EMPLOYMENT TRIBUNALS

Claimant: Ms A Kozakiewicz

Respondent: Futon Ltd

Heard at: Nottingham

On: 13, 14, 15 November 2017

Before: Employment Judge Faulkner
Members: Mrs C Hatcliff
Mr Z Sher

Representation
Claimant: Mr Donavan (non-legal advisor)
Respondent: Mr J Harris (Co-Chairman) and Ms A Ibrahim (HR Manager)

JUDGMENT

The unanimous decision of the Tribunal is that the Claimant was not dismissed because of her race, nor treated less favourably than the Respondent treated or would treat others. Accordingly, the Respondent did not discriminate against her and her complaint of race discrimination is dismissed.

REASONS

Complaint

1. Mr Donavan confirmed at the outset that the Claimant pursued a single complaint before the Tribunal, namely that her dismissal by the Respondent on 4 October 2016 was an act of direct race discrimination. He expressly confirmed in closing submissions (in accordance with our understanding of how the Claimant's case had been put throughout) that there was no complaint relating to the way in which the Claimant was dismissed: her claim concerned the fact of her dismissal. Further, notwithstanding the record of the discussion at the Preliminary Hearing with REJ Swann on 22 May 2017, it was confirmed at the outset of this Hearing that the Claimant did not pursue any complaint, whether of harassment or direct discrimination, related to events before or after 4 October 2016, though some of those events were relied on by the Claimant as relevant background.

Issues

2. The issues the Tribunal was required to decide, notified to the parties at the outset, were therefore:

2.1. Whether the complaint was brought in time – this was dealt with essentially as a preliminary issue on day 1;

2.2. If it was, whether in dismissing the Claimant the Respondent treated her less favourably than it treated or would treat others. The Claimant signified that she relied on a hypothetical comparator.

2.3. If she was so treated, was the less favourable treatment because of the Claimant's race (she specifically relied on her nationality)?

2.4. In determining these issues, the Tribunal had to consider whether there were facts from which it could decide in the absence of any other explanation that the Respondent thus discriminated against the Claimant. If there were such facts, it would be for the Respondent to show that the Claimant's dismissal was not on the grounds of her nationality at all.

Time limit

3. It became apparent to the Tribunal when reviewing the papers in the allocated reading time on the first morning of this Hearing that the complaint had been presented to the Tribunal out of time.

4. Section 123 of the Equality Act 2010 ("the Act") states:

"*(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 [that section establishes the jurisdiction of employment tribunals under the Act in relation to complaints of discrimination at work] may not be brought after the end of:*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable".

The date of the act complained of (dismissal) was agreed to be 4 October 2016. Without taking account of section 140B, which concerns ACAS Early Conciliation, the normal 3-month time limit for presenting a complaint of discrimination would have expired on 3 January 2017.

5. As far as relevant to this case, section 140B of the Act states:

"*(1) This section applies where a time limit is set by section 123(1)(a) ...*

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) … expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) … would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

6. ACAS was first contacted by or on behalf of the Claimant in respect of Early Conciliation on 23 November 2016 ("Day A"). It issued the Early Conciliation certificate on 23 December 2016 ("Day B"). The time limit under section 123(1)(a) would, if not extended by section 140B(4) expire during the period beginning with Day A and ending one month after Day B, i.e. it would have expired as stated above on 3 January 2017. Accordingly, under section 140B(4) it was deemed to expire instead one month after Day B, in other words on 23 January 2017. The complaint was presented to the Tribunal on 25 February 2017. It was therefore presented out of time. The Tribunal thus had to determine whether it was presented within such period beyond the normal time limit as the Tribunal thought just and equitable.

7. When we explained this point to the parties, it became evident that Mr Donavan had advised the Claimant that the deadline for submitting the complaint was 28 February 2017, and that he had given this advice based on what he said he had been told by ACAS. We therefore decided that it was necessary for us to hear evidence on this point from Mr Donavan, and more briefly from the Claimant herself. Our findings of fact having heard this evidence now follow.

