EMPLOYMENT TRIBUNALS

Claimant: **Miss A.B. Machado**

Respondent: **Swansea Audio Limited t/a Coyote Ugly**

Heard at: **Liverpool** **On: 9, 10, 11, 12 – 13 June 2025; and 22 July 2025 (deliberations)**

Before: **Judge Callan**
Mr. G. Pennie
Mr. S. Husain

Representation
Claimant: In person (Interpreter Ms. S. Rodrigues present – 9-11 June & Mrs. Schmidt present 12-13 June)
Respondent: Mrs. Kaur-Singh, solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) Issues 4.1 to 4.10, 4.12, 4.13 4.15 and 4.16 which are complaints of harassment related to nationality are not well-founded and are dismissed;

(2) Issues 4.11 and 4.14 which are further complaints of harassment related to nationality succeed;

(3) The complaint in respect of issue 10.1, having been found to be an act of unlawful harassment (issue 4.14), cannot also succeed as an act of direct discrimination;

(4) Issues 10.2 and 10.3 which are further complaints of direct discrimination are not well-founded and are dismissed; and

(5) Issues 17.1, 17.2 and 17.3 being complaints of victimisation are not well-founded and are dismissed.

REASONS

Introduction

1. The claimant represented herself and the respondent was represented by Mrs. Kaur-Singh. The Tribunal took time on the first morning to read the statements and the documents referred to therein.

2. The Tribunal heard evidence from:

   Ms. A. Machado, the claimant;
   Ms. R. Fitzsimmons, Assistant Manager, Coyote Ugly, Liverpool
   Ms. R. Freeman former bartender, Coyote Ugly, Liverpool
   Mr. R. Boreham, Manager. Coyote Ugly, Liverpool

   The claimant tendered two witness statements from ex-employees (Ms. A. Elverstone and Ms. L. Rutherford). They were not available to be cross-examined and the Tribunal gave their statements little weight accordingly.

3. The Tribunal was provided with a hearing bundle numbered to page 419, to which were added supplementary pages up to page 440, transcripts of recordings of meetings held on 31 December 2022; 23 January 2023 and 25 January 2023. The Tribunal considered the documents referred to by the parties.

Strike out application

4. Whilst the Tribunal were undertaking the reading, at lunchtime on the first day the respondent emailed an application to strike out the claim based on the assertion that a Facebook page in the bundle at page 337 and dated 3 December 2022 had been tampered with (copy of the altered page added at page 337A). At the commencement of the afternoon session, that application was heard. Although the claimant's response was not entirely satisfactory (she said that the changes were due to her de-friending Becca Fitzsimmons from her Facebook account), the Tribunal found that the respondent had not surpassed the high threshold attached to striking out the claim. It was found that there were anomalies in the document relied upon for the application, but it was not proportionate to strike out the claim either in part or in its entirety. The concerns about the potential that the Facebook page at the centre of the application could be met by being particularly careful in respect of assessing the claimant's evidence and a fair hearing was still possible. The strike out application was therefore refused.

5. The afternoon of the first day after giving the decision on the strike out application, was spent dealing with the arrangements for the agreement of transcripts, the viewing of CCTV and hearing of audio if necessary.

Other matters

6. Oral evidence was heard over the course of the following 2.5 days. The claimant fell ill at lunchtime on the fourth day. The tribunal adjourned to allow her time to recover. Submissions were heard in the morning of the fifth day. Written submissions were provided by both parties.

7. The manager who dealt with the claimant's grievance/appeal against dismissal did not give evidence. We were told that he had left the business around May 2025. Surprisingly, no evidence in the form of a draft statement, for example, was available from him (we noted that the witness statements were exchanged on 6 June 2025). There were, however, recordings and two agreed transcripts of the meetings he held with the claimant on 23 and 25 January 2023.

The Issues

8. The issues are set out in the attached Appendix.

Findings of Fact

9. In part, the claimant's witness statement does not deal with the central allegations contained in the list of issues but with other matters which are clearly of importance to her. As a tribunal, it is not our role, and we do not have the jurisdiction, to conduct an enquiry into whether the respondent is a good employer generally. It is our role to consider the issues in the case and the evidence which relates to those issues. We can only reach conclusions based on the evidence which is presented to us by the parties. If particular facts are not dealt with in evidence, we are not in a position to make findings in respect of them. Therefore, the way in which the claimant presented her evidence has, on occasion, made it difficult for us to make findings of fact. In relation to the issues at paragraphs 4.1 to 4.4 of the list of issues, the claimant has not given specific evidence in her witness statement but has made assertions or referred to a number of pages in the bundle.

