

JB1



## THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss R Gordon**

**v**

**Genus UK Ltd t/a Select Fashion**

**Heard at:** London Central

**On:** 20-21 July 2017 &  
In Chambers on 21 August 2017

**Before:** Employment Judge Ms A Isaacson

**Members:** Mr M Simon  
Mr D L Eggmore

**Representation:**

Claimant: In Person

Respondent: Mr A Ohringer, Counsel

### JUDGMENT

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

- 1. The Claimant's claim of race discrimination succeeds.**
- 2. The Claimant's claim of victimisation fails and is dismissed.**
- 3. The case will now be listed for a remedy hearing.**

### REASONS

**Background**

1. The Claimant presented her claim on the 30<sup>th</sup> November 2016. A Case Management Preliminary Hearing ("PH") was held on the 6<sup>th</sup> April 2017 before Employment Judge Pearl. At the PH Judge Pearl confirmed that the

claims before the Employment Tribunal were for direct race discrimination and/or victimisation. The victimisation claim was based upon the Claimant having given evidence for another employee in a discrimination claim previously heard in Watford Employment Tribunal in October 2014.

2. At the PH the parties agreed that paragraphs 5 (a) to (h) in the grounds of resistance accurately summarised the Claimant's complaints:
  - (a) that Ms Modestou shouted at the Claimant in front of customers;
  - (b) that Ms Modestou ordered the Claimant to do things outside of her job description – the Claimant refers to cleaning;
  - (c) that Ms Modestou talked about the Claimant to a staff member;
  - (d) that Ms Modestou wrote reports on the Claimant;
  - (e) that Ms Modestou questioned staff about the Claimant, including in relation to what she was wearing to work;
  - (f) that Ms Modestou refused to give the Claimant extra hours;
  - (g) that a grievance raised by the Claimant was not afforded a fair hearing and did not resolve the problem; and
  - (h) when the Claimant goes to other staff members they “carry on funnily” to her and try to order her about.
  
3. The Claimant's claim form also included complaints that Ms Modestou would do anything to get her to react so that she could sack her and that Ms Modestou picked on her supervisor Nadia, causing Nadia to leave the Respondent. What also became clear during the hearing was that part of the Claimant's complaint was that in January 2016 and on other occasions, when black customers came in to the store, Ms Modestou would stare at the

customer, then look at the Claimant and say *“look your people is over there trying to steal”*.

4. At the PH, Judge Pearl noted that the Claimant had not provided dates of the incidents that she complained of but the Claimant told Judge Pearl that she had kept a diary in a notebook form in which she had recorded incidents as soon as they had occurred and that the document, including the relevant dates, would be produced for the Tribunal.
5. The PH Order went on to require disclosure of documents on or before 20 April 2017 and the exchange of witness statements on 30 June 2017.
6. On 29 June 2017, the Respondent’s representatives wrote to the Tribunal requesting an order that the Claimant had failed to comply with the PH Order date of 6 April 2017.
7. A letter was sent to the Claimant from the Tribunal asking for an explanation why she had not complied with the PH Order. On 14 July 2017 Judge Pearl made an Unless Order, having considered the case papers and noting from the file that the Claimant had failed to comply with the Case Management Orders, and having failed to reply to the Tribunal’s letter dated 11 July. The Unless Order stated:
  1. *“The Claimant shall by **12 noon on Tuesday, 18 July 2017** serve upon the Respondent both:*
    - (a) *copies of the documents she was ordered to disclose in the Orders dated 6 April 2017, and*
    - (b) *her witness statement(s). “*
8. The Unless Order went on to state that unless the order was complied with within the time specified the claim would be struck out on the date of non-compliance without further order on the ground that it had not been actively

pursued. The Unless Order went on to state that if the order was complied with, the Respondent should serve it's witness statements on the Claimant.

9. Whether the Claimant had complied with the Unless Order was considered at the beginning of the hearing on 20 July 2017. The Tribunal considered the exchange of emails between the parties and heard evidence from the Claimant. The Claimant accepted that she had not complied with the Unless Order by failing to send her witness statements on time, although she had tried to send copies of her relevant documents on time.
10. The Tribunal concluded that the claim had been struck out as the Claimant had not complied with the Unless Order by failing to serve her witness statements. However, the Tribunal agreed to hear the Claimant's application for relief from the sanction on the basis that it would be in the interests of justice to do so. All the parties agreed that it was in the interests of both parties to proceed with her application despite no written notice of her application being received by the Tribunal.
11. Having heard arguments from both parties the Tribunal concluded that it would be in the interests of justice to allow the claims to proceed. The Tribunal took in to account the Claimant's reasons for default: that she had had difficulty communicating with the Tribunal; that there was a clear attempt to exchange documents within the time specified within the Unless Order; there was difficulty with her emails and that the Claimant was dyslexic. However, the Tribunal was critical of the Claimant for not taking steps to comply with the Unless Order earlier.
12. The Tribunal weighed up the prejudice to both parties and whether it was still possible to have a fair hearing. It took in to account the fact that the Respondent would need to take instructions in relation to the Claimant's witness statements and her documents in support of her claims. However, the Tribunal could ensure that the Respondent had sufficient time to take those instructions before having to cross examine the Claimant. On balance the Tribunal concluded that the Claimant's failure to exchange witness

statements a few days before the hearing would not unduly prejudice the parties and it was still possible to have a fair trial, particularly as documents had been received, including the Claimant's notebook.

