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# THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss C Akorli**

**v Marks & Spencer PLC**

**Heard at:** London Central

**On:** 20, 21, 24 & 25 April 2017

**Before:** Employment Judge Isaacson

**Members:** Mr T Robinson  
Mr D L Eggmore

**Representation:**

**Claimant:** In Person  
**Respondent:** Ms R Thomas, Counsel

## RESERVED JUDGMENT

**The unanimous Judgment of the Tribunal is as follows:**

1. The Claimant's claim of direct race discrimination fails and is dismissed.
2. The Claimant's claim of harassment on the grounds of her race fails and is dismissed.
3. The Claimant's claim for an unlawful deduction from wages fails and is dismissed.

## REASONS

**Background**

- 1 By a Claim Form presented on 27 October 2016, the Claimant complained of unfair dismissal, direct race discrimination, harassment on the grounds of her

race and unlawful deduction from wages. At a Preliminary Hearing on 30 January 2017, the Claimant's claim of unfair dismissal was withdrawn on the basis that she did not have two years continuous service. Her remaining claims were confirmed by Judge Grewal at the Preliminary Hearing as follows:-

*"1.1 Direct race discrimination – the Claimant describes herself as black and of African descent, the Respondent directly discriminated against her by:-*

- (a) Frequently asking her to clean the toilets after work;*
- (b) Dismissing her (the Claimant relies on Helen Shearer, Debbie Flint, Heather Philips and Berivan Sipan as comparators); and*
- (c) Failing to deal with her grievance.*

*1.2 Race related harassment- In the alternative, whether the Respondent harassed the Claimant by doing the acts as paragraphs 1.1 (a) or (c) above.*

*1.3 Unauthorised deduction from wages/breach of contract- Whether the Respondent at any time between May and July 2016 paid the Claimant less than what she was entitled to be paid under her contract."*

- 2 Approximately 36 hours before the Tribunal hearing, listed for the 20-25 April, the Claimant's solicitor notified the Tribunal that he was no longer representing the Claimant. The Claimant wrote to the Employment Tribunal the night before the hearing notifying them that because her instructing solicitor had withdrawn at such short notice, she wanted time to obtain representation and sought an adjournment of the hearing. Her email was not received by the Tribunal until the morning of the hearing. The Tribunal telephoned the Claimant on the morning of the hearing and it was agreed that the Claimant would attend the Tribunal that afternoon.

- 3 The Claimant explained that she was in fact at work and told the Tribunal that she did not know that she would be required to attend a hearing and had assumed that since a solicitor was representing her, he would do everything for her and there would be no need to attend the Tribunal.
- 4 The Claimant attended at the Tribunal on the afternoon of the first day and spent most of the afternoon reading the papers, including her witness statement and the Respondents' witness statements. She notified the Tribunal that she wanted to call witnesses to attend the Tribunal. On the second day the Claimant was 20 minutes late to the Tribunal, stating that she had to attend at work beforehand to explain why she could not be in work and to give some work in. She then notified the Tribunal that she would be calling witnesses that day and the witnesses were present. The Tribunal asked the witnesses to write out their witness statements so that the Tribunal and the Respondent had an opportunity to consider the statements and decide whether they objected to their late presentation.
- 5 On reading the witness statements of Mr Nwakuba and Mr Ajoku and following representations from both parties, the Tribunal decided that the two witnesses could give evidence but that certain paragraphs of their statements were to be deleted on the basis that they were not relevant to the case or were too prejudicial, having been served so late in the day. A further witness, Mr Akinkugbe attended on the third day of the hearing and presented a short witness statement. Following representations from both parties the Tribunal decided that he could give evidence limited to what was set out in his witness statement.
- 6 On the third day of the hearing the Claimant arrived an hour late due to childcare difficulties and it was agreed that the fourth day would commence at 11 because of her childcare arrangements. The Claimant informed the Tribunal that she had just been dismissed from her new job.
- 7 Also on the third day of the hearing the Tribunal was informed by the Respondent that a sum of £146.88 had been transferred into the Claimant's bank account, which was the equivalent of seven days' net pay, on the basis

that there was no clear evidence that the Claimant had been paid seven days' notice pay. The Respondent argued that it was not necessary to have made the payment as the Claimant still owed the Respondent the sum of £246.49 and that the failure to pay the seven days' notice pay was not a deduction as the Claimant was still in credit and the Respondent could just have reduced the outstanding sum of £246.49 by £146.88.

### **Evidence before the Tribunal**

- 8 The Tribunal was presented with a bundle of documents. The Respondent produced a number of late documents. Firstly, an email addressed to the Claimant from HR dated 10 August 2016 which set out an explanation for the Claimant's August payslip and a standard contract of employment as the Respondent had been unable to find the Claimant's own contract of employment.
- 9 On the last day of the hearing, just before submissions, the Respondent handed up an email dated 1 March 2016 which was addressed to the Claimant, which she accepted she received at the time, together with attachments which the Claimant would have received had she clicked on or been able to click on a link contained within that email. The link took the Claimant to an offer letter dated 1 March 2016 and the Claimant's terms and conditions of employment. The Tribunal was unable to question the Respondent's witnesses regarding the email but did question the Claimant regarding it.
- 10 The Claimant gave evidence herself and had three other witnesses all employees or former employees of the Respondent, Mr Akinkugbe, Mr Ajoku and Mr Nwakuba. The Respondent called three witnesses, Ms Weatherill who was the Claimant's Section Manager, Ms Remzi who was also the Claimant's Section Manager and who dismissed the Claimant and Ms Evans who is a Store Manager at the Respondent. The Tribunal had written statements from all the witnesses and had an opportunity to question all the

witnesses. The Tribunal was also assisted by written submissions from both the Respondent and the Claimant and a chronology from the Respondent.

### **Claims and Issues**

- 11 The claims had already been clarified at the Case Management Preliminary Hearing as direct race discrimination, harassment on the grounds of race and an unlawful deduction from wages. Because of the late evidence regarding the Claimant's contract produced by the Respondent only just before submissions, during the hearing one issue raised by the Tribunal was whether or not the Claimant had in fact received a contract of employment and therefore whether the Respondent had failed in their statutory duty to provide the Claimant with a statement of employment particulars.

### **The Claimant's Case**

- 12 At the beginning of the hearing and during the hearing the Tribunal tried to clarify with the Claimant what she asserted was the less favourable treatment and harassment she suffered within the confines of what had been clarified as her claims at the Preliminary Hearing. Having taken into account what was set out in the Claimant's Claim Form, grievances and appeal letters and the Claimant's submissions, the Tribunal summarises the Claimant's assertions as follows:-

1. White people who turned up to work when they were feeling sick or stressed were allowed to leave and their absence would not be counted as sick leave.
2. White people were welcomed back to work after sick leave and were not disciplined whereas the Claimant was dismissed for her absence.
3. The Claimant was the only person to be dismissed without a warning and without following a fair and proper procedure: she did not receive an informal or formal warning under the Respondent's attendance

policy; she was not given sufficient notice; she was not given sufficient time to prepare for the attendance review meeting or appeal or grievance meetings; she was not given sufficient time or an opportunity to find someone to accompany her; she was not given a copy of the relevant policies or her contract of employment or staff handbook in advance of any of the meetings; her appeal and grievance meetings were deliberately closed and not reopened until she contacted ACAS and when it was reopened she was not given an opportunity to be heard; and any issue regarding lost letters in the post and tracking numbers were swept under the carpet.

4. At the attendance review hearing, the Claimant was refused an adjournment because she could not be accompanied and was required to go ahead and proceed with the meeting.
5. The Claimant alleged that she was dismissed after only six absences whereas the trigger under the policy was eight.
6. The Claimant was asked to call in every day when she was off sick as a result of her hand injury when other people were not.
7. The Claimant was told many times by Ms Remzi that she would let her go.
8. On return to work after her knee injury she was coerced to go home by Ms Remzi so that her absence could be a trigger under the attendance policy.
9. The Claimant was laughed at by Ms Weatherill and James Gotman when she fell and injured her knee at work.
10. The Claimant was told after injuring her knee that she was not allowed to go home because they were short staffed and made to work for two

hours when she was clearly in distress and in extreme pain rather than being given assistance and sympathy.