10. However, the claimant's oral evidence was presented in a straightforward fashion and marked by a willingness to make concessions where she considered it appropriate (for example, where she conceded that she had made mistakes in entering sales onto the till). The Tribunal did not form the view that she was seeking to mislead us and we find that she was telling us about events as she genuinely believed them to have been. It was apparent to us that she is clearly distressed by her recollection of what happened. We found she presented her case to the Tribunal politely and with sincerity.

11. The respondent's witnesses were less straightforward. Mr. Boreham, in particular, answered the questions somewhat "formulaically" and avoided

using the word "discrimination". We find Ms. Fitzsimmons' evidence evasive around the meeting of 31 December 2022. Ms Freeman's evidence was also less than frank. Mr. Boreham and Ms. Fitzsimmons were partners, and had been, we understand, for some years.

12. Having heard the evidence, we made the following key findings of fact.

13. The claimant is a Brazilian national, currently having leave to remain through her daughter who is a UK citizen. She was employed as a Coyote/Bartender from 4 December 2021 to 31 December 2022. The termination date was unclear and the respondent offered 3 different dates for the termination of the claimant's employment but for the reasons set out below, we found that she had been dismissed on 31 December 2022 by Ms. Fitzsimmons.

14. The duties of a "coyote" included bartending, waitressing, and entertainment duties such as dancing on the bar with customers in choreographed routines. The coyotes undertook dance practices generally every week. The American parent company would periodically send someone to the UK to "refresh" the dance routines.

15. Customers would sometimes tip the coyotes and these were paid either as part of a card payment or in cash. The cash and copy of receipts showing tips being given were put in a jar near the till. The jars were then taken to the office at the end of the shift and would be shared between the coyotes on shift when the tips were made. The payment out of tips often would occur some days later. Both the bar areas and the office were covered by CCTV.

16. Early in her employment, the claimant contends she was met with mockery and hostility from a colleague (AJ Williams) who she alleges shouted at her in front of customers when she froze while using the microphone. The claimant's statement was sparse in giving any further details (see above), such as when it was that this occurred and when she reported it to her manager. Her statement also contained allegations in respect of acts of complaint which were not in the List of Issues and again with insufficient particularity, for example, having been hit on the legs by another coyote while the claimant was dancing on the bar.

17. In or about April 2024, the claimant moved from the women's refuge where she had been housed to a rental property. She was given a surprise party at work and given household items as well as children's toys by her colleagues, including Ms. Fitzsimmons.

18. The respondent operates a system to manage matters such as absences and days of leave on its Bright HR App. This claimant had access to, and knew of, the App. The respondent operates a shift system and the allocation of staff to the shifts is made approximately 4 weeks in advance.

19. On or about 15 July 2022 the claimant made a verbal request to Ms. Fitzsimmons to have 12 August 2022 as a day's leave. Subsequently, on 12 August 2022 she received a message from the manager Sarah Loo to say she was expected to be at work and where was she. The claimant explained that

she had had the day authorised as leave by Ms. Fitzsimmons Shortly after, the claimant received a message on the Bright HR App informing her that the day off was an unauthorised absence. We find that the claimant is likely to have asked verbally on 15 July 2022 for the 12 August 2022 as a day off but did not process her request via the HR App. However, it is not clear if she was directed to enter that into the Bright HR App as we would have expected as the respondent would need to know when the staff members were available in order to construct the rota.

20. Following the unauthorised absence on 12 August 2022, the claimant resigned on 16 August 2022. Subsequently, she retracted her resignation on 25 August 2022. We find that the rota for the period mid August to 4 September had already been set by that time. That being the case, we find that it would not have been feasible to withdraw shifts already allocated to others.

21. In respect of the allegation that Ms. Fitzsimmons around mid July 2022 said to new starters (referring to the claimant) "don't worry about her, because she is very hard to understand" was not made out and we declined to make findings of fact due to insufficient evidence.

22. Throughout the period of the claimant's employment, there was ample evidence provided in Whatsapp messages and Facebook posts to demonstrate the claimant was included in social interactions with colleagues up to and including 20 September 2022. The claimant was unable to evidence any particular social event from which she had been excluded.

23. The claimant contends that Ms. Fitzsimmmons said to Sarah Mack that the claimant was "shy and didn't involve herself with the group". We find that the claimant was described by Ms. Fitzsimmons as "amazing" and was very good at engaging with the customers. We find this is not consistent with the alleged comment by Ms Fitzsimmons.