**The Claims and Issues**

13. The claims before the Tribunal are direct race discrimination and victimisation.

14. The issues before the Tribunal are: -

14.1 Has the Claimant presented her claim in time?

14.2 If not would it be just and equitable to extend time?

14.3 Section 13 of the Equality Act 2010 direct discrimination on the grounds of race - has the Respondent subjected the Claimant to the following treatment namely:

(a) That Ms Modestou shouted at the Claimant in front of customers?

(b) That Ms Modestou ordered the Claimant to do things outside of her job description?

(c) That Ms Modestou talked about the Claimant to staff members?

(d) That Ms Modestou wrote reports about the Claimant?

(e) That Ms Modestou questioned staff about the Claimant, including in relation to what she was wearing to work?

(f) That Ms Modestou refused to give the Claimant extra hours?

- (g) Whether a grievance raised by the Claimant was not afforded a fair hearing and did not resolve the problem?
  - (h) Whether when the Claimant went to other staff members they “carry on funnily” to her and try to order her about?
  - (i) Whether Ms Modestou would provoke or do anything to the Claimant so that she would react so that Ms Modestou could sack her?
  - (j) That Ms Modestou picked on her supervisor Nadia, causing her to leave the Respondent?
  - (k) Whether, when black customers came in to the store, Ms Modestou would look at the customer and then say to the Claimant “*look your people is over there trying to steal*”?
- 14.4 Has the Respondent treated the Claimant as alleged less favourably than it would have treated a comparator? The Claimant relies on as her comparators all other members of staff who were not black women.
- 14.5 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant’s protected characteristic?
- 14.6 If so, what is the Respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment?
- 14.7 Victimisation Section 27 of the Equality Act 2010 - has the Claimant carried out a protected act? The Claimant relies on giving evidence at an Employment Tribunal in October 2014.

- 14.8 If there was a protected act, has the Respondent carried out any of the treatment as set out above (a) – (k) because the Claimant had done a protected act?

## 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.”* Race is one of the protected characteristics listed in section 4 of the EQA.

- 16 Section 27 of the EQA provides protection against victimisation:-

*“(1) A person (A) victimises another person (B) if A subjects B to a detriment because-*

- (a) B does a protected act, or*
- (b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act-*

- (a) bringing proceedings under this Act;*
- (b) giving evidence or information in connection with proceedings under this Act; ...”*

- 17 Section 136 sets out the burden of proof:

*“(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.*

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.”*

18 In Efobi v Royal Mail Group Limited, the EAT held that section 136 of the EQA does not impose any initial burden on Claimants to establish a prima facie case of discrimination. Rather, it requires the Tribunal to consider all the evidence, from all sources, at the end of the hearing, to decide whether or not there are facts from which it can infer discrimination. If there are such facts, and no explanation from the Respondent, the Tribunal must uphold the complaint.

19 Section 123 of the EQA provides a time limit for presenting a claim within the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. An Employment Tribunal has very wide discretion in determining whether or not it is just and equitable to extend time. However, the exercise of discretion should be the exception rather than the rule as time limits should be strictly applied.

20 When considering whether to extend time the Tribunal needs to consider whether a fair trial is possible and to take in to account the prejudice to the employer of allowing a claim out of time. The Employment Tribunal should consider that time elements are generally enforced strictly and to ask whether a sufficient case has been made out to exercise its discretion in favour of extension.



- 21 The Tribunal may have regard to the check list set out in section 33 of the Limitation Act 1980 when considering whether it is just and equitable to extend time, although there is no legal requirement to do so. The factors listed in section 33 are the length and reason for delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties have co-operated with any reasonable request for information; the promptness with which the Claimant acted once they knew the facts giving rise to a cause of action and the steps taken by the Claimant to obtain professional advice once it knew it was possible to take action.

### **Evidence before the Tribunal**

- 22 The Tribunal was presented with a bundle of documents prepared by the Respondent which included some of the documents that the Claimant had sent to the Respondent prior to the hearing. During the hearing the Claimant produced her original notebook, which included dated entries, and these were copied for the Tribunal. The Tribunal also requested original employee work schedules as there was a dispute about the accuracy of the schedules. Neither party had had an opportunity to consider the other parties' witness statements before the hearing so both parties were given time to read the witness statements and to take instructions.
- 23 The Claimant produced three witness statements: the Claimant's own witness statement which was brief, a statement from Nadia Benahmed and a statement from Brian Parchment. Nadia Benahmed did not attend the Tribunal and consequently the Tribunal gave little weight to her evidence. Brian Parchment did attend the Tribunal. There was one witness for the Respondent, Ms Androulla Modestou, the Respondent's Store Manager.
- 24 The Tribunal found both the Claimant and Ms Modestou to be inconsistent at times when giving evidence. From experience the Tribunal panel are used to seeing witnesses say what they think the Tribunal wants to be told. This does not mean that the witness is unreliable but on occasion the Tribunal will accept their evidence but on occasion may not accept part of their evidence.

- 25 Both parties gave a summary of their case at the end of the hearing and the Respondent's counsel also produced a written submission on liability.