11. The Claimant argued that she had not been properly dismissed and this was evidenced by the Respondent sending her a new attendance review meeting notice after her dismissal and therefore she should have been on full pay until the conclusion of the investigation.
12. The Claimant was made to clean the toilets every late shift.
13. The Claimant alleged that she spoke to Tom Mear and Tracey Metselaar of BIG, Business Improvement Group, complaining that Ms Remzi kept saying she would let her go and that it was as a result of Tracey speaking to Ms Remzi that she was called to attend the attendance review meeting and then dismissed.
14. That she was humiliated by being escorted out of the store through the public entrance, rather than through the employee door.
15. That money was deducted from her wages without her knowledge or understanding and without seeing a copy of the Respondent's sickness policy or absence policy.
16. The Claimant asserted that a return to work interview on 18 May 2016 should not have been deemed as an informal warning as it was as a result of an accident at work and that an informal warning can only take place following an absence that has been recognised as a trigger under the policy.

### **The Respondent's case**

- 13 The Respondent's case is set out in the Respondent's outline submissions. In brief the Respondent asserted that the Claimant was not treated less favourably or harassed on the grounds of her race. The Claimant was treated

like other employees in accordance with the Respondent's probation absence policy and standard terms and conditions. The Claimant had failed to establish that she was subject to a detriment as she was not required to clean the toilets more often than anyone else. She was dismissed in accordance with the probation absence policy having had eight absences. The Respondent did follow their procedures and the Claimant's grievance and appeals were only closed because they thought that she had failed to attend the hearings and therefore they assumed she no longer wanted to pursue them. They then held a grievance investigation in accordance with their post termination grievance policy.

- 14 The Respondent argued that the Claimant did not suffer any unlawful deduction from wages and that as the Claimant still owed the Respondent money, having been overpaid, it was not necessary for the Respondent to have paid the Claimant any money for notice because the amount the Claimant still owed to the Respondent was more than her notice pay entitlement. The Respondent asserted that the Claimant was sent her contract of employment.

### **The Law**

- 15 Section 13 of the Equality Act 2010 "EQA" provides:-

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

In order to show that there has been unlawful direct discrimination the Tribunal must be satisfied that there has been less favourable treatment than an actual or hypothetical comparator and that such treatment was on the grounds of the Claimant's protected characteristic. In this case the protected characteristic asserted is the Claimant's race.

- 16 The burden of proof is set out at Section 136 of the EQA:-



*“(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.*

17 The Claimant does need to establish a prima facie case before the burden of proof can shift to the Respondent. A difference in treatment alone is not enough to shift that burden and showing that conduct is unreasonable or unfair will not by itself be enough to trigger the transfer of the burden of proof.

18 Section 23 of the EQA provides:-

*“(1) 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.”*

19 The protected characteristic need not be the only reason for the less favourable treatment but does need to be an effective cause for the less favourable treatment.

20 Harassment is defined in section 26 of the EQA:-

*“(1) A person (A) harasses another (B) if:-*

*a) A engages in unwanted conduct related to 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) *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.”*

21 Direct discrimination claims and harassment claims are mutually exclusive (section 212 of the EQA).

22 Section 13 of the Employment Rights Act 1996 (“ERA”) provides a right not to suffer unauthorised deductions:-

*“(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

*(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*

*(b) The worker has previously signified in writing his agreement or consent to the making of the deduction....*

#### **14 Excepted Deduction**

*(1) Section 13 does not apply to a deduction from a worker’s wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –*

*(a) an overpayment of wages, or*

*(b) An overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.”*

- 23 Section 1 of the ERA provides that an employer must give to an employee, not later than two months after the beginning of employment, written particulars of employment.

### **Findings of Fact**

- 24 The Claimant commenced employment on 9 March 2016 on a probationary basis as a Customer Assistant in training in the Respondent's Hatfield Outlets Store, after completing two weeks' work experience in February through Gingerbread, which is a charity that supports single mothers in returning to work.
- 25 On 27 February 2016, after her two week work experience and after she had successfully applied to be an employee of the Respondent, the Claimant had a one to one discussion with Ms Weatherill which is recorded in a document at pages 82-85 of the bundle. Unfortunately the document is inserted in the bundle in an incorrect order, but the Tribunal do find that page 85 should have been inserted before 84 and accept that the Claimant signed the document after the whole document had been explained to her.
- 26 The Tribunal accepts the evidence of Ms Weatherill that when going through the document with the Claimant it was not just a tick box exercise but she did in fact explain to the Claimant the contents of some of the longer paragraphs in the document, for example the paragraph on flexibility and also the paragraph relating to the probationary period. This paragraph confirmed that the Respondent had a probationary period of 12-26 weeks for all new employees. An individual's performance would be reviewed and if at any time performance was unsatisfactory, appropriate training and support would be provided. If performance was satisfactory and opportunities were available in the store then the continued employment would be confirmed and the probationary period would count as part of the employee's continuous service.

- 27 During the Claimant's work experience and at the beginning of her employment at the Hatfield Outlet Store, the Claimant had training and some form of induction. During that induction, the Claimant was directed to the Company's Intranet and told that she could access her payslips online and was also informed that policy documents were available online. Although the Claimant could access her payslips, the Tribunal finds that the Claimant was never in fact taken to the policy documents and shown them and explained the contents of those documents other than the brief explanation of the policies at the meeting on the 27 February 2016.
- 28 The Respondent provided for the Tribunal a standard copy of a contract of employment which is at pages 189-190 of the bundle. It was the evidence of Ms Weatherill that it was standard practice that following the appointment of an employee that the Human Resources Department would send in the post a contract of employment to the individual employee. The Respondent was unable to provide the Tribunal with a copy of a contract of employment that had been specifically drafted and sent to the Claimant until on the last day of the hearing.
- 29 After all the evidence had been given on the very last day of the hearing, just before both parties gave submissions, the Respondent's representative handed up an email dated 1 March 2016 which was addressed to the Claimant's home email address. The Claimant accepted that she received that email. The email confirmed that she had successfully completed her assessment and that she had verbally accepted an offer of employment. The email goes on to ask the Claimant to take a number of steps. The first one headed "Contract and Offer" is to log into her application by clicking a link to view correspondence. Then goes on to set out links to personal information and exploring the world of M & S.
- 30 The Respondent produced a copy of the documents which the Claimant would have seen had she clicked the link and had the link worked. This included a letter to the Claimant dated 1 March confirming her start date and salary, setting out details regarding pension and then asking her to formally

accept the contract of employment electronically through their application centre and also provided her a pass code for logging into the Marks and Spencer's intranet.

- 31 The Claimant told the Tribunal that she had received the email and after some thought said that she recalled clicking on the link, it not working and then telephoning Ms Remzi and having a discussion that she could come into work and log on to the system to access the documents. The Tribunal find that the Respondent, by sending the email, did provide the Claimant with access to her offer letter and terms of conditions of employment. The Claimant had access to the link and if she was unable to access the documents at home because of any problem with the link, then when she went into the store she would have been able to access it from the store.
- 32 The Claimant did confirm in evidence that she had been able to access her payslips which were also through the company's intranet and therefore the Tribunal are satisfied that the Claimant could, without the assistance of a manager, log on to the intranet. Therefore the Tribunal finds that the Respondent had complied with its statutory duty to provide a written statement of employment particulars.
- 33 The Respondent has a Probationary Period Policy ("PPP")(page 61 of the bundle). This was not sent to the Claimant, but would have been accessible on the Respondent's intranet. The Tribunal find that the Claimant did not in fact know the terms of the PPP. Under the heading "Probationary Period Duration Retail", the policy confirms that a customer assistant is on probation throughout their trainee period, which is usually a minimum of 12 weeks but could last up to 26 weeks and the probationary period is only extended past 26 weeks in exceptional circumstances. The policy provides for assessing performance during the probation period and provides for informal meetings to highlight instances of poor performance. Within the PPP there is a section regarding absence during probation (page 63). The policy provides as follows:-

*“Absence During Probation*

*If an employee is absent from work during their probationary period, the following shortened process should be used:*

- *Informal Warning*
- *Dismissal – giving 7 days’ notice and the right to appeal.*

***Returning to Work***

*On the employee’s return to work the line manager should hold a “Return to Work” meeting with them, preferably on the employee’s first day back or as soon as possible thereafter. During probation, this meeting is especially important as it is the informal warning stage of the shortened process. The employee’s first period of absence will not count towards their trigger. However, the absence triggers must be clearly explained to the employee as, if they reach a trigger, the next stage of the process may be dismissal. The conversation should be clearly recorded as an informal discussion on the RTW.*

***Absence Triggers***

*The following absence triggers should be used for all employees during the probationary period:*

*For contracts up to and including 13 weeks:*

- *4 shifts in a rolling 13 week period*
- *3 occurrences in a rolling 12 week period*

*or contracts of 14 weeks or more normal triggers apply as per the Attendance at Work Policy. These are:*

- *8 shifts in a rolling 26 week period*
- *3 occurrences in a rolling 12 week period.*