24. In October 2022, in particular on 13 October 2022, the claimant alleges that Ms. Fitzsimmons said "she's Brazilian, she doesn't understand us". There was scant evidence to support this allegation. As a result, we decline to make findings of fact. Similarly, the allegation that Ms. Fitzsimmons, during an argument with people from neighbouring premises who were of South Asian origin, had refuted an allegation of racism by one of them by stating "she wasn't being racist because she had the claimant in the team and because of this she couldn't be racist" was not evidenced.

25. Ms R. Freeman joined the respondent's organisation as a coyote on 3 October 2022 and her first shift at the premises was on 6 October 2022. She first met the claimant at the end of October over the Halloween weekend. The claimant had by this time been employed for about 11 months. During a shift on 4 November 2022, Ms. Freeman remarked on the claimant's accent to the effect that customers don't understand her. Ms. Freeman denied that it was because of her accent but because she was quite muffled and hard to understand. Subsequently, a waitress approached Ms. Freeman and asked "who do I pass this to" [meaning the microphone]. At busy times, the respondent opens its upstairs bar at around 7 pm. One of the coyotes announces that the bar

upstairs is open and encourages customers to go up there. Ms. Freeman admitted that she made the comment to the waitress "not to Bea (the claimant) or Daisy because you can't understand them." In evidence, Ms. Freeman denies that this was said in respect of the claimant's nationality or level of English but because she and Daisy were not clear when they spoke on the microphone. She said in oral evidence she had heard the claimant use the microphone previously and that she needed more practice. Given that Ms. Freeman had limited experience of working with the claimant, we do not accept that explanation. We also note that when the claimant put to her that she had said the claimant was weird, struggled to communicate and did not like her voice, the witness did not deny the allegations but stated she could not recollect them. She was visibly uncomfortable which contrasted with the earlier part of her evidence. We find the witness R. Freeman lacking in credibility with regard to events on 4 November 2022.

26. On 11 November 2022, the claimant spoke to Mr. Boreham about what occurred on 4 November 2022 in respect of her interactions with Rhianon, including the microphone incident. Mr. Boreham accepts he did have a meeting with the claimant. He denies that the claimant raised issues in respect of her nationality in that conversation (he was careful to say that the claimant had not used the word "discrimination" and he denied she had mentioned the microphone incident). However, he then met Ms. Freeman about her interactions with the claimant the week before. We find that the claimant did make a complaint of discrimination because of her protected characteristic although Mr. Boreham denies that was the case. The claimant alleges that the respondent did not speak to Ms. Freeman. We find that he had a conversation with Ms. Freeman about taking steps to improve the relationship between the claimant and herself (clearing the air). As with previous meetings, there were no notes provided.

27. On 25 November 2022 it was alleged that Ms Fitzsimmons told the claimant she would have wait to be served her end of shift drink whilst others were able to drink their beer without waiting. The evidence was that the claimant was asked to wait along with her colleague who had been working that shift with her.

28. In respect of the allegation that Ms. Fitzsimmons put applications, including those with Asian sounding names, in the bin and said she would "not hire foreign people because she could not deal with this S*** anymore". The evidence was sparse and inconclusive. We were therefore unable to make findings of fact on this issue.

29. The allegation that Ms. Fitzsimmons repeatedly ignored the claimant and when a customer was being aggressive, the claimant was not given support. The evidence was lacking. There was also scant evidence in respect of a rat being allegedly found in the stock room and when the claimant attempted to report that to Ms. Fitzsimmons she walked away. Once more, there was little evidence to support these allegations and the Tribunal were unable to make findings of fact as a consequence.

30. Ms. Fitzsimmons, as Assistant Manager, did not have authority to dismiss staff.

31. On 22 December 2022 (a Thursday), Ms. Fitzsimmons noticed that the claimant's tip jar was quite full for a weekday. She decided to look at the CCTV of the bar area. Ms. Fitzsimmons' evidence was that the claimant served two pints of lager but only charged for one and served a double spirit to a former colleague but only charged for a single. The claimant then served a large group of customers and did not charge for some of the drinks she served. Ms. Fitzsimmons said that the claimant took a cash payment for a round of drinks but did not enter all the drinks into the till. She then allegedly put cash in the tip jar along with a printed drinks ticket from the order and also placed that it the tip jar. We observed the CCTV and found it to be inconclusive.

32. In her witness statement, Ms. Fitzsimmons alleges there were further anomalies on 29 December 2022 but did not give any details of what they were.