### **Findings of Fact**

- 26 The Respondent is a private limited company that carries on business as a clothing retailer. The Tribunal was informed by the Respondent that they had 220 shops. The Claimant worked in one of the Respondent's two stores in Wood Green London.
- 27 The structure of the Respondent company begins from the top with a Regional Director and then an Area Manager, the Manager of the store and normally a Deputy Manager, Supervisor, Key Holders and Staff. Ms Modestou became the Store Manager of one of the Wood Green stores in October 2015.
- 28 The staff are divided into weekly staff who are scheduled to work on Mondays to Fridays and weekend staff scheduled to work on Saturdays and Sundays only. Managers worked week days and weekends.
- 29 The Tribunal was not presented with a job description for the Claimant nor was the Tribunal presented with a copy of a contract of employment. The Tribunal was disappointed by the lack of documentation, especially considering the size of the Respondent.
- 30 The Tribunal finds that all staff are required to clean the shop as there are no external cleaners. The Tribunal notes that at page 35 of the bundle, which is an extract from the Employee Handbook, headed Effective Selling Skills, it states, under bullet points about contributing towards providing excellent customer service: "*Ensure the branch is tidy and spotlessly clean*".
- 31 The Claimant complained that she was required to bend down and clean the bottom of the display in the store and Mr Parchment complained about the Claimant being required to dust the top shelves as the Claimant is small and

would have to climb on ladders. However, the Tribunal finds that it is reasonable to require all staff to clean all parts of the store. There was no evidence before the Tribunal that the Claimant was the only one required to clean the bottom or top of displays etc. The Tribunal accepted the evidence of Ms Modestou that she also cleaned in the store, including the displays and windows etc.

- 32 The staff working in the Wood Green Store were from a number of different Countries including Pakistan, Turkey, Jamaica, Romania, Africa, Italy, Bulgaria and Lithuania. The Claimant told the Tribunal that she was the only black female member of staff working in the store until she presented her grievance and then other female black members of staff were appointed, for example Venus and April.
- 33 The Claimant commenced employment with the Respondent in September 2012. The Claimant still works for the Respondent as a part time sales assistant, working an eight hour shift on a Thursday. In the past she worked additional days when required during the store's busy seasons.
- 34 In October 2014, the Claimant gave evidence on behalf of another former employee in a claim against the Respondent for race discrimination and unfair dismissal. Ms Modestou also gave evidence on behalf of the Respondent at that Tribunal Hearing. This Tribunal was not shown a copy of the Tribunal decision dated October 2014 but was informed by the Respondent's witness, Ms Modestou, that the outcome of the case in October 2014 was that the Claimant was successful in his /her claim for unfair dismissal on the basis of a failure to follow procedure but was unsuccessful in the Claimant's claim for race discrimination. Ms Modestou was told after the Employment Tribunal case in October 2014 that because the Claimant had given evidence in the Employment Tribunal, she had to be very careful about what was said to the Claimant.
- 35 It was clear to the Tribunal that the Claimant and Ms Modestou disliked each other. The overall impression the Tribunal had, from hearing all the

witnesses, was that there was a toxic atmosphere within the Wood Green store where the Claimant worked. The Claimant and Ms Modestou would shout at each other when they were working together. Staff members would talk about each other to each other and behind their backs. Allegations of incidents would be raised by staff but not put to the staff member accused.

- 36 The Claimant had told Ms Modestou that she did not want to work with her anymore and by the time of the hearing the Claimant only worked on a Thursday when Ms Modestou had one of her day offs. Ms Modestou also didn't work on a Sunday. The Claimant told the Tribunal that she also wanted to work on a Sunday.
- 37 It is not clear to the Tribunal when the Claimant asked for extra hours but it is apparent that she had been asking for extra hours, as demonstrated in the note of concern at page 80 when Ms Modestou asked the Claimant "*How can I give you hours when you have poor work performance?*" Ms Modestou in her witness statement, at paragraph 20, said that as the Claimant had refused to work with her, the only extra hours she could give to her was when she was on holiday.
- 38 In paragraph 64 of her witness statement Ms Modestou stated that she has not given the Claimant overtime since early 2016 because she had available overtime for staff who were more reliable than the Claimant and apart from when she was on holiday it would be impossible to arrange her rota so that the Claimant could work when Ms Modestou was not there.
- 39 When questioned by the Tribunal why the Claimant could not be given an extra day on the Sunday, Ms Modestou explained that Saturdays and Sundays were generally given to staff who were rostered to work the weekends, whereas the Claimant was on the weekday rota.
- 40 There is no evidence before the Tribunal to suggest that the decision not to give the Claimant extra hours was influenced by her race. The Tribunal accepts the reasons given by Ms Modestou for not giving the Claimant extra

hours, namely that Ms Modestou believed that she was a poor performer, that she had more reliable staff to give the extra overtime to and that as the Claimant had specified that she would not work with Ms Modestou, the only other day she didn't work was a Sunday and Sundays were filled by staff who worked on the weekends.

The Claimant's notebook

- 41 At the beginning of the hearing the Claimant presented to the Tribunal a notebook which she had referred to at the PH before Judge Pearl in April 2017. The Respondent's representative pointed out several inconsistencies in relation to the notebook entries when cross referring the entries to the employee work schedules.
- 42 The Claimant was concerned about the accuracy of the employee work schedules presented to the Tribunal in the bundles. The original schedules were produced on the second day of the hearing. It was accepted by the Claimant that a draft schedule would initially be produced but as time went on it would be updated with some entries tipexed out and others crossed out. The Tribunal was satisfied that the Respondent did present to the Tribunal the final versions of the work schedules.
- 43 The Tribunal examined the notebook. On the first page of the notebook it looked like the beginnings of a draft statement. There then were dated entries. Not all the notes were dated in chronological order. One of the entries began with "*The following week*" which is an indication that the notes were written in one go after the events. A number of the dates referred to by the Claimant could not have been accurate as the employee work schedules demonstrated that the Claimant or someone she was referring to in the notebook was not in attendance at work on the day specified in her notebook.
- 44 Taking in to account the number of inconsistencies in the notebook, when cross referred to the employee work schedules, and having looked at the

original notebook, the overall impression the Tribunal had of the notebook is that the diary entries were not made on the dates specified but were written later, probably all at the same time. However, the Tribunal does find that the notes reflect what the Claimant recalled were incidents that took place over a period commencing in January 2016.