***Attendance Review Meeting***

*If an employee has reached an absence trigger whilst on probation, the line manager should invite them to an Attendance Review Meeting. The employee should be given at least 24 hours' notice of the ARM. They may be accompanied by a colleague, BIG representative or trade union representative if they wish. Employees under the age of 18 should always be accompanied at a meeting. If they refuse to be accompanied, the line manager should arrange for a colleague to be present.*

*At this meeting, the Manager should consider the employee's absence from work and whether dismissal is appropriate. **If dismissal is being considered, the line manager should contact PPS first.***

*If the manager decides that dismissal is the appropriate outcome, this will be confirmed in writing and 7 days' notice must be given. The employee has the right to appeal against the dismissal.*

*If the Line Manager decides not to dismiss the employee, this should be updated on their "Return to Work" record."*

- 34 There is a separate section headed "Attendance at Work" which sets out an attendance policy for those people who are not on probation. Appendix 1 to the Company's attendance at work policy provides details regarding the Company's sick pay. It confirms that employees with less than 6 months' service are not entitled to sick pay.
- 35 The Respondent provided a document headed "Clean as you Go" at page 74 which refers to cleaning, including cleaning toilets, but the Tribunal finds that this particular document was not relevant to the Claimant's Hatfield Outlet Store as that Store did not have customer toilets. The Tribunal finds that it was part of a customer assistant's duties to be on a rota of cleaning duties which included cleaning the staff toilets, hoovering, tidying up and dusting.

- 36 There were at the time of the Claimant's employment approximately 35 members of staff at the Hatfield Store. The person responsible for the Store was the Store Manager. There were 2 Section Managers, Ms Remzi and Ms Weatherill, 3 Section Coordinators/Duty Managers and then Customer Assistants and Customer Assistants in training and other staff including Warehouse Staff. The Claimant was the only female black African woman at the store but there was a diverse ethnic mix of staff at the Hatfield store.
- 37 Each evening before the next day, a rota sheet was printed out from the computer usually by the Store Manager but sometimes by the Section Coordinator or Duty Manager. The computer generated the roster for the day and listed those who were in on that day based on their hours. Ms Weatherill confirmed in her evidence that as a Section Manager she would then put numbers on the rota sometimes listing 1-6 or sometimes reversing the order 6-1. Each number indicated a different duty, for example: 1 – cleaning the lounge, 2 – the toilets, 3 – the fitting rooms etc.
- 38 The Tribunal accepted the evidence of Ms Weatherill that she did allocate the cleaning duties on the basis of listing a number down the rota each day, sometimes in order of 1-6 and sometimes in order of 6-1. Therefore the Tribunal does not find that Ms Weatherill or anyone else targeted the Claimant for cleaning duties.
- 39 However, the Tribunal also accepted the evidence of the Claimant that it was her perception that she was always on the roster to clean the toilets. Ms Weatherill confirmed there was no system to check whether the random number system in fact evenly distributed the duties amongst the staff that were on duty particularly on the late shift as it would have depended on how they were listed in the hours on the rota. There were a number of people preparing the rota and there does not appear to have been any system to ensure that there was consistency and to ensure that the duties such as cleaning the toilets were evenly distributed. Ms Weatherill confirmed she only looked at the rota if someone complained and the Tribunal accepted the



evidence of Ms Weatherill that the Claimant never complained directly to her about being always required to clean the toilets.

- 40 The Respondent produced documents headed "My People Systems Hub" which have on each sheet an "effective date" and then a heading "Action" and a job code and title. There are four of these system hub documents in the bundle, the first begins on the Claimant's hire date 6 March 2016 in which the Claimant is described as assistant in training. The second is the 1<sup>st</sup> April 2016 when there is a pay rate change when she is again described as assistant in training. Third is dated 16 or 15 May when it refers to a transfer, again the Claimant is described as assistant in training and then we have a similar document dated 15 July which is when the system says the Claimant's employment is terminated, in fact her last date of employment should have been 21 July 2016. Again, her job code is described as assistant in training.
  
- 41 The Claimant argued before the Tribunal that she was not on probation at the time of her dismissal and therefore the Respondent's normal attendance policy and not the probationary attendance policy should have applied to her. The Tribunal finds that the Claimant was in fact still on probation at the time of her dismissal. This is supported first by the documents on the My People Systems Hub, which confirm her status as assistant in training and by the words of the actual probationary policy itself which refers to a minimum period of 12 weeks up to 26 weeks.
  
- 42 The Tribunal finds that at the one to one discussion she had with Ms Weatherill on the 27 February 2016 it was explained to her, as set out in the document at page 85, that an individual's performance would be reviewed and if performance was satisfactory and opportunities were available in store, her continued employment would be confirmed and her probationary period would count as part of her continuous service. There is no evidence before the Tribunal that the Respondent informed the Claimant that she had completed her probationary period and that she was now no longer on

probation. Both Ms Remzi and Ms Weatherill confirmed that the Claimant was still on probation at the time of her dismissal.

### **Claimant's absences**

- 43 On 18 March 2016 the Claimant telephoned the Respondent to notify them that her son was unwell and that she would have to stay at home to look after him. Ms Weatherill agreed that she could have the day as unpaid absence and that her absence would not count as a trigger under the attendance policy. This is confirmed in an email at page 86.
- 44 On 21 April 2016, the Claimant attended a continuous performance review meeting with her Line Manager, Ms Remzi. This is recorded at pages 88-89 of the bundle. Both the Claimant and Ms Remzi signed the document. The document confirmed that the Claimant had been trained for bra fitting, but also confirmed that she had been rated as "performance requires improvement" and stated that she needed to improve her productivity and work with pace and energy. The Tribunal finds that this document supports the Respondent's position that the Claimant was at this stage still on the probationary period. The Tribunal does not accept the Claimant's evidence that the only thing that happened in this meeting was that it was confirmed she had qualified to fit bras.

### **Accident at Work**

- 45 On 7 May 2016, the Claimant suffered a knee injury at the Respondent's store. She was found lying down in the fitting rooms and was assisted to a seat to rest in the office by Ms Weatherill and by James Gotman who was called as the First Aider. The Claimant was in severe pain and asked for Deep Heat and for painkillers to be brought and offered to pay with her own money. James went to a shop to buy the Deep Heat and painkillers for her. The Tribunal accepts the evidence of Ms Weatherill that the store does not keep painkillers.

- 46 The Tribunal accepted the evidence of Mr Ajoku, who is an employee of the Respondent based at the Hatfield Outlet Store, that he believed he saw James Gotman and Ms Weatherill laughing at the Claimant after she had fallen and injured herself despite her being in tears and that he later told the Claimant what he had seen. The Claimant didn't herself witness them laughing at her. Although Ms Weatherill denied laughing with James after the Claimant fell the Tribunal accept that it appeared to Mr Ajoku that Ms Weatherill was laughing about the Claimant as if she didn't believe she had really injured her knee.
- 47 After a period of rest in the office the Claimant was asked by Ms Weatherill whether she wanted to continue working or whether she wanted to go home. The Claimant alleged that Ms Weatherill in fact put pressure on her saying that they were short of staff by two and that she would need to continue to work. The Tribunal finds that the Claimant was aware that the store was understaffed and felt the pressure to continue to work but do not find that Ms Weatherill specifically told the Claimant that she had to stay to work, but gave her the option to stay or to go home. The Claimant was then pushed on a chair to the till where she continued to serve customers for a period of time. During that period she was in tears and in pain and really needed to go home.
- 48 Ms Weatherill went to check on the Claimant and when Ms Weatherill realised that the Claimant was in discomfort, she helped the Claimant to telephone a friend to assist her to go home and when she discovered that the friend had arrived with three children in tow in a pushchair, went to find a wheelchair so that the Claimant could be moved from the store to the friend's car.
- 49 With hindsight it would have been better for the Claimant to have been helped to go home shortly after the accident as she was in severe pain. However the Tribunal does not find that Ms Weatherill forced the Claimant to stay, treating her differently to other employees. The Claimant may have felt

pressurised to stay as the store was short staffed but the Tribunal finds that the Claimant was given the option to stay or leave.