33. On 31 December 2022, at the end of the claimant's shift, Ms. Fitzsimmons questioned her about what had occurred on 22 December but the transcript does not mention matters said to have occurred on 29 December. (Mr. Morris questioned the claimant about this on 23/01/2023). Towards the end of the meeting on 31 December 2022, Ms. Fitzsimmons stated that she needed to telephone Bright HR. There were some two minutes of audio which have not been transcribed at the end of the interview. In her witness statement, Ms. Fitzsimmons said that she made the decision to suspend the claimant. She told us in oral evidence that she had prepared a letter of suspension but could not hand it to the claimant as she had "run out" of the premises before she could do so. There was no copy of the letter of suspension in the bundle and Ms. Fitzsimmons said they had had a computer malfunction and could not provide the letter. The claimant's evidence was that she was told to go home and was being dismissed for gross misconduct. There is one page of notes made by Charlotte Fletcher on 31/12/2022 on page 206 of the bundle. This ends with the sentence "Rebecca breaks the news that her contract had been terminated and Ana states she understands". As this accords with the claimant's version of events, we prefer the evidence of the claimant.

34. The claimant's evidence was that on 31 December 2022, Ms. Fitzsimmons had implied that the claimant was more likely to steal as she was sending money to her family in Brazil.

35. In cross-examination of Ms. Fitzsimmons, the claimant put to her that she had worked for 13 months without a problem relating to behaviour or handling money but after she had raised her complaint on 11 November 2022 with Ray, 40 days later she was dismissed. Ms. Fitzsimmons said the claimant could have been doing it the whole time. Ms. Fitzsimmons maintained her position that she had not dismissed the claimant but had suspended her.

36. At the hearing, the Tribunal were faced by the respondent putting forward 3 different dates for the dismissal of the claimant: (i) 31 December 2022 by Ms. Fitzsimmons; (ii) 20 January 2023 (date on the claimant's P45) (iii) 25 January 2023 by Mr. Morris. There was evidence to show that the claimant's account on Bright HR had been closed on 3 January 2023. It was suggested that it

may have been S. Walbrooke or B. Mason who informed Bright HR to close the claimant's account. There was a dearth of documentation including the lack of a letter suspending the claimant on 31 December 2022 although we were told one was drafted ready to hand to her which was not in evidence; no dismissal letter was produced although there was mention of a letter in an email There was no appeal outcome letter. There was no outcome letter of the claimant's grievance alleging discrimination. Clearly the situation is highly unsatisfactory. We find that on the balance of probabilities the claimant was dismissed on 31 December 2022.

37. We find that remarks were made by Ms Fitzsimmons which included that she thought the claimant may have been misappropriating drinks takings over a longer period and implying she may have been sending money back to Brazil. – we find that this remark was made and is linked to the claimant's protected characteristic.

38. Following events on 31 December 2022, the claimant lodged an appeal against her dismissal/grievance alleging discrimination in an email dated 7 January 2023 to Ray Boreham. Following the raising of the appeal/grievance, David Morris (a manager at a different branch of Coyote Ugly) was appointed to deal with the matter. He interviewed the claimant by Teams on 23/01/2023 and 25/01/2023. We were provided with transcripts of those meetings.

39. At page 417 we were provided with the copy of a message from Mr. Morris said to be dated February 2023. In the message, Mr. Morris says he has not responded to the claimant as he had been on annual leave. He says he has sent out a dismissal letter to the claimant "for theft and failure to comply with company policy and asked for your P45". Apart from the P45, no other letters relating to the grievance/appeal were provided in the bundle. At page 418, we were provided with a message from the claimant to Mr. Morris challenging the reason given for the dismissal as being theft and referring to the transcript of the meeting on 25 January 2023. In the transcript, Mr. Morris states "I have dismissed you for failure to comply basically and I think that is what we will go forward with today from all the evidence I've got together. And obviously as I said to you, if you need a reference you'd have to use myself. We'd offer you a reference still." Later, he stated "So I'm going to conclude that we will have dismissed you for just basically, it's not gross misconduct, more negligence."

40. In the same meeting, on 25 January 2023, Mr Morris stated "We will investigate the discrimination in-house". As noted above, no outcome letter has been provided.

41. In respect of Mr. Morris telling the claimant that she could not return to the Liverpool venue on 25 January 2023, the evidence was that there was a period of about 3 months after dismissal before an ex employee would be able to attend the premises. That decision was one which Mr. Boreham had authority to make. There was no evidence to support this complaint in that the claimant did not give evidence, for example, that she had attempted to attend the premises and had been refused entry. In any event, there was no evidence that this was because of, or related to, the claimant's nationality.