- 45 The first date noted in the Claimant's notebook, relating to Ms Modestou, is dated the 17<sup>th</sup> or 18<sup>th</sup> January 2016 in which it is alleged that the Claimant was working with a new girl Rosie and that Rosie and she were not getting on. The Claimant alleges that Rosie said to her "*Ms Modestou was right you are lazy*". Ms Modestou denied ever calling the Claimant lazy to Rosie or to any member of staff.
- 46 The employee work schedules show that the Claimant was not working on the 17<sup>th</sup> or 18<sup>th</sup> January. However, the Claimant did work at some point with Rozy. Rozy may have told the Claimant that Ms Modestou said that the Claimant was lazy. The Tribunal did not have an opportunity to question Rozy and the only evidence presented by the Claimant was what the Claimant says Rozy told her about what Ms Modestou had said.
- 47 The Tribunal does accept that Ms Modestou was questioning staff members about what the Claimant had done during her shift as Ms Modestou was the Store Manager and did not work with the Claimant on the same day. Therefore, it was reasonable for her to be questioning what the Claimant had been doing on her shift. Ms Modestou denies calling the Claimant lazy.
- 48 It is clear from later incident reports (see below) that Ms Modestou believed the Claimant had a poor work rate. The general picture the Tribunal has formed from hearing all the evidence is that staff in the Wood Green store were talking about each other behind their backs. On balance the Tribunal finds, in light of the incident report written by Ms Modestou in February and March, that she did call the Claimant lazy to Rosy. There isn't evidence before the Tribunal to persuade it that one of the influencing factors for calling the Claimant lazy was her race. The evidence before the Tribunal

from the incident reports in February and March indicate that Ms Modestou genuinely believed the Claimant was lazy, particularly following a complaint from a customer.

### Racial comments

- 49 The Claimant wrote a note in her notebook, dated 26 January 2016, which stated *“Black customers came in the store and Androulla was staring at them then looked over at me and said look your people is over there trying to steal, I replied back to her they are not my people.”* There is a further mention by the Claimant in a note dated 8<sup>th</sup> December 2016 when she again noted *“If black people come into the shop she would be like your people are here sort them out and don’t make them steal all the good, I replied back and said that it isn’t my people I don’t find that funny.”*
- 50 On the 26<sup>th</sup> January 2016, the Claimant was on holiday and on 8<sup>th</sup> December 2016, Ms Modestou was not working that day. Although the Tribunal finds that the dates of the note entries cannot be correct, the Tribunal does find that this is a note of what the Claimant’s recollection is of something said by Ms Modestou to her.
- 51 Ms Modestou denied ever making such statements to the Claimant. However, the Tribunal note that Brian Parchment in his statement and when giving evidence to the Tribunal, told the Tribunal that Ms Modestou had said things like *“why black people steal you and Ronnique know the people that come in and steal and if a black person comes in the shop she will say watch you family she going to steal she is always saying black people are so nasty.”* Mr Parchment was dismissed from the Respondent in December 2015 and therefore these alleged comments would have been said prior to December 2015.
- 52 The Tribunal do note that these alleged racial comments are not mentioned in the Claimant’s later grievance or in her short statement to the Tribunal. However, her witness statement was not a detailed statement and had

clearly been rushed and prepared without legal assistance. It is surprising that the racial comments are not in her grievance but the Tribunal appreciates that raising an allegation of race discrimination in a grievance can be a very difficult thing to do while you are still working for the company.

- 53 The Tribunal finds Mr Parchment to be a credible witness and his evidence corroborates the Claimant's recall of what Ms Modestou had said to her. On balance the Tribunal prefers the evidence of the Claimant, supported by Mr Parchment, that these comments or comments of a similar nature were said by Ms Modestou.
- 54 In reaching its decision the Tribunal also takes account of the fact that Ms Modestou suggests in her own witness statement that the Claimant had been stealing and that her view is recorded in an incident report following a complaint by a customer in February 2016 (see below). In that report Ms Modestou records that the customer accused of stealing on two occasions was a West Indian woman. The Tribunal also notes, however, that the customer complaint is made after Mr Parchment has left the Respondent.
- 55 The Tribunal finds that the comments are directly discriminatory on the grounds of the Claimant's protected characteristic. By implying that black customers coming in to the store are likely to steal and that they are directly connected to the Claimant because she is black is treating the Claimant less favourably because of her race.
- 56 On 8<sup>th</sup> February 2016 there was an incident when a sale assistant, Sienna, racially abused the Claimant. This was witnessed by another member of staff, Nadia Benahmed. Sienna was subsequently dismissed.

#### Incident Report February 2016

- 57 A report written by Ms Modestou headed, "Incident Report", is undated but refers to an incident on 28<sup>th</sup> February 2016, is on the Claimant's personnel file. The Claimant was unaware of the report until disclosure. The report



stated that a customer had come in to the shop to complain about two occasions on 19 February and 25 February when the customer had been in the shop and had seen a West Indian woman at the front of the store with a large bin bag and handbag helping herself to stock and that the Claimant was alleged to have been sitting on a footstool behind the till playing on her mobile phone, while another member of staff was serving customers at the dressing room and shoe area. The report goes on to suggest that Brian Parchment, who had been dismissed by the Respondent at this time, may have also been involved with shop lifting and that if he was involved in shop lifting he may have been assisted by the Claimant.