- 50 Following her knee injury at work on 7 May the Claimant was absent from work on 8 May. The Claimant returned to work on Wednesday 11 May which was the next shift she was scheduled to work.
- 51 On 18 May 2016, the Claimant attended a “return to work interview” (“RTW”) with Ms Remzi. This is recorded at page 90 of the bundle and is in accordance with the PPP, page 63. The Respondent argued that this RTW was an informal warning under their policy and that at the RTW Ms Remzi explained the triggers set out under the policy as evidenced by Ms Remzi at page 90. Ms Remzi typed on the computer what was discussed as they were having the return to work interview “*Explained Triggers. Informal Discussion.*” It was made clear to the Claimant that her absence on the 8<sup>th</sup> May did not count as a trigger under the PPP. This decision was in accordance with the PPP (page 63).
- 52 The Claimant denied that at the return to work interview Ms Remzi explained the triggers to her and suggested that the return to work interview should not have counted as an informal warning under the PPP. Her recollection of her first meeting with Ms Remzi after returning to work was that Ms Remzi asked her why she was sitting down as she had been sitting in a friend’s chair and questioned whether she should be at work and whether she was well enough to be at work. The Claimant took this as Ms Remzi coercing her to go home so that her absence would then be a trigger under the absence policy.
- 53 The Tribunal finds that Ms Remzi was not coercing the Claimant to be absent so as to have an absence which would be a trigger under the PPP. The Tribunal finds that the return to work interview as evidenced by page 90 of the bundle was an informal warning under the Respondent’s PPP and that at that meeting Ms Remzi did explain the triggers under the policy to the Claimant and explained that it was an informal discussion. Ms Remzi’s

conversation with the Claimant when she was seen sitting down was not the RTW.

- 54 The Claimant had got the impression from Ms Remzi that Ms Remzi wanted to “let her go” and therefore the Claimant felt very concerned about her job security. The Tribunal does not find that Ms Remzi actually said to the Claimant on a number of occasions “I will let you go” and accepts Ms Remzi’s evidence that it is not the sort of language she would use. However, the Tribunal does find that the Claimant did feel concerned about her job security and spoke to Tom Mear, who was the BIG (Business Improvement Group Representative) who told her to speak to Tracey Metselaar about her concerns. Tracey was not actually a BIG representative but said she would speak to Ms Remzi on the Claimant’s behalf.
- 55 Tracey Metselaar was not present at the Tribunal to give evidence or to be questioned. Ms Remzi denied ever having such a conversation with Tracey. The Tribunal finds, based on the evidence before the Tribunal, that although the Claimant may have believed that having spoken to Tom and Tracey that Tracey would speak to Ms Remzi about her concerns, there is no direct evidence before the Tribunal that Tracey did in fact speak to Ms Remzi about those concerns and concludes that Tracey did not speak to Ms Remzi about the Claimant. Therefore the Tribunal finds that there is no evidence to support the Claimant’s assertion that a conversation with Tracey regarding the Claimant’s concerns that she wanted to let her go influenced Ms Remzi’s decision to dismiss the Claimant.
- 56 Around 22 June 2016 the Claimant injured her hand with a knife at home. She visited her GP who said that she should not put pressure on her hand. She went into the store on 22 June and showed her bandaged hand to Ms Weatherill and explained that she had cut her hand. It was agreed that she should go on sick leave and that it would be on the basis that she was self-certificating her absence. Ms Weatherill asked her to call in every day to give an update.

- 57 The Claimant was rostered to work on 22 – 24 June and the Claimant telephoned in sick on 23<sup>rd</sup> and 24<sup>th</sup> June. For the following five shifts she was rostered to work from 29 June to 3 July she had a note from her GP. In total the Claimant was on sick leave for eight shifts from 22 June to 3 July 2016, as confirmed by her timesheets at pages 168-169. The Tribunal finds therefore that the Claimant was absent for eight shifts in a rolling 26 week period.
- 58 The Claimant argued before the Tribunal that because she had turned up to work to show her bandaged hand that her absence on 22 June should not have been counted because she had actually attended at work. However the Tribunal accepted the evidence of the Respondent's witnesses that even a half an hour's absence would be counted as an absence under the Respondent's absence policy unless the member of staff was working over and above their contractual hours and that the Claimant was being treated like any other employee would have been treated under the PPP.
- 59 The Claimant also argued that the day she attended at work to hand in her GP's note should not count as an absence as she had turned up to work. The Tribunal finds that just turning up to work to demonstrate that you are unable to work by showing a bandaged hand or handing in a GP's note which says you are not fit to work, is not attending work and does not make an employee eligible to be paid for the day. The Tribunal accepts that it would be counted as an absence, as was the case with the Claimant, as confirmed by the timesheets in the bundle.
- 60 The Claimant alleged that requiring her to telephone in every day whilst she was off sick until she had a GP's certificate was unfair treatment as she was the only employee who was required to telephone in. The Tribunal finds that the Claimant was not treated less favourably than other staff in relation to calling in each day as this is a requirement set out in the PPP (page 65). The PPP states that the minimum appropriate level of contact, unless otherwise agreed, for an employee is to report to their line manager on a daily basis during the first week of absence and thereafter on a weekly basis.

**Second RTW**

61 On 7 July 2016, the Claimant returned to work and attended a return to work meeting (RTW) with Ms Weatherill, page 91. The Claimant denies having a RTW and says that Ms Weatherill merely asked her how she was feeling and said that she would be having a meeting with Ms Remzi.

62 However the Tribunal accepted the evidence of Ms Weatherill, as evidenced by the document at page 91 and confirmed in a PPS contact record report at page 157, that there was a RTW and at the RTW Ms Weatherill discussed the injury, how long the Claimant had been off, and confirmed that the Claimant's absence was a trigger under the PPP because she had been absent for eight shifts. This is recorded at the top of the document in two places where Ms Weatherill types in eight for total number of shifts worked and shifts absence in a rolling 26 week period. Unfortunately when typing in the document under the heading "summary" she incorrectly put in the figure of six shifts rather than eight shifts. The Tribunal accepts that that was a typo and that she was always referring to the eight shifts that the Claimant was in fact absent for during her probationary period. There was also a discussion with the Claimant about her being seen on social media going shopping on one of the days that she was absent.

63 Following her return to work meeting with the Claimant Ms Weatherill contacted the Respondent's HR who confirmed that as the Claimant had had eight absences and had already had an informal warning that the Claimant should be invited to an Attendance Review Meeting ("ARM").

**Dismissal**

64 On 13 July 2016 Ms Remzi hand delivered to the Claimant, during her shift, a letter dated 13 July (page 92 of the bundle). The letter confirmed that the Claimant was being invited to a formal attendance review meeting the following day at 2 o'clock and that at the meeting they will be discussing her absence from work and confirmed that the Claimant will be given an

opportunity to explain her absence and provide any information. The letter went on to say *“I would like to emphasise that I do not doubt the genuineness of your absence, however, we do need all our employees to attend work regularly to provide good service to our customers and meet operational needs.”*

- 65 The letter went on to set out what the purpose of the meeting was, which was to decide if formal action should be taken in line with the attendance at work policy and stated that the Claimant may be issued with a written or final warning and that if she had already had a live final warning or was in her probationary period, then dismissal was a potential outcome. The Claimant was told that she could be accompanied to the meeting and that if she chose to be accompanied and needed to rearrange the meeting, then she could do so. The letter went on to state that the attendance at work policy was available online and a contact number was given for Ms Remzi if needed.
- 66 Although the letter may well have been given to the Claimant within 24 hours of the attendance review meeting the next day, the Tribunal accepts the Claimant’s argument that while on shift she was not really able to read the letter. It was only when she was back at home around 9pm that she had an opportunity to read the letter and therefore was not able to arrange for someone to accompany her. However the letter does specifically say that if she wanted to rearrange the meeting she could do so.
- 67 The following day the Claimant was called to a meeting with Ms Remzi and a note of that meeting was taken by a note taker (pages 94-96 of the bundle). The Claimant told the Tribunal that at the beginning of the meeting she said she did not want to go ahead because she could not be accompanied but that Ms Remzi said she had to go ahead with the meeting. The Tribunal on balance prefers the evidence of Ms Remzi that the Claimant agreed at the beginning of the meeting to go ahead without being accompanied. This may have been because the Claimant was not under the impression that she was in danger of losing her job at that time. The Tribunal feels that as Ms Remzi had set out in her letter that the Claimant could rearrange the meeting if she was unable to be accompanied, that on balance it was unlikely that she



would have insisted that the Claimant go ahead unaccompanied when the Claimant was saying she did not want to do so. The Tribunal also takes account of the fact that the Claimant does not raise this as an issue in her later grievance or appeal.