42. The claimant did make a protected act on 11 November 2022 (see above). However, there was insufficient evidence to establish that the raising of the protected act influenced Ms. Fitzsimmons to instigate the investigation and dismiss the claimant on 31/12/2022. We accept that she knew Rhiannon had spoken to Ray Boreham but she did not know the details of the microphone incident.

43. Nor is there evidence to support a finding that Mr. Morris knew of the protected act, still less that he dismissed the appeal because the claimant had made a protected act

Time Limits

44. Given the date the claimant entered into early conciliation with ACAS, acts prior to 27 October 2022 were, on their face, out of time.

Relevant Law

Direct Discrimination contrary to section 13 Equality Act 2010 (EqA 2010)

45. Section 13(1) EqA 2010 provides:

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.

Section 23 EqA 2010 states:

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

47. To establish direct discrimination, the respondent must treat the claimant less favourably than it treats, or would treat another (the comparator) who is in the same or not materially different circumstances. (s23 EqA). In **Parmar v Leicester City Council** [2024] IRLR 85, the EAT recently discussed the role of comparators. It is for the claimant to show that the comparator has or would have been treated more favourably. The claimant can use "evidential" comparators to construct a hypothetical comparator. The closer the circumstances of those individuals are to those of the claimant, the weightier will be the significance of their treatment.

48. The ultimate question for the Tribunal is the reason why any act or failure to act occurred. **Amnesty International v Ahmed** [2009] ICR 1450 at paragraph 37 is authority for the proposition that the test of whether an act or omission is because of the protected characteristic is not a but for test. The Court of Appeal decision in **Chief Constable of Greater Manchester v Bailey** [2017] EWCA Civ 425 emphasised that a "but for" causative link does not mean that the act complained of was "because of" the protected characteristic in the relevant sense.

49. In respect of direct discrimination, **Shamoon v Chief Constable of Ulster Constabulary** [2003] ICR 337 held that the first question the tribunal should

consider is whether the claimant received less favourable treatment than the appropriate comparator (the less favourable treatment issue), and if so, whether it was on the relevant proscribed ground (the reason why issue). The less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which they are complaining. However, the House of Lords also stated that sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

50. The claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, the burden of proof shifts to the respondent to disprove the allegations. In **Madarassy v Nomura International plc** [2007] ICR 867, the Court of Appeal held that it is insufficient for a claimant to show a difference in race (or other protected characteristic) and a difference in treatment but that "something more" was required before the respondent would be required to provide a non-discriminatory explanation.

51. A claimant cannot rely simply upon unreasonable treatment by the employer as giving rise to an inference of unlawful direct discrimination – **Glasgow City Council v Zafar** [1998] ICR 120. Unreasonable treatment of itself does not shift the burden of proof to the respondent as it may be that someone of a different race (or other protected characteristic) would have also been treated unreasonably.

52. Where multiple allegations are raised as evidence of discrimination, the correct approach is for the Tribunal to find the primary facts about the incidents in question and then to look at the totality of those facts (including the respondent's explanation) to determine whether the acts complained of were on racial grounds (**Rihal v Ealing LBC** [2004] IRLR 642.

53. In looking at the overall picture, it is also necessary to consider the inherent probabilities of what a witness is saying and how well it fits with "objective" facts (those things which are undisputed or indisputable). In deciding where the truth lies the Tribunal should make some overall assessment of the witnesses which includes taking account of things such as any demonstrable lies or exaggeration (**Talbot v Costain Oil Ltd.** UKEAT/0283/16).

Harassment contrary to section 26 EqA 2010

54. Section 26 EqA 2010 provides:

(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.

55. The test is part objective and part subjective. The Tribunal must objectively evaluate the claimant's subjective perception to determine if it was reasonable for her to have considered her dignity to be violated or that it created an intimidating, hostile, degrading, humiliating, or offensive environment.

56. In the Court of Appeal case of **Grant v HM Land Registry** [2011] IRLR 748 it was held that:

"Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating, or offensive environment." They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

57. In the case of **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, the EAT held:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

58. In the case of **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495 in respect of the relevant legal test. It was stated by HHJ Auerbach (having quoted from Unite the Union v Nailard [2019] ICR 28) that "the broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or

only possible route to the conclusion that an individual's conduct was related to the characteristic in question". He went on to state "Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic as alleged."