- 58 The report also suggested that the Claimant was wearing Select clothes that had not been purchased in store and that Ms Modestou was suspicious that the Claimant had taken the stock. She questioned the Claimant about where she got the clothes from and the Claimant had said that she had brought them or the clothes had been brought for her in the Stratford Store. Ms Modestou had made enquiries with the Stratford Store and had been told that the Claimant had never been seen in the Stratford Store.
- 59 This incident report was never put to the Claimant. The report contains a number of serious allegations and the Tribunal are critical of the Respondent for failing to put them to the Claimant. The Tribunal accepts that Ms Modestou was given advice from Loss Prevention and/or Head Office that unless the suspected staff member was caught red handed there was insufficient proof and nothing could be done. The Tribunal is critical that such a negative report is recorded on an employee's file without the employee being given an opportunity to respond to each and every allegation.
- 60 What the incident report does demonstrate is that Ms Modestou was of the view that the Claimant was involved with stealing from the store, following a complaint from a customer. It also confirms that she questioned the Claimant about what she was wearing and then spoke to staff in another store about the Claimant.

31 March 2016

- 61 In the Claimant's notebook she recorded a note, dated 31 March 2016, that she didn't have a good shift with Ms Modestou who had been demanding that she stay at the back of the store and suggesting that she treated Nadia, who was also working with her, differently.
- 62 Her note does not mention the fact that on the 31<sup>st</sup> March 2016 the Claimant was called in to a meeting with Ms Modestou, as recorded in two notes of concern at pages 80 and 81 of the bundle. The first note of concern is regarding the Claimant's work conduct. Ms Modestou records that she was told by members of staff and customers that the Claimant had just sat behind the till and did very little work, throwing comments like "*you don't get paid enough to do this work*".
- 63 The note went on to state that the Claimant had been slating Ms Modestou for not giving her extra hours and Ms Modestou questioned "*how can I give you hours when you have poor work performance that needs to improve dramatically?*". Ms Modestou goes on to criticise the Claimant's use of the company phone, graffiting bits of paper and being consistently late.
- 64 Ms Modestou's second note of concern is headed "*Use of mobile phone on shop floor*" and states that she had a number of complaints from staff about the Claimant using a mobile phone on the shop floor while Nadia was on lunch and that even a customer had complained about it. The Claimant was referred to the company policy of no mobiles on the shop floor. The Claimant refused to sign either of the forms. Written on the form is that the Claimant refused to sign and started shouting.
- 65 The Tribunal finds that the notes of concern were written at the time of the meeting on 31 March 2016 and were an accurate record of what was said at the meeting. They reflect the fact that Ms Modestou was concerned about the Claimant's conduct and work performance and that she didn't feel she could give the Claimant extra hours work because of these concerns.

Grievance

- 66 Around the time of the notes of concern the Claimant spoke to Ali, the Area Manager and told her that she did not want to work with Ms Modestou again.
- 67 On the 19<sup>th</sup> April 2016 the Claimant presented a grievance to the Respondent, the grievance is at pages 81 A-B of the bundle. The grievance was against Ms Modestou. The Claimant stated that the situation had become unbearable and referred to bullying, being shouted at, picked on, intimidated, low self esteem, condescending behaviour and being prevented from progressing in her work. The grievance went on to suggest that changes were made to the rota without consultation and that the rotas were hidden and that Ms Modestou said horrible things about her. She concluded that she was being subjected to bullying, victimisation and treated unfairly with no respect. The grievance did not refer to being discriminated against on the grounds of race and the Tribunal notes that the grievance did not refer to the racial comments referred to in the Claimant's notebook dated 26<sup>th</sup> January 2016 and 8<sup>th</sup> December 2016.
- 68 The Claimant's notebook had an entry dated 22 April 2016 in which the Claimant stated that she was required to stay at the back of the store during her shift. The rota for that day at page 162 of the bundle shows that the Claimant was not working that day.
- 69 The Tribunal accepts the evidence of Ms Modestou that on each shift one member of staff was required to work at the front of the store, one in the middle and one at the back of the store. The Tribunal notes that in her grievance the Claimant did not refer to being required to stay at the back of the store but refers to having to stay and cover the store on her own.
- 70 The Tribunal does not find that the Claimant was treated less favourably because of her race by being made to stay at the back of the store. The Tribunal finds that all staff worked in each part of the store and on occasion

the Claimant was made to work at the back of the store and on occasion manned the store alone, as would other sales assistants.

Asking staff about the Claimant

- 71 The Claimant notes in her notebook, dated the 6<sup>th</sup> May 2016, that a staff member (which the Claimant would not identify) told her that Ms Modestou was asking who had done the delivery yesterday because she found stock chucked on the stairs and she was questioning whether the Claimant had done the delivery because she knew she was lazy. The note also stated that Ms Modestou had said that the Claimant didn't like to do any work and went on to say that a lot of the stock was missing off the shop floor and that when she was at work last there was more stock in.
- 72 The Tribunal does finds that Ms Modestou was of the opinion that the Claimant was lazy and that she was stealing from the store. The Tribunal refers to Ms Modestou's witness statement in which she refers to rumours that when Nadia and the Claimant worked together the back door had been found to have been left open which meant that a lot of stock could have been taken. She also suggested that it was said that Nadia, April and the Claimant sold goods to their friends but allowed them to remove much more than they brought. For example, they would leave with bags of clothes but the till receipt would say one pair of socks had been brought.
- 73 These allegations were never put directly to the Claimant but the matters were reported to Loss Prevention and Head Office. Their advice to Ms Modestou was that unless the suspected staff were caught red handed there was insufficient proof and therefore nothing could be done about it. The Tribunal is critical of the Respondent for failing to put these allegations to the Claimant so she had an opportunity to respond to any allegations rather than having all the suspicions being raised and put on file but never actually being put to her so she could defend herself.