- 68 The Claimant was not willing to sign the notes of the meeting but the Tribunal finds that although they may not be completely verbatim, that as they were written at the time of the meeting that they are a reasonably accurate record of what was said at the meeting. At the beginning of the meeting Ms Remzi explained that it was a formal meeting to decide if formal action should be taken in line with the attendance at work policy. She mentioned that the Claimant had triggered under the policy because she had had eight absences in a 26 week period and asked if the Claimant understood the attendance policy and that she had triggered it and the Claimant confirmed she had.
- 69 The Tribunal also finds that the Claimant did say at the meeting that she understood that she was still on probation but that the doctor had advised her to stay at home.
- 70 There was then a break in the meeting and Ms Remzi telephoned PPS (the Respondent's HR) as recorded in their records at page 157. Ms Remzi sought confirmation whether she could dismiss the Claimant and the PPS confirmed she could. Ms Remzi then notified the Claimant of her decision that she was dismissing her with one week's notice and that she had the right to appeal within five days.
- 71 Ms Remzi then escorted the Claimant to the customers' front door entrance but left her when Tom, the BIG representative, went to speak to the Claimant. The Tribunal accepts Ms Remzi's evidence that it was normal practice to escort someone off the premises through the customer entrance. However the Tribunal is critical of the Respondent for doing so when there is a back entrance, particularly where dismissal is for absences rather than for misconduct. The Tribunal accepts that the Claimant felt humiliated by being escorted from her local store.

- 72 The next day on 25 July Ms Remzi wrote to the Claimant confirming the decision to dismiss her under the attendance review policy and explaining how she reached that decision. The letter went on to confirm that the Claimant's final day of employment would be the 21 July 2016. The letter stated that she would receive seven days payment in lieu of notice plus payment of any outstanding statutory holiday. The letter went on to explain that Marks and Spencer's basic salary was paid partly in arrears and partly in advance, and that depending on the final day of employment and as a result of holiday taken, the Claimant may owe money to the company. If there had been an overpayment the Claimant would receive a letter from HR shared services explaining how this would be repaid. The letter went on to confirm that the Claimant had a right to appeal and Ms Remzi enclosed with the letter a copy of the appeal policy and an appeal form.
- 73 The Tribunal finds that the Respondent did pay the Claimant and all employees on the 10th of the month. Coincidentally that was a date close to when she started employment and therefore the Claimant may not have realised that the system was that she was paid ten days in arrears and the rest of the month in advance.

### **Appeal and Grievance**

- 74 The Claimant wrote a letter of grievance and appeal dated 14 July and completed the Respondent's appeal form and on 18 July sent a further typed letter of appeal/grievance. In the Claimant's first letter of grievance /appeal she accused Ms Remzi of bullying her and on a number of occasions saying that she would let her go. The Claimant stated that she had complained to Tracey and Tom that she did not feel secure and that the manager would do everything in her power to sack her because she was "the only black girl at the time". She referred to racism and being discriminated.
- 75 She concluded by saying that it should be the management's responsibility to ensure the physical wellbeing of their staff rather than dismissing them for being genuinely off sick. In the appeal form, she referred to the accident and

stated that she was made to work and referred to Ms Remzi as coercing her to go home.

- 76 In her further letter dated the 18<sup>th</sup> July, she again referred to Ms Remzi's threats of dismissing her and referred to the managers as a clique and if the clique liked a person then they would extend the new employee's contract. For the first time in this letter she referred to being bullied by Ms Weatherill, referring to the accident at work and being required to continue to work. She also mentioned bullying against another black employee and complained about always being rostered to clean the toilets.
- 77 An email from the Respondent's PPS (People Policy Specialist) to the Claimant dated 19 July 2006 confirmed receipt of her appeal and that arrangements were being made to conduct the appeal. An email was then sent to the Claimant on 22 July 2016. The covering email states: "*Please find attached details of your appeal next Thursday 28 July at 12 noon.*" Unfortunately the letter attached to the email dated 22 July invites the Claimant to a formal Attendance Review Meeting on 28 July, although the reference at the top of the letter does say appeal. The Tribunal finds that unfortunately the letter dated 22 July 2016 was a template letter used under the attendance policy for when employees are invited to attend an attendance review meeting and is very similar to the letter that the Claimant was given on 13 July 2016. The Claimant should never have been sent that letter. The Respondent realised their mistake and sent a further letter to the Claimant dated 25 July 2016 (page 111). This letter stated that it was inviting the Claimant to a formal meeting to discuss her appeal on 28 July and confirmed that the Claimant could be accompanied to the meeting. It also enclosed guidelines about being accompanied at an appeal meeting.
- 78 Unfortunately the Respondent never explained to the Claimant that their letter dated 22 July was sent in error and that the letter of 25 July was the correct letter that she should have received and to ignore the letter dated 22 July 2016. The Claimant, on receipt of the Respondent's letter dated 22 July (page 110), wrote to the Respondent on 25 July (page 116) stating that the

attendance review meeting scheduled for 28 July was not conducive for her to be accompanied and therefore asked for a day later than ten days from the date of her letter. She also requested, as referred to in their letter, a copy of the attendance at work policy and a copy of her employee handbook so that she could familiarise herself with the policies before the attendance review meeting. She asked for the documents to be sent to her via post within five days of the date of her letter.

79 The Claimant's letter was sent by recorded delivery to Head Office to Michelle Evans which was the name and address she was given by the Respondent in their letter to her of 22 July and their letter of 25 July 2016. In fact that address is the Respondent's Head Office address rather than the address where Michelle Evans works from. The Claimant's letter of 25 July 2016 was received at the Respondent's Head Office on 26 July 2016. Ms Evans confirmed when giving her evidence to the Tribunal that she in fact never got to see the Claimant's letter of 25 July even though it was addressed to her at the correct address as stated in her letter to the Claimant. Ms Evans said she merely received a call from HR explaining that the letter had been received and that the full content of the letter was never shown to her. This is particularly regrettable as the Claimant was specifically asking for a copy of the employee handbook and the attendance at work policy and it was appropriate for the Claimant to have been sent the policies under which she had been dismissed.

80 It should have been obvious to Ms Evans, who was conducting the appeal, that the Claimant was entitled and should have been sent a copy of the relevant policy. The Tribunal are critical that Ms Evans was not sent a copy of the Claimant's letter so she could read the full letter and that the Claimant was not then sent all the policy documents. Although the policy documents may have been accessible by the Claimant remotely, by logging into the Respondent's intranet system, the Tribunal feel that it was fair and reasonable for the Respondent to have sent a copy of the policies to the Claimant by post or by email so that she could easily access the documents without having to log into any intranet.

- 81 The Tribunal appreciate and understand why the Claimant was very confused by the letter which was incorrectly sent to her on 22 July, inviting her to a formal attendance review meeting. The Tribunal accept the Claimant's evidence that on receipt of that letter she was under the impression that the meeting she would be attending would be a continuation of the previous attendance policy and thought that it was possible that she was therefore no longer dismissed but still employed. It is unclear to the Tribunal whether or not the Claimant actually received the Respondent's letter dated 25 July 2016.
- 82 The Respondent did receive the Claimant's letter of 25 July requesting a postponement of the meeting listed for 28 July and therefore on the 27<sup>th</sup> July wrote to the Claimant informing her that her Appeal Hearing had been rearranged for Tuesday 2 August 2016 (page 118). The Respondent sent this letter by recorded delivery and looking at the tracking system it appeared to them that the Claimant had signed for that letter on 29 July 2016 at 9.36am as evidenced at page 115. In reality the letter was not delivered to the Claimant and in fact was returned to the Respondent on 18 August by the Royal Mail who confirmed that the letter had not been delivered to the Claimant.
- 83 However on 2 August the Respondent thought that the Claimant had received their letter dated 27 July 2016 rearranging the Claimant's appeal meeting for the 2<sup>nd</sup> August and expected the Claimant to turn up on 2<sup>nd</sup> August because they had not received any letter from the Claimant suggesting she could not attend the meeting on the 2<sup>nd</sup> August. Therefore, on 2<sup>nd</sup> August, Ms Evans waited for the Claimant for 30 minutes and she did not attend. She then tried to telephone the Claimant but could not get through to her. Tom Mear, who was the Business Involvement Group representative was the scribe for Ms Evans on the day and also tried to call the Claimant. He managed to get through to her but she said she would not be attending the meeting. Ms Evans concluded that the Claimant no longer wished to pursue her appeal and grievance and closed the matter. She

confirmed this in writing to the Claimant by letter dated 2 August 2016 (page 119).