Victimisation contrary to section 27 EqA 2010

59. Section 27 EqA 2010, provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

60. The first matter is to identify whether the claimant has performed a protected act, or whether the respondent believed that she had done or may do so. It is then for the Tribunal to decide whether the respondent subjected the claimant to a detriment. If so, the question is whether that detriment was because the claimant had performed the protected act or the respondent believed that the claimant had done or may do so. In evaluating the latter question, the Tribunal must consider whether the protected act (or the relevant belief) had a material or significant influence on the detrimental treatment and in doing so, must apply the burden of proof. If the claimant proves facts from which the Tribunal could reasonably conclude that the protected act had a material influence on the detrimental treatment, the claimant would succeed unless the respondent can establish a non-discriminatory reason for that treatment. There is no need for a comparator.

61. In establishing the causative link between the protected act and the less favourable treatment, the Tribunal must understand why the employer acted in the way that is said to amount to victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as they did because of the protected act. It is enough if the unlawful motive was of sufficient weight in the decision-making process to be treated as a cause,

not the sole cause, and it is not necessary to show that the discriminator was consciously prejudiced against the claimant because he had done a protected act (**O'Donoghue v Redcar & Cleveland Borough Council** [2001] IRLR 615).

62. The claimant relied upon a meeting with Ray Boreham on 11 November 2022 as the protected act and whilst the respondent accepted there was a meeting on that day between the claimant and Mr. Boreham, it was denied that a protected act took place.

Burden of proof

63. Section 136 EqA 2010 in respect of the burden of proof provides as follows:

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

64. Guidance on operation of the burden of proof has been provided by the Court of Appeal in **Igen v Wong** [2005] IRLR 258 and in **Madarassy v Nomura International plc** [2007] IRLR 246. In short, the claimant must prove facts from which a Tribunal could, on the balance of probabilities and in the absence of an adequate explanation, conclude that the respondent had discriminated against him. If the claimant establishes such facts, then the respondent must prove that they did not commit the act because of a relevant protected characteristic. The Tribunal will need to consider the subjective reasons which caused the alleged discriminator to act as they did. If the claimant establishes the initial case, the respondent will have to show a non-discriminatory reason for the difference in treatment. The bare fact of a difference in status and a difference in treatment is insufficient, without more, to establish that the respondent had committed unlawful discrimination.

65. In the case of **Hewage v Grampian Health Board** [2012] UKSC 37, the Supreme Court held that it is important not to make too much of the role of the burden of proof provisions. They have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Time limits – course of conduct

66. Section 123 EqA 2010 provides that the proceedings must be brought within three months of the act to which the complaint relates (subject to extensions of time for the ACAS Early Conciliation period to take place) or such other period as the Tribunal considers is just and equitable.

67. Conduct extending over a period is treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

68. In the case of **Hendricks v Metropolitan Police Comr** [2003] IRLR 96, EWCA, the Court of Appeal held that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather what has to be proven by the claimant in order to establish 'an act extending over a period' is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs.' The focus of the enquiry should be on whether there was an 'ongoing situation or continuing state of affairs' as opposed to 'a succession of unconnected or isolated specific acts.' It will be a relevant, but not a conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs which involved a number of different individuals.

69. The case of **Greco v General Physics Ltd.** UKEAT/0114/16 (which in turn cited **Hendricks**) supports the proposition that the relevant factors in determining whether there is a *prima facie* course of conduct extending over a period includes whether the same individuals are involved, whether the allegations concern the same subject matter, whether there is any connection alleged between the acts/omissions. Further, even if the acts are carried out by the same individual, that is not determinative of the issue as to whether they amount to a single course of conduct extending over a period.

70. A Tribunal has a discretion to extend time if it is just and equitable to do so, the onus being on the claimant to provide evidence that supports the Tribunal doing so, and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre** [2003] IRLR 434, EWCA). In exercising its discretion, the Tribunal has to balance the prejudice to the claimant in being unable to pursue his claims, and the prejudice to the respondent in having to defend claims brought outside the time limit. Relevant factors include the length and reason for the delay, and this often involves considering the effect of delay on the cogency of the evidence. Other considerations will include promptness of the claimant acting once she knew of the facts giving rise to her claim, and whether she took steps taken to obtain advice.

Submissions

71. Both parties addressed the Tribunal orally, supplementing their written documents. These submissions were helpful. They are not set out in detail but the Tribunal has considered the points made even where no specific reference is made to them.