- 74 The Tribunal also takes in to account the notes of concern where Ms Modestou is critical of the Claimant's work conduct.
- 75 The Claimant also noted in her notebook, dated 16 December, that a member of staff had called her and told her Ms Modestou had said that she had let people come in to the shop the last week and let them steal clothes. The Claimant told the staff member that nothing of the sort had happened.
- 76 These recollections noted by the Claimant in her notebook are reflected in Ms Modestou's own witness statement. In her statement Ms Modestou's suggests that the Claimant had been stealing from the Respondent store, although Ms Modestou did not specifically say in her statement or to the Tribunal that she did believe the Claimant was stealing.
- 77 The Tribunal finds on balance, taking in to account the incident report, notes of concern and the comments in Ms Modestou's own witness statement, that the comments by Ms Modestou to other staff about the Claimant recorded in the Claimant's note book were said by Ms Modestou.

#### Grievance hearing

- 78 On 12 May 2016 the Claimant was accompanied to a grievance hearing but the meeting was cancelled on the basis that the Respondent did not feel her representative was the appropriate person to accompany her to the meeting. This is confirmed in a letter dated 12 May 2016 at page 82 of the bundle.
- 79 The Claimant responded on the 14<sup>th</sup> May 2016, raising her concern about the adjournment and referring to her disability of dyslexia and that she wanted to choose someone who could support her who had knowledge of her dyslexia. There is then a response from the Respondent dated 20 May setting up a further grievance meeting for 26 May 2016.

- 80 On 26 May 2016 there is an investigation hearing attended by the Claimant, at pages 86 – 89 of the bundle. At this hearing the Respondent tried to establish what reasonable adjustments the Claimant needed for her dyslexia.
- 81 On 31<sup>st</sup> May 2016 the Respondent wrote to the Claimant asking for details of her dyslexia and any reasonable adjustments required. On 2<sup>nd</sup> June the Claimant wrote to the Respondent but unfortunately the letter was not received and was resent seeking a response on the 13<sup>th</sup> June. On 23<sup>rd</sup> June the Respondent accepted that Mrs Modeste, who is the Claimant's mother, was allowed to attend as her representative at the grievance hearing.
- 82 The grievance hearing eventually took place on 14<sup>th</sup> July 2016 and minutes of the meeting commence at page 96 of the bundle. The investigating manager was David Vecchi. At the grievance hearing the Claimant alleged that Ms Modestou said that she was lazy, asked if she was on anti-depressants, questioned whether she could wear cream with her complexion, that she accused her of leaning against fixtures, she would not give her the hours to work and that she gave more hours to others. In addition that she was asked to clean the bottom of fixtures on her hands and knees which she did not ask others to do, that she was shouted at and that Ms Modestou talked about employees behind her back. She also said that her pay was cut because she was five minutes late but that others were not and that because Ms Modestou had told the Claimant's supervisor about a grievance it caused her to fall out with her supervisor.
- 83 The Claimant does not raise at the grievance meeting that Ms Modestou had commented, when black customers came in to the store, "*your people is over there and about to steal*".
- 84 At the grievance hearing the Claimant was asked what could be done to resolve the situation and whether she would consider, as a possible solution, working in another store. The Claimant made it clear that she would not work at another store as she felt she had worked too long at the store. The

Claimant was notified at the end of the grievance hearing that she would be able to appeal the outcome.

- 85 A letter was sent to the Claimant, dated 26 July 2016, setting out the outcome to her grievance. The Claimant told the Tribunal that the letter was never received by her and that she was told that her grievance had not been successful by the Area Manager Ali.
- 86 Mr Vecchi did not attend the Tribunal hearing. From the bundle it appears that the only investigation Mr Vecchi carried out was to talk to Ms Modestou on the 25 July 2016. There is a note of Ms Modestou's discussions with Mr Vecchi, prepared by Ms Modestou, at page 108 of the bundle. It would have been preferable if Mr Vecchi had also spoken to other members of staff who worked in the same store as the Claimant. However, the Tribunal finds that overall the investigation was reasonable as the Claimant had not named other members of staff to be questioned, Mr Vecchi had considered the points raised by the Claimant in her grievance and had given the Claimant an opportunity to put her case to him.
- 87 The letter made a recommendation that the Claimant be offered the opportunity to work at another store of her choosing or to enter into mediation with Ms Modestou to improve the working relationship. The Claimant was not willing to work in another store and told the Tribunal that she was not happy to sit alone with Ms Modestou face to face in a mediation meeting. When questioned by the Tribunal what she felt would have resolved her grievance the Claimant said getting an extra days work per week on a Sunday.
- 88 Around 24<sup>th</sup> June 2016, the Claimant made contact with ACAS and there is a ACAS Certificate on the Tribunal file confirming that early conciliation commenced on 24 June 2016 and that the ACAS Certificate was issued on 24<sup>th</sup> July 2016.