- 84 The Respondent's letter of 2 August crossed with the Claimant's letter of 4 August chasing a response to her letter of 25 July (page 120). She sent her letter with a copy of her previous letter of 25 July by recorded delivery to the Respondent's Head Office.
- 85 On 12 August (page 123) Ms Carlton from PPS wrote to the Claimant acknowledging receipt of her letter of 4 August. In that letter she went through the history of the correspondence and stated that Ms Evans had sent a letter to invite the Claimant to a rearranged appeal and grievance hearing and stated that that letter of invite to the appeal meeting had been tracked and shown as signed for at the Claimant's address on 29 July. When they called her from the meeting when she had not attended on 2 August the Claimant had stated that she did not know what Ms Evans was calling about and that because the Claimant had not attended the prearranged appeal meeting the appeal and grievance was now closed.
- 86 Ms Carlton's letter to the Claimant dated 12 August was only received by the Claimant on 17 August. She responded to their letter on 17 August again by recorded delivery (page 125). She stated she never received a letter telling her about a rearranged meeting and asked for the tracking number so that she could check up the information with Royal Mail. Her letter also stated that she had never received a rearranged appeal meeting and as far as she was aware the Respondent had only rearranged her dismissal hearing. This confirms the Claimant's state of mind at the time that she believed that the only letter she had received was the letter inviting her to an attendance review meeting and that she was still under the impression that the meeting she was being asked to attend was in relation to her dismissal. She also mentions in her letter being bullied and asks to have a fair hearing and a date to be fixed for her grievance and bullying complaint letter within 7 days.
- 87 Ms Evans responded to the Claimant's letter of 17 August by letter to the Claimant which is shown as dated 1 September in the bundle at page 130

but may have intended to be dated 7 September. In any event the letter was only received by the Claimant on 8 September 2016, more than 7 days from the date of the Claimant's letter. This letter invited the Claimant to attend a rearranged appeal meeting on Tuesday 13 September. The letter asked the Claimant to confirm her attendance by Friday 9 September by telephoning Ms Evans.

- 88 The Claimant did not telephone Ms Evans but wrote to her on the 8 September (page 133) which unfortunately was only delivered to the Respondent on 14 September 2016 and therefore after the date of the rearranged appeal meeting. In fact the Claimant's letter of 8 September was delivered to the Respondent on 14 September but was given to another Michelle Evans in a different department, therefore was only received by the relevant department on 19 September 2016. Ms Evans told the Tribunal that the Claimant's letter of 8 September was never in fact forwarded on to her by HR and that she was not aware of the content of the letter.
- 89 In her letter dated 8 September the Claimant referred to the content of her letter dated 25 July in which she asked for a copy of her employee handbook and attendance at work policy. She stated that the rescheduled meeting for 13 September was too soon, particularly as she has not yet received a copy of the policies and asked to receive a reply within 5 days.
- 90 Since the Respondent did not receive a copy of the Claimant's letter stating that she would not be attending the meeting on 13 September until after the meeting, the Respondent was unaware that the Claimant would not be attending the meeting on 13 September and convened for the meeting. It appeared to Ms Evans that the Claimant had once again not attended a meeting without explaining why. She tried to call the Claimant but was unable to reach her. Since she thought that the Claimant had not called or written she concluded that the Claimant did not wish to pursue her appeal or grievance and once again closed her case.

- 91 On 14 September 2016, Ms Evans wrote to the Claimant (page 131) notifying her that she was closing her appeal and grievance on the basis that the Claimant had not attended the rearranged meeting on 13 September 2016.
- 92 On receipt of Ms Evans' letter of 14 September, the Claimant wrote to the Respondent on 21 September 2016 (page 136-138). Her letter referred to being bullied and victimised by Ms Weatherill and threatened by Ms Remzi and to the fact that she still had not received a copy of the relevant policies. She also raised concern about being accused of receiving a letter which was never in fact delivered to her and wanting evidence of the tracked post. She stated that she felt that the Respondent was coming out with one excuse after another to cover up her victimisation. Her letter is copied to the CEO of the Respondent and also to ACAS as well as being sent to the Respondent's Head Office.
- 93 By letter dated 26 September 2016 (page 139) Ms Carlton from PPS responded to the Claimant's three letters, including her letter of 21 September 2016, explaining that the Claimant's appeal and grievance had been closed following the Claimant not attending the meeting on 13 September and Ms Evans not being able to reach her. She confirmed that no further meeting would be scheduled to take place in relation to the Claimant's appeal and grievance. However the letter went on to state *"In relation to your grievance and the nature of the claims that you raised, the company has looked into your concerns and any appropriate action will be taken."* The Tribunal finds that this statement does not make it clear to the Claimant that the Respondent had decided to open a grievance under the Respondent's post termination grievance policy (page 81).
- 94 A grievance investigation was carried out by Mr Stuart Snaith, a Store Manager at the Respondent's Wembley Outlet. As part of the investigation, Mr Snaith interviewed Ms Weatherill (page 140-145), Mr Mear (pages 146-147), Ms Remzi (pages 148-152) and Ms Handley (pages 153-154).



- 95 The Tribunal did not hear evidence directly from Mr Snaith but a copy of his letter to the Claimant confirming his outcome to the Claimant's grievance, undated but sent around 10 October 2016, is at page 155. The Tribunal also had in the bundle copies of his interview notes with the four interviewees. Mr Snaith also consulted with PPS HR before sending out his grievance outcome letter. In Mr Snaith's letter at page 155, he referred to the Claimant's three grievance letters dated 14 July, 18 July and 21 September and using headed points and bullet points, responded to each of the concerns raised by the Claimant. He concluded that the Claimant's grievance was not upheld and confirmed that the grievance process was now concluded. Although the Tribunal was not able to question Mr Snaith, the documentation does evidence that there was an investigation and that a reasoned conclusion was reached consistent with the Respondent's policy.
- 96 The Claimant was upset not only with the outcome to the grievance but the fact that she was never given the opportunity to attend to put her case to the Respondent, nor was she ever sent a copy of the policy under which she was dismissed despite repeated requests for copies. The Claimant contacted ACAS on 29 August 2016 and an ACAS Early Conciliation Certificate was issued on 29 September 2016. The Claimant submitted her claim to the Employment Tribunal on 27 October 2016.

### **Overpayments**

- 97 The Claimant was paid on the 10<sup>th</sup> of each month which was the standard practice of the Respondent. This meant that the Claimant was paid ten days in arrears and the rest of the month in advance. The Respondent would deduct from the next month's pay any unworked hours or any absence due to sickness on the basis that an employee was not paid for sick leave in their first six months of employment apart from statutory sick pay. The Claimant did not receive payslips in the post but was able to access her payslips through the Respondent's portal and copies of the Claimant's payslips are at pages 161 to 166 of the bundle.

- 98 On 10 March 2016, although the Claimant had only worked for one day, she received net pay of £590.24 which was equivalent to a full month's pay. The next month there was £52.05 deducted from her pay for unworked hours and could have related to her absence on the 18<sup>th</sup> March when she took unpaid leave to look after her son. It is not clear to the Tribunal why on the 10<sup>th</sup> May there was a deduction of £1.24. The Claimant was paid more than her basic hours that month because she had worked additional hours. In her payslip for June there is a deduction of £73.80 for sick pay which would have related to her absence on the 8<sup>th</sup> May.
- 99 In her payslip on the 8<sup>th</sup> July there was deducted a sum for one hour not worked, which the Tribunal is not clear about, but also for sick leave of £162.00 which would have related to some of her absence in June.
- 100 An explanation of the Claimant's last payslip dated 10 August, is set out in a email from the Respondent to the Claimant of the same date, which is at page 187 of the bundle. It states that the Claimant has been overpaid by £246.49 which is referred to as a figure carried forward (C/F). The overpayment is calculated on the basis that in the Claimant's previous payslip she was paid for the full month of work, whereas she left work on 14 July and was therefore overpaid a total of £492.69, which is the first figure deducted on the payslip dated 10 August 2016. This statement by the Respondent is in fact wrong because the Claimant should have been paid until 21 July 2016 because she was entitled to seven days notice and therefore the overpayment should not have been £492.69 but that figure less another seven days' gross pay which amounts to approximately £217.05.
- 101 The email goes on to state a further figure of £270.00 was deducted for the Claimant's absences from work when she injured her hand, but that a figure of £132.66 also needed to be added as the Claimant was entitled to statutory sick pay for that period. The Claimant was also entitled to a payment for holiday pay accrued of £367.14 and that there should have been a tax adjustment of £16.40.

102 The Tribunal is critical of the Respondent for failing to remember that the Claimant was entitled to seven days' notice pay and therefore her last day of employment was on 21 July 2016 and not 14 July 2016. This should have been reflected in her payslip of the 10<sup>th</sup> August 2016 and in the accompanying email of the same date at page 187 of the bundle. However this would still have meant that the Claimant would have received a zero balance in her August payslip because 7 days' gross pay is still less than the overpayment carried forward of £246.49

103 The Tribunal finds that the Respondent was entitled to recoup overpayments paid to the Claimant as a result of part of her salary being paid in advance and on the basis that the Claimant was paid in advance for days when she was on sick leave and should only have been paid statutory sick pay.