Discussion and Conclusions

72. We reached the following conclusions unanimously on the balance of probabilities and on the basis of our findings above, taking into account the relevant law and submissions of the parties.

73. In respect of issues 4.1 to 4.10, 4.12, 4.13, 4.15 (repeated at 10.2 and 17.2), and 4.16 (repeated at 10.3 and 17.3), as set out above, we were unable to make findings of fact due to insufficient and unclear evidence. Additionally, complaints 4.1 to 4.8 were out of time, even after applying the extension of time afforded by ACAS Early Conciliation. We did not consider there was a basis to extend time for those complaints, for example on the grounds that of it being just and equitable to do so. The burden was on the claimant to prove primary facts relating to her case and she has failed to do so. Therefore, her complaints on these matters do not succeed and are dismissed.

Harassment related to nationality

74. With regard to issue 4.11, harassment by R. Freeman on 4 November 2022, we find that the allegation relating to the comment about not passing the microphone to the claimant was related to the claimant's accent and thereby her nationality, Ms. Freeman having remarked on the claimant's accent to the effect that customers didn't understand her. Although the comment of "don't pass the microphone" was made in respect of Daisy, we find that the context was materially different given the comments made by Ms. Freeman to the claimant earlier. It was unwanted conduct which had the effect of humiliating the claimant or creating an offensive environment for her. The claimant's accent is intrinsic to her nationality and we therefore find the act of unlawful harassment is made out.

75. Having found that remarks were made by Ms Fitzsimmons on 31 December 2022 which were linked to the claimant's protected characteristic (see paragraph 37 above), we find that Ms. Fitzsimmons was influenced by the claimant's nationality in dismissing her. She expressed a view that the claimant may have been sending money back to family in Brazil, and could have been doing this for some time. We find that the dismissal was related to the claimant's nationality and was an act of harassment. It was clearly unwanted conduct which had the effect of violating the claimant's dignity or alternatively creating a proscribed environment for her.

76. As the dismissal was an act of harassment, it is cannot be also be an act of direct discrimination.

Victimisation

77. For the reasons set out above, we find that the claimant did make a protected act. However, we find that the dismissal was not materially influenced by that act.

78. We did not hear from Mr. Morris. The evidence we had was within the transcripts of the meetings held on Teams with the claimant on 23 and 25

January 2023. The evidence did not support a finding that his decision to dismiss the claimant's appeal was materially influenced by her making the protected act. We do find it unsatisfactory that we have not been provided with the letter dismissing the appeal, particularly as there was good evidence that Mr. Morris was going to uphold the decision to dismiss, not for dishonesty but rather for "negligence" and "failure to comply" by which we infer the claimant had failed to follow proper procedures in respect of the till.

Conclusion

79. For the reasons given above, we find that the claimant was subjected to harassment related to her nationality with regard to the comment made by Ms. Freeman on 4 November 2022, and the dismissal by Ms. Fitzsimmons on 31 December 2022.

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Judge Callan

Date: 4 August 2025

JUDGMENT SENT TO THE PARTIES ON

16 September 2025

FOR THE TRIBUNAL OFFICE

APPENDIX

Complaints and Issues

Tjme Limits

1. Given the date the claim form was presented and the dates of Given the date the claim form was presented and the dates of early conciliation, have the complaints been brought in time? Any complaint about an act or omission before 27 October 2022 is potentially out of time.

2. Were the discrimination complaints made within the time limit in S.123 of the Equality Act 2010? The Tribunal will decide:

   2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

   2.2 If not, was there conduct extending over a period of time?

   2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

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

      a. Why were the complaints not made to the Tribunal in time?
      b. In any event, is it just and equitable in all the circumstances to extend time?

Harassment related to nationality (Equality Act section 26)

3. The Claimant relies on her Brazilian nationality for the purposes of this head of claim.

4. Did the Respondent do the following things:

   4.1. On 11th December 2021 when the Claimant was using the microphone, did a colleague Amy Jayne Williams say to her: “if [she] was in England then [she] would have to learn English because [she] was ruining the Coyote Ugly reputation?”

   .

   4.2 In or around mid July did Ms Rebecca Fitzsimmons, Assistant Manager, refer to the Claimant when speaking with new starters, Including Rachel Flettery and say: “don’t worry about [her] because [she] was very hard to understand.”

   4.3. In October 2022, n multiple times including 13th October did Ms

Fitzsimmons say the following about the Claimant: “she’s Brazilian, she doesn’t understand us?”