8. Mr Donavan works for Resolutions as an appointed advisor. Resolutions is a multi-disciplinary business based in Mansfield, which includes a legal services arm. It was he who was responsible for advice to the Claimant in respect of her dispute with the Respondent, the Claimant having first contacted him in early October 2016. It was agreed that ACAS was first contacted in relation to the matter on 23 November 2016, but Mr Donavan went on to say that contact with ACAS continued until 23 January 2017 when ACAS informed him that the Respondent was standing by the position set out in its reply to the correspondence in which Mr Donavan had asserted the Claimant's potential claim on her behalf. It was during that same telephone conversation, Mr Donavan says, that the ACAS officer told him the deadline for submitting the complaint was 28 February. Mr Donavan said, and we accept, that he understood the deadline to be 12 weeks from the date of dismissal minus the period of ACAS's involvement to the point of the 23 January conversation, which would indeed have taken the deadline to 28 February. We viewed Mr Donavan's "running record", which is essentially a note on his client file of important developments in the case. It recorded the conversation with ACAS on 23 January in line with his evidence. The Respondent was understanding of the fact that it would not be appropriate for it to review this document, and was content to rely on our verification of its contents.

9. Mr Donavan contacted the Claimant by email on 23 January. Just prior to giving the parties our decision on the time limit point, we viewed a copy of this email on the Claimant's mobile telephone and were thus able to confirm that it covered the matters described by Mr Donavan in his evidence. Again, the Respondent was understanding of the fact that it would not be appropriate for it to see that correspondence and was content to rely on our verification of its contents. In broad terms, Mr Donavan advised the Claimant that she needed to make her claim to the Tribunal and needed to do so urgently. He advised that the deadline was 28 February. He met with the Claimant on 5 February to explain the required next steps and obtain funds from the Claimant for the work. They made an appointment to meet again on 24 February. It was at that second meeting that they completed the Tribunal application, and dealt with the Claimant's application for help with paying Tribunal fees.

10. In short, notwithstanding the fact that he was sent the ACAS Early Conciliation Certificate clearly showing the date on which it was issued, it was Mr Donavan's understanding that whilst he was still in discussions with ACAS on the Claimant's behalf, the normal time limit for bringing a claim remained paused. He has been engaged in the provision of legal services for 25 years, either as part of a solicitors practice or in business on his own account, but whilst he has been involved in one other employment matter that went as far as a claim being presented to the Tribunal, most of his work concerns housing matters.

11. The Claimant confirmed that she had never been involved in legal proceedings before. She first contacted Mr Donavan by telephone, sometime between 5 and 7 October. She had no understanding of time limits in Tribunal matters, and therefore relied wholly on Mr Donavan in this respect. She confirmed the contents of the two meetings in February as outlined above.

12. In reaching our decision on this preliminary issue, we reminded ourselves that the provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability for unfair dismissal and detriment purposes, although the onus remains on the Claimant to demonstrate why time should be extended; extending time, even in discrimination claims, remains the exception not the rule. The question is whether there is material based on which the Tribunal could properly exercise its discretion to so extend the time limit.

13. In **British Coal Corporation v Keeble [1997] IRLR 336,** it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of granting or refusing an extension, together with all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking action. Accordingly, whilst in a case where the test is reasonable practicability a claimant normally has to take the adverse consequences of having received inaccurate advice, there are a number of cases which make clear that the position is different where the test is whether it is just and equitable to extend time. One such case is **Chohan v Derby Law Centre [2004] IRLR 685,** in which the Employment Appeal Tribunal stated as follows: "*Where the issue turns upon the steps taken by the Applicant to obtain and act upon legal advice, Steeds v Peverel [Steeds v Peverel Management Services Ltd [2001] EWCA Civ. 419, a personal injury case concerned with the application of the Limitation Act] indicates that wrong advice, or the existence of an implied case against negligent solicitors, ought not defeat an applicant's contention that the claim ought to be heard*."