- 89 On the 30<sup>th</sup> November 2016, the Claimant submitted her claim to the Employment Tribunal.
- 90 There are several entries in the Claimant's notebook that postdate the submission of her claim form. Although the entries cannot be part of the Claimant's claim, the Tribunal does consider the entries as part of the background to the Claimant's claim and take in to account the entry dated 8<sup>th</sup> December 2016 to assist the Tribunal in reaching its conclusion.

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

#### Time

- 91 The Claimant entered in to early conciliation with ACAS on 24<sup>th</sup> June 2016 and the ACAS Certificate was issued on 24<sup>th</sup> July 2016. The Claimant only commenced her Employment Tribunal claim on the 30<sup>th</sup> November 2016.
- 92 The Claimant alleged that Ms Modestou made racial comments in January 2016 and December 2016. Any comment made in December 2016 post dates the claim form. The incident reports and notes of concern are dated late February and March 2016. The Respondent's outcome letter to her grievance was dated 26<sup>th</sup> July 2016 and although the Claimant did not receive the letter until disclosure, she was notified of the outcome around the end of July by Ali.
- 93 The Claimant did not work with Ms Modestou between July and November 2016. There are no notebook entries between 6 May 2016 and 8 December 2016. Since there is no alleged act of discrimination after 26 July and within three months from when the Claimant presented her claim form on the 30 November 2016, the Claimant's claims for race discrimination and victimisation are out of time.
- 94 The Tribunal finds that it is just and equitable to extend time to allow the Claimant's claim to proceed. In reaching this decision the Tribunal has taken



in to account the length and reason for the delay and the other relevant factors listed in section 33 of the Limitation Act. The Claimant is a litigant in person and is dyslexic who did contact ACAS early. The Tribunal accepts the Claimant's evidence that she sought advice from the CAB, prior to submitting her claim, but was not advised about the time limit for bringing a claim. The Claimant could have found out about the time limit from searching on the internet but the Claimant's brief witness statement assisted the Tribunal in concluding that she did not have legal advice.

- 95 The Respondent was not unduly prejudiced by the delay. The Respondent still had an opportunity to prepare their response and evidence to defend the claims. The delay of a few months didn't affect the ability of both parties to have a fair hearing.

Did Ms Modestou shout at the Claimant in front of customers?

- 96 The Claimant did not provide any specific incident with dates and times when Ms Modestou shouted at the Claimant in front of customers. The overall impression the Tribunal gets from the evidence before it is that both the Claimant and Ms Modestou shouted at each other and that it is possible they both shouted at each other in front of customers. The Tribunal also notes that Mr Parchment, in his witness statement, said that Ms Modestou shouted at the Claimant in front of customers all the time when she did not get her own way. I also note that Mr Parchment refers to Ms Modestou treating staff like rubbish and belittling them. The Tribunal concludes that Ms Modestou shouted at many members of staff, including the Claimant and therefore the Claimant was not treated differently because of her race.
- 97 Nor does the Tribunal find that Ms Modestou shouted at the Claimant because the Claimant had given evidence before an Employment Tribunal in October 2014. The evidence before the Tribunal is that Ms Modestou was specifically told to be careful about what she said to Ms Modestou because she had given evidence before a Tribunal.

- 98 The general impression the Tribunal gets from the evidence before it is that there was a toxic atmosphere between the Claimant and Ms Modestou but there isn't evidence that the shouting between them was influenced in any way by the Claimant's race.
- 99 Did Ms Modestou order the Claimant to do things outside of her job description, namely cleaning? The Tribunal finds that all members of staff were required to clean the shop as there were no external cleaners employed. All members of staff cleaned the whole store, including the Claimant and Ms Modestou.
- 100 Did Ms Modestou talk about the Claimant to staff members? The Tribunal finds that Ms Modestou did talk about the Claimant to other staff members. This was partly because she never worked with the Claimant after March 2016 and therefore needed to know what had happened in the store the day before. The Tribunal finds that Ms Modestou also questioned members of staff about the Claimant because she was unhappy about the Claimant's work conduct, as reflected in the incident reports. There was also a general culture in the shop that members of staff were talking about each other.
- 101 The Tribunal finds that all these factors lead to Ms Modestou talking to members of staff about the Claimant. The general gossiping and backstabbing was not directly linked to the Claimant's race but was an unfortunate culture of the shop at that time. Ms Modestou had genuine concerns about the Claimant's work conduct.
- 102 Did Ms Modestou write reports on the Claimant? There are three reports on the Claimant's file held by the Respondent written by Ms Modestou. Two notes of concern dated 31<sup>st</sup> March 2016 which were presented to the Claimant at a meeting on the 31<sup>st</sup> March 2016 and the additional report written by Ms Modestou headed, incident report, which resulted from a complaint by a customer following an incident on 28<sup>th</sup> February 2016.