#### **Facts relating to the Claimant's comparators**

104 The Claimant alleged that white employees were welcomed back after sick leave whereas she was dismissed. The Claimant relied on four comparators, Helen Shearer, Debbie Flint, Heather Phillips and Berivan Sipan. The Respondent's witnesses, Ms Weatherill and Ms Remzi, provided evidence of how the Respondent's absence policy had been applied to the four comparators and how their circumstances differed from the Claimant's. There was no evidence from the Claimant to counter the evidence produced by Ms Weatherill and Ms Remzi and the Tribunal accepted their evidence in relation to the four comparators.

105 The four comparators can be distinguished from the Claimant because they are all permanent employees who had passed their probationary period, whereas the Claimant was still on her probationary period when she was dismissed and therefore the four comparators sick leave was managed under the Respondent's attendance at work policy rather than the probationary period policy, with different absence triggers and procedural steps. Under the PPP the Respondent was required to give an informal warning at a RTW and then if a trigger was met could dismiss with 7 days'

notice. Under their Attendance at Work policy the Respondent was required to have an Absence Review Meeting and then follow a number of formal action stages; written warning, final written warning and then dismissal.

- 106 Ms Shearer was absent from work for 24 shifts over the course of 26 weeks. As she had been absent for more than one period of absence, she was issued with a written warning on 23 June 2016. As no formal action had been taken against Ms Shearer previously, this was the first step in the process and Ms Remzi felt it was not appropriate for her to dismiss Ms Shearer. Ms Shearer has not reached any further absence triggers under the attendance at work policy at the time that she left the store.
- 107 Ms Phillips was absent from work in July 2016 with suspected appendicitis. As this was her first period of absence no formal action was taken but her return to work meeting was taken as an informal warning. Ms Phillips was absent again in November 2016 and reached an absence trigger. Ms Weatherill held an absence review meeting at which Ms Phillips provided mitigating circumstances and it was decided not to issue a written warning but instead to keep the instances live so that any further absences would immediately trigger another meeting. Ms Philips has not reached any further absence triggers under the attendance at work policy.
- 108 Ms Sipan was absent from work for several shifts over the course of 2016 but did not reach any absence triggers so no informal or formal action was taken. At a return to work meeting Ms Sipan was told about the procedures of absence triggers. Ms Sipan has resigned from the business.
- 109 Ms Flint was absent for nine shifts across a 26 weeks period, Ms Remzi issued her with a written warning on 14 March 2016 as no formal action had been taken against Ms Flint previously, this was the first step under the attendance policy. Ms Flint has since triggered again and is being managed under the policy.

### **Applying the Law to the Facts**

**Was the Claimant treated less favourably because she was a Black African?**

110 The Claimant when giving her evidence and in her submission often mentioned that she felt she was treated differently because she was a Black African woman. However, her claim was not on the grounds of her sex, but on the grounds of her race. As set out in the findings of fact above, the Tribunal does not find that the Claimant was treated less favourably by the Respondent on the grounds of her race by being required to clean the toilets daily or by being dismissed.

111 The Tribunal finds that the Claimant may have perceived that she was being required to clean the toilets far more often than other members of staff and it is possible that as a result of the Respondent's policy of putting numbers 1-6 against the names of the staff on the rota for the day that she did in fact end up being rostered to clean the toilets more often than others. However, the Tribunal accepts the evidence of Ms Weatherill that she had a system for allocating the duties required to be covered by the members of staff on duty that day and that she believed she was applying a fair policy by putting an allocated duty which was numbered against the names of those listed on the roster by listing down 1-6 or 6-1.

112 The Tribunal accepts the evidence of Ms Remzi that she did not in fact draw up or create the rosters although she could influence a roster if someone asked her to change a duty for a particular reason. There is no evidence before the Tribunal other than the Claimant's assertion that the Claimant was targeted to clean the toilets because of her race, although the Claimant may have been rostered to clean the toilets frequently. The Tribunal accepts that there was a system of allocation in place and there was no intention of targeting a particular employee. However, the Tribunal does note that without doing reviews of the system and checking who in fact ends up each day doing a particular duty, that the random allocation by listing 1-6 on a roster may in fact at times result in some people ending up cleaning the

toilets more often than someone else and this may be a matter that the Respondent should consider reviewing to avoid any unfairness in the future.

- 113 The Tribunal finds that the Respondent did not treat the Claimant differently to other white employees who turned up to work and then felt sick or stressed and were allowed to leave work. The Tribunal accepts the evidence of the Respondent's witnesses that if an employee was absent from work for more than half an hour, then this would count as a day of absence and that policy would be applied to all employees. The fact that the Claimant turned up to work to say that she wasn't well enough to work by showing her bandaged hand or handing in a GP's certificate did not mean she was working on those days and entitled to be paid.
- 114 The Tribunal does not find that white employees were welcomed back after sick leave whereas the Claimant was dismissed. The Claimant relied on four comparators, Helen Shearer, Debbie Flint, Heather Phillips and Berivan Sipan. The Respondent's witnesses, Ms Weatherill and Ms Remzi, provided evidence of how the Respondent's absence policy had been applied to the four comparators and how their circumstances differed from the Claimant's. There was no evidence from the Claimant to counter the evidence produced by Ms Weatherill and Ms Remzi and the Tribunal accepted their evidence in relation to the four comparators as set out in the findings of facts above.
- 115 The four comparators can be distinguished from the Claimant because they are all permanent employees who had passed their probationary period, whereas the Claimant was still on her probationary period when she was dismissed and therefore the four comparators sick leave was managed under the Respondent's attendance at work policy rather than the probationary period policy, with different absence triggers and procedures.
- 116 The Tribunal accepted the evidence from the Respondent's witnesses that each of the comparators were dealt with under the Respondent's Attendance at Work policy which provided for written warnings and a final written warning before dismissal. This is in contrast to the PPP which applied to the Claimant which only required an informal warning at a RTW and then dismissal with 7

days' notice. Although the Respondent's PPP seems very harsh and it is understandable that the Claimant felt it was unfair to be dismissed for being off sick when genuinely ill, the Tribunal finds that the Claimant was dismissed in accordance with the PPP and there is no evidence that the decision to dismiss was influenced by the Claimant's race.

- 117 The Claimant also asserts that she was treated less favourably by the Respondent failing to follow a fair and proper procedure. Firstly, she asserted that she was not given a warning under the policy and instead Ms Remzi moved straight to an attendance review meeting. As set out in the findings of fact above the Tribunal finds that the Claimant was given an informal warning in accordance with the probationary period policy when she attended the return to work meeting with Ms Remzi on 18 May 2016 as evidenced by the record of that meeting at page 90.
- 118 The Tribunal can understand why the Claimant feels she was not given sufficient notice of her requirement to attend the attendance review meeting on 14 July 2016, having only received the letter during her shift on 13 July and that in reality she probably would have only been able to open it when she was back home that evening. However, the Tribunal finds that the letter stated that if she wanted to rearrange the meeting so that she could be accompanied, she could do so and the Tribunal accepts the evidence of Ms Remzi that the Claimant was willing to go ahead with the meeting and does not accept the evidence of the Claimant that she specifically said she did not want to go ahead with the meeting without being accompanied and was forced to do so by Ms Remzi.
- 119 The minutes of that meeting suggest that the Claimant did not raise an issue regarding being accompanied and there is nothing in the note to suggest that she objected to attending the meeting. The Tribunal however is critical of the Respondent for giving the Claimant such short notice and although the policy only requires 24 hours, there should be a genuine 24 hours when the Claimant is free to actually consider what is about to happen and to prepare for the meeting and obtain representation in that time.

- 120 The Tribunal finds that the Claimant felt she did not have sufficient time to prepare for the meeting but she did have the option not to attend the meeting and to rearrange it so that she could be accompanied.
- 121 The Tribunal finds that the Claimant could have accessed the policy documents and her contract of employment through the Respondent's portal, had she known how to do it. However once the Claimant had asked for the documents during her grievance and appeal process, those documents should have been printed and sent to her rather than getting just the standard letter which stated she could access those policies online.
- 122 However the Tribunal does not find that the Respondent's failure to provide the Claimant with the policy documents and employee handbook when requested amounted to an act of direct race discrimination or harassment. The Respondent was merely following their normal practice of referring the employee to the policies online and the Tribunal accept that the Claimant could have in fact accessed the documents had she wanted to do so.
- 123 The Tribunal finds that the Claimant was given a link to enable her to see her terms and conditions of employment before she started work in March 2016.
- 124 The Tribunal does not find that the Respondent deliberately closed her grievance and appeal process and only reopened it when she contacted ACAS. Firstly, the Tribunal accepted the evidence of Ms Evans that she was unaware that the Claimant had contacted ACAS at the time. Secondly, as set out in the findings of fact, the Tribunal find that as a consequence of a very poor postal service and tracking service, both the Claimant and the Respondent were under the impression that the other party had received their letters but just were not doing anything. The Claimant thought that the Respondent was failing to respond to her requests and the Respondent thought the Claimant was failing to attend meetings even though they had rearranged them on more than one occasion.