14. The reason why the complaint was presented out of time in this case was plainly that the Claimant relied on incorrect advice given by Mr Donavan. Mr Donavan is an experienced adviser (albeit apparently not especially experienced in employment tribunal matters), holding himself out generally – and to the Claimant specifically – as being able to advise on employment tribunal claims. It was thus incumbent on Mr Donavan to check the correct legal position. As we have said, it is clear that he believed – and communicated to the Claimant – that any period during which attempts were being made to negotiate with ACAS extended the usual time limit. His understanding was clearly incorrect, as it confused ongoing ACAS settlement discussions with the requirements of ACAS Early Conciliation and their impact on

time limits. Whatever the relevant ACAS officer told Mr Donavan, we accept that his understanding of the conversation on 23 January 2017 was that 28 February 2017 was the deadline for submission of the Claimant's complaint, or at the very least that is what Mr Donavan wrote down on his file. It is also what he emailed to the Claimant on the same day.

15. What is crucial is that the Claimant plainly relied on Mr Donavan's advice, and for the reasons given above we are satisfied that she was entitled to do so. We note that she first contacted him very shortly after her dismissal, so that she did not delay in obtaining advice on her legal position and was thus relying on Mr Donavan's advice from the outset. She and Mr Donavan sought over some considerable time to settle her potential claim and certainly cannot be criticised for that. When it became clear that it could not be settled, the Claimant plainly relied on Mr Donavan's advice regarding the specific question of when her claim had to be presented to the Tribunal. It is of course unsurprising that she did so, given that she had never been involved in legal proceedings before, and had no knowledge of time limits or other procedural issues, except that which had been imparted to her by Mr Donavan. We would add, in Mr Donavan's defence, that although he should have checked the correct time limit position for himself, rather than relying on what he says he was told by ACAS, the time limit implications of Early Conciliation are not straightforward. Indeed, the fact that the complaint had been presented out of time was not picked up in these proceedings until the start of this Hearing.

16. Taking these issues into account, what we had to decide was whether the complaint was presented within such period beyond normal time limits which we considered just and equitable. As we have indicated, it is not enough to say that the Claimant's adviser got it wrong and that she thus has a cause of action against him: that would be of little or no value to the Claimant. The key question, as **Keeble** makes clear, is that of prejudice to the parties. In this case, the prejudice to the Claimant would be substantial if we were to visit on her the mistake of her adviser, or as it may be the mistake of the ACAS officer. Conversely, the Respondent did not suggest that it would experience any prejudice were the complaint to proceed, except that one of its witnesses was not present to give evidence (see below). As it fairly accepted however, that witness would have been absent from this Hearing even if the complaint had been presented in time, such that there was no prejudice to the Respondent arising from the delay in doing so. We were therefore satisfied that the evidence in this case would not be adversely affected by the delay at all. As for other matters, the delay was not extensive (just over a month); this was a claimant who obtained legal advice immediately after the act complained of; and she acted promptly at all times in following that advice, the Claim Form being lodged the day after the meeting at which Mr Donavan obtained detailed instructions.

17. For all of these reasons, in our judgment the complaint was lodged within such further period after the expiry of the normal time limit as was just and equitable, and on that basis, we determined that it should be considered on its substantive merits. The reasons for our judgment in respect of the substantive case now follow.

Facts

18. The parties produced two separate bundles of documents, the Claimant handing up additional documents on days 1 and 2 of this Hearing; there was no objection to their being admitted. The Claimant's documents were not page-numbered, and so page references in these Reasons are references to the Respondent's bundle; we refer to the Claimant's documents by description. We read short statements from the

Claimant, Mr Harris and the Respondent's former HR manager, Mrs Sudesh O'Byrne. The Claimant and Mr Harris gave oral evidence; Mrs O' Byrne did not. She retired in February 2017, and Mr Harris believes she may now be abroad. His last contact with her was in June 2017 when she signed the statement at pages 3 and 4. We made clear that we could take account of her statement, but that we would be obliged to attach less weight to it than might otherwise have been the case, as she was not available for cross-examination. We also read an unsigned statement from another former employee of the Respondent, Malgorzata Lajdecka, which appears to have been produced for her by Ms Ibrahim, together with some email correspondence between her and Ms Ibrahim. Ms Lajdecka expressed in one of her emails (page 11) an unwillingness to get involved in the proceedings and so did not sign the draft statement; as it turned out there was no material reference to her statement during the Hearing in any event.