4.4. In October 2022 whilst arguing with the staff of the pub in front of the Respondent’s premises, did Ms Fitzsimmons say: “she wasn’t being Racist because she had [the Claimant] on the team and because of this She couldn’t be racist?”

4.5. When the Claimant requested time off for 12th August 2022 this was requested on 15th July 2022 did Ms Fitzsimmons verbally agree to this but then say she had never spoken with the Claimant about it and say, she cannot understand [her].”

4.6. Following the above, did Ms Fitzsimmons cut the Claimant’s shifts over a period of some 3 weeks without justification? The shifts were reinstated after the claimant complained to the general manger Ray
. Boreham on 4 September 2022.

4.7. Did Ms Fitzsimmons repeatedly exclude the Claimant from socialising interactions with colleagues. The claimant says this last happened on the last occasion she worked at night which was on 20th September 2022.

4.8. On 20th September 2022 did Ms Fitzsimmons say to Sarah Mack that it was the Claimant’s fault she was not including herself because she was “shy and didn’t try to involve [herself] with the group.”

4.9. On 26th November 2022 did Ms Fitzsimmons tell the Claimant she would have to wait until the other girls from the team could join for a beer whereas, other girls were able to drink a beer without waiting?

4.10. Did Ms Fitzsimmons repeatedly ignore the Claimant? The claimant says the last time this happened was 16th December 2022– when a customer was complaining and being aggressive and when the Claimant requested assistance Ms Fitzsimmons walked away, and also when the claimant found a rat at the stock.and tried to notify Ms Fitzsimmons and she walked away, but when my colleague Charlotte reported the same issue, the management did something about it, so this means the claimant’s concerns or problems reported were not taken seriously.

4.11. On or around 4 November 2022 did Ms Rhiannon Freeman, tell the Claimant she was ‘weird,’ and / or that she was “struggling to communicate with [her], that “she didn’t like [her] voice,” and that if she was the manager, she “wouldn’t let [the Claimant] use the microphone because the customers don’t understand [her]?”

4.12. Did the Respondent fail to speak to Ms Freeman about that after the Claimant complained to Mr Boreham on 11 November 2022 about what had been said?

4.13. At beginning of December 2022 , did Ms Fitzsimmons put the CVs of a number of applicants including those with Asian sounding names in the bin and say she would not "hire foreign people because she could not deal with this s*** anymore?"

4.14. Dismiss the Claimant on 31st December 2022.

4.15. Dismiss the Claimant's appeal against dismissal.

4.16. Did Mr David Morris, Manager, tell the Claimant she could not return to the Liverpool venue?

5. If so, was that unwanted conduct?

6. Was it related to the Claimant's nationality? The Claimant is Brazilian.

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

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

Direct race discrimination (Equality Act 2010 section 13)

9. The Claimant relies on her nationality. She is Brazilian.

10. What are the facts in relation to the following allegations:

10.1. The dismissal of the Claimant on 31st December 2022 by Ms Fitzsimmons

10.2. The dismissal of the Claimant's appeal by Mr David Morris.

10.3. Mr David Morris, Manager, telling the Claimant she could not return to the Liverpool venue?

11. Did the claimant reasonably see that treatment as a detriment?

12. If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different nationality was or would have been treated?

13. The claimant says she was treated worse than the claimant relies on a hypothetical comparison.

14. If so, has the claimant also proven facts from which the Tribunal could

conclude that the less favourable treatment was because of she is Brazilian.

15. If so, has the respondent shown that there was no less favourable treatment because of the claimant's nationality?

Victimisation (Equality Act 2010 section 27)

16. Did the claimant do a protected act as follows:

    16.1. Complain about discrimination from Rhiannon Freeman and Rebecca Fitzsimmons to Mr Boreham on 11 November 2022 via a Whatsapp message.

    16.2. Was there a further discussion or meeting about her complaint with Mr Boreham on the same date?

17. Did the respondent do the following things:

    17.1. Dismiss the Claimant on 31st December 2022?

    17.2. Dismiss the Claimant's appeal?

    17.3. Did Mr David Morris, Manager, tell the Claimant she could not return to the Liverpool venue?

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

19. If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

20. If so, has the respondent shown that there was no contravention of section 27?

Remedy for discrimination or victimisation

21. What financial losses has the discrimination caused the claimant?

22. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

23. If not, for what period of loss should the claimant be compensated?

24. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

25. Is there a chance that the claimant's employment would have ended in any event?

26. Should their compensation be reduced as a result?

27. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

28. Did the respondent or the claimant unreasonably fail to comply with it by

29. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

30. Should interest be awarded? How much?