to reduce the number of customer assistant hours in the store by 40, from 77. That was a significant reduction. We are satisfied that that was the operative reason for the dismissal.

189. We then consider whether the respondent acted reasonably in all of the circumstances in treating that as a sufficient reason for the claimant's dismissal.

Information and consultation

190. We consider that the respondent undertook reasonable consultation with the claimant. The claimant was given information about the proposals once formal redundancies were announced. She attended a consultation meeting at which the proposals and the scoring process were discussed.

She was invited to two further meetings, although she elected not to attend them. We bear in mind that during the period when the claimant was not attending consultation meetings, she was engaged in preparing material in relation to her grievance. She was also given the opportunity to make submissions in writing regarding the proposed redundancy.

191. Overall, we consider that the degree of consultation carried out by the respondent was reasonable.

Selection criteria

192. We consider that the selection criteria were not entirely objective, and did involve an element of subjectivity. But given the nature of the claimant's role, we consider that the selection criteria adopted were not unfair overall.

193. In terms of the claimant's scoring, she was given the opportunity to be rescored by another manager when she objected to being scored by Ms Suteu. She was then rescored by Ms Brooker. Ms Brooker did not score any of the other candidates. Given the lack of any scoring key for the scores between one and four, we were concerned about the possibility for discrepancies between different markers. However the respondent did ultimately use Ms Suteu's score, which was higher than Ms Brooker's.

194. The claimant's case was that her relatively low scores were inconsistent with the positive feedback she had received throughout her employment. As an overall mark, it was at first blush hard to reconcile the claimant's score with the positive feedback she had received. It was clear that the claimant excelled at some parts of her job. In particular, she provided excellent service to customers, evidenced by the positive customer feedback she received.

195. On closer analysis, however, Ms Suteu's comments did reflect the claimant's areas of strength. The score reflected Ms Suteu's perception that the claimant tended to prefer to focus on serving customers on the till, and took less of a part in other operational aspects of the role. The same came through from Ms Brooker's comments on the scoring sheet. The issue in our judgment was not so much that the claimant's strengths were underscored, as that the scoring criteria focused on a broad range of skills. We consider that the respondent was entitled to adopt the selection criteria that it did.

196. We bear in mind also that the respondent needed to lose 40 hours of the 77 within the pool at Sheerness. The effect of that was that even if the claimant had scored second in the pool, she would have needed to either reduce her hours of work or be made redundant. The only way the claimant's role would have been safe was had she scored top of the pool.

197. Overall, therefore, we do not consider that the scoring process adopted by the respondent, and the way they applied it to the claimant, fell outwith the band of reasonable responses.

Redeployment

198. The claimant was given a QR code from which she could apply for vacancies within the respondent. The claimant's evidence was that she did log in to the portal but was unable to find any roles. The claimant was not given any specific support to locate alternative vacancies.

199. We bear in mind that:

199.1. There was evidence before us that that was somewhat different to the treatment of other affected employees. In Ms Taylor's case, when she was put at risk of redundancy in a previous redundancy exercise, she was found another role without having to apply for it. Ms Taylor asked the claimant about whether she was willing to work in other stores, but then did nothing to explore whether there may be vacancies coming up in any of those stores.

199.2. The claimant had over 20 years' service, with a clean disciplinary record. She was absent from work due to work related stress throughout the consultation process.

199.3. Ms Suteu had been confident enough that there was a vacancy at Sittingbourne as of October 2020 that she had told the claimant, in terms, that she may not still be at the Sheerness store in a month's time. The respondent knew throughout that period that it was faced with the possibility of redundancies at the Sheerness store. None of the witnesses who gave evidence on behalf of the respondent were able to tell us whether that vacancy still existed at the point that the claimant was made redundant, and if not, what had happened to it. Ms Taylor's evidence, in her witness statement, implied that the vacancy still existed at the point that the claimant was dismissed (although she caveated that somewhat in her oral evidence). If there was a vacancy, it would have been reasonable to expect the respondent to at least consider holding it pending the outcome of the redundancy consultation. But somewhat surprisingly, there was simply no evidence about what happened to that role. Nor did we hear any evidence about other vacancies in nearby stores.

200. In our judgment, the position in respect of the Sittingbourne store was indicative of a respondent which had not given sufficient attention to the possibility of redeploying the claimant. The respondent had known from the autumn of 2020 that they needed to reduce the hours at the Sheerness store. From the point that the Voluntary Redundancy process started, the respondent should have done more to attempt to ensure that opportunities

existed to redeploy any potentially redundant employees, including the claimant.

201. Overall, therefore, we conclude that dismissal did not fall within the range of reasonable responses available to a reasonable respondent, because insufficient steps were taken to consider redeployment.

Polkey

202. We have carefully considered whether this employer would nonetheless have dismissed the claimant if a fair process had been followed. The issue we have found with the process was with the way that redeployment was dealt with.

203. The fact that the claimant's own line manager, as of September 2020, thought it was "likely" that the claimant would move to Sittingbourne is strongly suggestive in our view that there was at some point a suitable vacancy for the claimant in Sittingbourne. The claimant suggested in the consultation process that she would have taken such a role had it been offered.

204. There was no evidence presented about how the redeployment portal operated. There was, of course, evidence that some potentially redundant employees were offered jobs outside the portal. Critically, again, there was no evidence about what happened to the vacant role in Sittingbourne.

205. We bear in mind that the claimant did, belatedly, attempt to apply for voluntary redundancy. But by the time of the compulsory redundancy consultation, she was apparently no longer interested in voluntary redundancy. In her consultation meeting with Ms Taylor, she spent some time talking about the locations and roles to which she would be willing to be redeployed. We consider that she would have accepted a role in Sittingbourne had one been offered to her.

206. In the circumstances, we are unable to conclude that the claimant would still have been dismissed had a fair process been followed, and had redeployment been properly considered. We therefore make no *Polkey* reduction.

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Employment Judge Leith
Date: 20 October 2023