19. Taking all of this material into account, together with the parties' closing submissions, the Tribunal's findings of fact are as set out below.

20. The Respondent employs over 90 staff, many of whom work at its 20 stores throughout the UK. The Claimant was employed as Manager of the Respondent's store in Nottingham from 16 March 2015, when it opened, to 4 October 2016 when she was dismissed. The Claimant is Polish. The other employees at the store at the time of her dismissal were Ms Lajdecka who is also Polish and a Ms Alina Ludveka who is Lithuanian. Naturally, the Claimant had most day-to-day contact with her immediate colleagues in Nottingham but she also had regular contact with Head Office. Mr Harris visited the store regularly, particularly in the first year of Claimant's employment. Thereafter the Claimant spoke with Ms O'Byrne on roughly a weekly basis – often by telephone.

21. The Respondent says that it has an equal opportunities policy (there is a June 2017 version at pages 14 to 18, forming part of the Respondent's staff handbook), though it is not clear the Claimant had seen it. She had though signed her contract of employment (not included in the bundles) which it is agreed referred to the staff handbook which was in place at that time.

22. Ms Lajdecka and Ms Ludveka were recruited by the Respondent in August 2015. The Claimant says that Ms O'Byrne thought Ms Ludveka the more suitable candidate, but as she was only available part-time the Claimant suggested calling Ms Lajdecka who had greater availability. The Claimant alleges that in response to that suggestion Ms O'Byrne said, "That's another Polish person". Eventually, the Claimant says, she persuaded Ms O'Byrne to appoint both candidates, though it was ultimately Ms O'Byrne's decision. The Claimant alleges that Ms O'Byrne said she felt Ms Lajdecka would not succeed in the role. In fact, she continued in employment until quite recently when she did not return from maternity leave. The Respondent disputes that these comments were made by Ms O'Byrne, for reasons we will come to shortly. We will return to and resolve this conflict of evidence in our conclusions.

April 2016 meeting

23. The Claimant produced to the Tribunal a transcript of a meeting she had with Ms O'Byrne in April 2016, which unbeknown to Ms O'Byrne she had recorded. No issue arose either as to its admissibility or its veracity. The meeting seems to have been focussed on a discussion of health and safety issues in respect of the Claimant and her colleagues, principally associated with their painting the Nottingham store, as the Claimant and one of those colleagues had fallen ill after doing so. The Claimant says the meeting was an investigation of whether she and her colleague were genuinely unwell.

24. It is clear that the meeting was a lengthy one, and that at one point it turned to a discussion of the Claimant's colleagues generally and whether, evidently because of concerns about the store's profitability, one of them should be dismissed. In that context Ms O'Byrne is recorded at one point as asking the Claimant which of her two colleagues was best for the Respondent's customers. With the exception of that comment, there was nothing in the transcript that appeared to us relevant to the issues to be decided. The Claimant says she introduced the transcript to the proceedings because she sought to demonstrate the unreasonableness of the Respondent's behaviour, namely that it required her and her colleague – as she saw it – to prove that they were unwell.

2016 recruitment

25. Later in 2016, the Claimant was asked to recruit maternity leave cover for Ms Ludveka. She makes a number of allegations about comments made by Ms O'Byrne during this process, which it is necessary for us to record in some detail:

25.1. First, the Claimant says that when she put forward a Polish candidate on 26 August 2016, Ms O'Byrne rejected her as a candidate for interview because she was Polish and said in a conversation on 12 September: "I don't want to employ any more Poles. This is not a Polish shop. I'm Indian and I don't employ just Indians". The Claimant called this individual to interview anyway.

25.2. Secondly, the Claimant says she got a similar response from Ms O'Byrne on 22 September 2016, the day on which interviews took place in the Nottingham store, when she introduced another Polish candidate for consideration.