- 103 This incident report was never put to the Claimant. The report contains a number of serious allegations and the Tribunal are critical of the Respondent for failing to put the serious allegations to the Claimant. The Tribunal accepts that Ms Modestou was given advice from Loss Prevention and/or Head Office that unless the suspected staff is caught red handed there is insufficient proof and nothing could be done. The Tribunal is critical that such a negative report is recorded on an employee's file without the employee being given an opportunity to respond to the allegations.
- 104 Although it is arguable that the incident report demonstrates that Ms Modestou believed that the Claimant was stealing and that was the influencing factor for her writing the report; the Tribunal also considers the report in the context of Ms Modestou's comments to the Claimant "*your people is over there trying to steal when black customers come into the store*". The Tribunal also notes the fact that the incident report refers to Brian who is also black, and the ethnicity of the suspected shop lifter. The Tribunal finds on balance that one of the influencing factors for Ms Modestou writing the report and being suspicious that the Claimant was stealing was the Claimant's race.
- 105 The Respondent's Counsel argued that there is no detriment to the Claimant because the Claimant did not know about the incident report. However, the Tribunal finds that having a report which raises allegations of theft against the Claimant on her file and which had been referred to Head Office and Loss Prevention is itself a detriment to the Claimant. The fact that the Claimant was unaware of the report will effect the amount of any injury to feelings award.
- 106 Does Ms Modestou question staff about the Claimant, including in relation to what she was wearing to work? The Tribunal does find that Ms Modestou was questioning staff about the Claimant, including in relation to what she was wearing to work. She was partly questioning staff about the Claimant because she did not work with her on a Thursday and therefore needed an update the following day when she was then in the store.

- 107 The Tribunal also finds, as set out above, that Ms Modestou was suspicious about the Claimant's behaviour particularly after the incident reported by the customer around the end of February 2016. She was suspicious about the Claimant wearing clothes from Select that Ms Modestou believed the Claimant had not paid for. The Tribunal finds that Ms Modestou did question members of staff about what the Claimant was wearing and that the reason she was questioning members of staff was because she was suspicious that the Claimant was stealing from the store.
- 108 Did Ms Modestou refuse to give the Claimant extra hours? As set out in the findings of fact above there is no evidence before the Tribunal to suggest that the decision not to give the Claimant extra hours was influenced by her race. The Tribunal accepts the reasons given by Ms Modestou for not giving the Claimant extra hours, namely that Ms Modestou believed that she was a poor performer, that she had more reliable staff to give the extra overtime to and that as the Claimant had specified that she would not work with Ms Modestou. The only other day she didn't work was a Sunday and Sundays were filled by staff who worked on the weekend rotas.
- 109 Was the grievance raised by the Claimant afforded a fair hearing and did it not resolve the problem? The Tribunal finds that the grievance hearing was dealt with adequately and that a reasoned outcome was set out in Mr Vecchi's letter dated 26 July 2016. The letter did provide reasonable resolutions to the Claimant's grievance. The Claimant's only acceptable resolution was to be given work on Sundays. As set out above the Tribunal accepts the reasons given by Ms Modestou for not giving the Claimant work on Sundays.
- 110 When the Claimant goes to other staff members, do they carry on funnily to her and try to order her about? The Claimant did not provide any particulars to the Tribunal about people carrying on funnily with her or ordering her about, but did tell the Tribunal that the staff's behaviour to her that she was referring to was during the time that she had raised her grievance. The

Tribunal finds that the Claimant has not sufficiently particularised this part of her claim or produced any evidence for the Tribunal to make a finding.

- 111 Did Ms Modestou try to provoke her to do something so that she would react so that Ms Modestou could sack her? The Claimant again did not provide any particulars of this allegation and the Tribunal finds that the evidence before the Tribunal counters the Claimant's complaint as Ms Modestou had been advised by Head Office that because the Claimant had given evidence at the Tribunal in October 2014 that she had to be very careful with the Claimant.
- 112 Did Ms Modestou pick on her supervisor Nadia causing her to leave? The Tribunal has no evidence before it regarding Ms Modestou causing Nadia to leave and accepts the evidence of Ms Modestou that the reason given by Nadia to Ms Modestou for leaving was because she had found new employment at a higher hourly rate.
- 113 Whether, when black customers came in to the store, Ms Modestou would look at the customer and then say to the Claimant "look your people over there trying to steal"? The Tribunal does find that Ms Modestou did make such a comment or a comment of a similar nature to the Claimant. Although the Tribunal find that Ms Modestou genuinely believed that the claimant was stealing, the fact that she specifically commented to the Claimant when black people entered the store and referred to them as "your people" indicates that Ms Modestou was taking in to account the Claimant's race and linking her race to the stealing. Therefore the Tribunal finds that the Claimant was treated less favourably by Ms Modestou because of her race.

### **Victimisation**

- 114 The Respondent accepted that the Claimant had carried out a protected act by giving evidence before an Employment Tribunal in October 2014. The Tribunal finds that Ms Modestou's behaviour towards the Claimant was influenced by the fact that the Claimant had given evidence before the

Tribunal by treating her more favourably than less favourably because she had been advised that she had to be careful with the Claimant because she had given evidence before an Employment Tribunal.

115 The Tribunal does not find that Ms Modestou shouted at the Claimant in front of customers, made her clean, talked about her or questioned other staff, apart from seeking advice from Head Office/ Crime Prevention, because she had given evidence before a Tribunal. Nor does the Tribunal find that the reports were written, extra hours refused or the way the grievance was conducted was influenced by her giving evidence. The Tribunal does not find that the racial comments made by Ms Modestou were influenced by the fact that the Claimant gave evidence at a Tribunal. Therefore the Claimant's claim of victimisation fails and is dismissed.

116 In conclusion the Tribunal finds that the Claimant was treated less favourably by Ms Modestou on the grounds of her race when she made a comment to the Claimant, around January 2016, that your people, referring to black customers who had come into the store, are trying to steal. The Tribunal also finds that the Claimant was treated less favourably by Ms Modestou by writing the incident report around 28 February 2016 which included allegations that the Claimant may have been involved in shoplifting and never putting the allegations directly to the Claimant. The Claimant's race was a factor in Ms Modestou writing the report.

117 The case will now be listed for a remedies hearing.

---

Employment Judge Isaacson  
15 September 2017