- 125 The reality was that the Claimant had not failed to attend a meeting but had asked for the meeting to be rearranged and had assumed that that had been agreed as she had sent letters in advance to the Respondent. Unfortunately due to the postal system the Respondent did not in fact receive those letters before the meetings took place, but the stream of letters between the parties demonstrate that the Respondent was attempting to hold an appeal and grievance meeting with the Claimant and the Tribunal finds there was no deliberate attempt to prevent the Claimant from attending an appeal or grievance meeting.
- 126 The Tribunal is critical of the Respondent for failing to clarify to the Claimant that their original letter dated 22 July 2016 was sent to the Claimant in error which caused a lot of confusion for the Claimant. The Tribunal was also critical of the Respondent for not explaining clearly in their letter to the Claimant, dated 26 September, that they would be holding an investigation into the Claimant's grievance in accordance with their post termination grievance policy. Although it would have been preferable for the Respondent to have allowed the Claimant to attend a grievance meeting, the Tribunal finds that it was reasonable for the Respondent to have decided, after the history of the failed previous hearings to choose to use their post termination grievance policy to consider and investigate the Claimant's grievances. The Tribunal finds that the grievance investigation undertaken was in accordance with the respondent's policy and appears to have been conducted reasonably.
- 127 The Claimant alleged that she was dismissed after only six absences and not eight because two of her absences should not have counted as she had attended at work on those days. As set out in the findings above, the Tribunal disagree with the Claimant and accept the evidence of the Respondent that the Claimant by merely turning up to show her injured hand and by handing in a GP's still counted as an absence and therefore the Claimant had in fact had eight absences and therefore had triggered the probationary period absence policy.

- 128 The Tribunal also finds that the Claimant was not treated less favourably on the grounds of her race because she was required to call in every day when she was off sick with her injured hand before she had a GP's note. As set out above, the requirement for the Claimant to call in each day was in accordance with the Respondent's own policy and the Tribunal find that any employee would have been treated in the same way.
- 129 The Tribunal does not accept the Claimant's assertion that the only reason Ms Remzi called her to an attendance review meeting and then dismissed her was because she had raised her concern about Ms Remzi saying to her that she would let her go with Tom Mear and Tracey Metselaar. The Tribunal find that the reason the Claimant was dismissed was because she had eight absences in a period of 26 weeks and therefore her absence of eight shifts was a trigger under the PPP. The Claimant had already had an informal warning at her return to work meeting and therefore it was within the Respondent's policy for Ms Remzi to reach the conclusion to dismiss the Claimant with seven days notice for being absent from work for eight shifts.
- 130 Although this policy seems very harsh and it is understandable why the Claimant finds it so hard to accept that she can be fairly dismissed when all she has done is be absent because of a genuine injury to her hand, the Tribunal finds that this is the policy of the Respondent. The Respondent requires staff to be in work. Whether or not the Respondent believed the Claimant was genuinely injured was not relevant; the Claimant was dismissed because she had so many absences in such a short period during her probationary period. Had she been past her probationary period then she may have received a written warning or a final written warning rather than being dismissed. There is no evidence before the Tribunal to demonstrate that one of the effective causes for her dismissal was her race.
- 131 The Tribunal does not find that Ms Remzi's treatment of the Claimant amounted to less favourable treatment on the grounds of her race or harassment on the grounds of her race. The Tribunal does not find that Ms Remzi constantly told the Claimant that she would be let go but does accept

that the Claimant felt that Ms Remzi was giving her the impression that she did want to let her go. In any event there is no evidence that Ms Remzi wanted the Claimant to go because of her race and note that the staff at the Hatfield outlet store came from diverse ethnic backgrounds.

- 132 The Tribunal does not accept the Claimant's assertion that Ms Remzi was trying to coerce her to go home to have an absence that would act as a trigger under the PPP. The Tribunal accepted the evidence of Ms Remzi that as the Claimant was sitting down or had been sitting down when Ms Remzi saw her after her knee accident at work she asked whether she was well enough to be at work.
- 133 The Tribunal does not find that Ms Weatherill treated the Claimant less favourably on the grounds of her race or harassed her when the Claimant had her knee injury at work. Ms Weatherill denied laughing at the Claimant when she fell but the Tribunal accepted the evidence of Mr Ajuku that it appeared to him from a distance away from the Claimant that James Gotman and Ms Weatherill were laughing at the Claimant. Even if Ms Weatherill had been laughing at the Claimant there is no evidence before the Tribunal to suggest that her treatment of the Claimant was on the basis of her race.
- 134 The Tribunal find that the Claimant was not forced to carry on working by Ms Weatherill because they were short staffed, but that the Claimant was given the option to go or carry on working. It is clear with hindsight that the Claimant should have immediately left work rather than trying to carry on through the pain by sitting at the till. However, the Tribunal does not find that she was forced to do so and that when it was clear to Ms Weatherill that the Claimant was in terrible pain, steps were taken to ensure that she was assisted out the store to her friend who was waiting to take her home.
- 135 There is no evidence before the Tribunal that the Claimant should have been on full pay until the conclusion of her investigations. This seems to be a misunderstanding by the Claimant having received the mistaken letter to her dated 22 July which suggested that she was being invited to a further

attendance review meeting. This letter led the Claimant to believe that she was no longer dismissed but was still having a further attendance review meeting. In fact the letter had been sent to her by mistake and really she should have been invited to an appeal and grievance meeting. The Claimant had been dismissed with 7 days' notice on 14 July 2016.

- 136 The Tribunal does not find that escorting the Claimant out of the store following her dismissal through the public doors was an act of race discrimination or harassment on the grounds of her race. The Tribunal is critical of the Respondent for escorting a member of staff through a public door, particularly in a store that is local to the employee and somewhere they would like to use in the future when the Claimant has not in fact been dismissed for misconduct but purely for not attending work and therefore triggering the probationary absence policy. However, the Tribunal accept the evidence of the Respondent that it was normal procedure to escort members of staff who had been dismissed for whatever reason through the public exit and therefore there is no evidence that this was done on the grounds of her race.
- 137 In conclusion there is no evidence before the Tribunal that the Claimant was in fact treated less favourably at all, nor is there any evidence that the Claimant's treatment, as it was, was on the grounds of her race. Therefore the Claimant's claim for race discrimination fails and is dismissed.
- 138 There is no evidence before the Tribunal that the Claimant was harassed on the grounds of her race or at all. Therefore the Claimant's claim of harassment on the grounds of her race fails and is dismissed.
- 139 The Tribunal finds that it understandable why the Claimant was so confused when all that she received from the Respondent was a payslip which gives her a zero payment in August. However, as set out at page 187 of the bundle, the Respondent did try to explain to the Claimant why her last payslip resulted in her not receiving any payment: she had been overpaid as a result of their policy of paying on the 10<sup>th</sup> of the month resulting in some

payment in advance, and the fact that there were adjustments made for the periods when the Claimant was absent on sick leave. The Claimant should have been paid up until the 21<sup>st</sup> July but the Tribunal finds that the only difference that would have made to the figures set out in the email on page 187, would have been to reduce the overpayment paid to the Claimant and carried forward by approximately £217.05.

140 Therefore, the Respondent had not made an unlawful deduction from wages but had recouped overpayments made to the Claimant, which falls within the exception set out in Section 14 of the ERA. Therefore the Claimant's claim for an unlawful deduction from wages fails and is dismissed.

141 The Tribunal did consider whether the Respondent had failed to provide the Claimant with a statement of employment particulars but finds that by sending the email to the Claimant on the 1<sup>st</sup> March with links to her terms and conditions of employment, they complied with their statutory requirement. In any event, the Claimant would only have been entitled to an award of 2 to 4 weeks pay had the Tribunal found in the Claimant's favour in relation to any of her claims. Since all of the Claimant's claims fail the Tribunal could not have made an award even if the Tribunal had found that the Claimant never in fact received those particulars of employment.

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Employment Judge Isaacson  
17 May 2017