25.3. Thirdly, in relation to a Greek woman who was one of the interviewees, the Claimant alleges that Ms O'Byrne said she would not employ her because looked strange and didn't speak English, though the Claimant says her English was fluent.

25.4. Fourthly, the Claimant alleges Ms O'Byrne said in relation to a Chinese woman that she had big breasts and would not be able to carry stock for customers.

25.5. Fifthly, it is alleged that Ms O'Byrne made a comment about another candidate's mental health.

26. All of these comments are alleged to have been made in the Nottingham store, with just the Claimant and Ms O'Byrne present. Ms O'Byrne denies these allegations in her written statement. The Respondent denies them for the following additional reasons:

26.1. First, the Respondent says Ms O'Byrne appointed many Polish and other non-British born employees both before and after the Claimant herself was employed. We accept that evidence as it was unchallenged.

26.2. Secondly, the Respondent says that more than a third of its staff are not White British (Ms O'Byrne herself is British Indian). Again we accept that as unchallenged evidence.

26.3. Thirdly, Ms O'Byrne says in her written statement that it would be commercially impossible in the service sector in which the Respondent operates to seek to recruit only people who are native born white British. Mr Harris said something similar in closing submissions, to the effect that the Respondent's business would not be viable if it recruited only on this basis.

26.4. Fourthly and more specifically, Ms O'Byrne says in her statement that she appointed a Polish manager in the Finchley Road store – the Claimant accepts there

is a Polish manager in that store and agreed that she could not dispute the verbal evidence of Mr Harris and the written statement of Ms O'Byrne that there is a Polish Assistant Manager at the Respondent's flagship store on Tottenham Court Road, and a Polish Assistant Manager at its Battersea store who also acted as a relief manager at stores elsewhere in London. The Claimant was also aware of other Polish staff within the business, in non-managerial positions.

26.5. Fifthly, Ms O'Byrne says in her statement that the Respondent has a variety of other employees of numerous different nationalities, 31 that she can recall, and most of whom she says she recruited. She goes on to say that when she retired, around a third of the Respondent's staff were "not actually or ethnically British". She describes herself as race indifferent, and that all she wanted was to have people working in the business who were "nice warm individuals who made our customers feel welcome and their best interests addressed". Mr Harris says something similar in his statement, namely that the Respondent wants nice, warm, effective people, adding that they do not need to speak fluent English. The Respondent's documentary evidence (page 5) says that 12 of 35 staff recruited by Ms O'Byrne were not born in the UK. Again, we accept that unchallenged evidence, in Ms O'Byrne's absence preferring what is shown in that document as a more accurate account than the recollections recorded in her statement.

26.6. Sixthly, Mr Harris says that he discussed recruitment with Ms O'Byrne on a regular basis, probably including for the Nottingham store, and has no recollection of Ms O'Byrne making a comment to the effect that she didn't want a Polish store. He said that a person's nationality would not be relevant to recruitment decisions and that he would have been surprised if Ms O'Byrne had said something along those lines. In fact, he said, again in unchallenged evidence, Ms O'Byrne was in favour of employing Polish people as the Respondent had assessed that Polish people "do rather well in Futon Company".

26.7. Seventhly, Mr Harris described how the Respondent revised its recruitment arrangements 20 years ago by utilising assessment days which were open to anyone, as a result of which more people of Eastern European origin were recruited. Mr Harris said he had never heard anything which suggested that Ms O'Byrne was unwilling to recruit from diverse candidate pools. We accept his unchallenged evidence on both of these counts. He was keen to emphasise that the Respondent would always seek to select from a wide pool of candidates.

26.8. Finally, the Respondent also says that the Claimant hired Polish nationals to work in the Nottingham store, whose appointments were approved by Ms O'Byrne. The Claimant also agrees that her Polish husband helped her in the store quite regularly, without any objection from the business.

27. That is the Respondent's reply to the Claimant's allegations regarding Ms O'Byrne's comments. As noted, we will deal with this conflict of evidence in our analysis of the case below.

28. The Claimant alleged, for the first time in oral evidence, that in addition to the comments allegedly made by Ms O'Byrne, it had been reported to her by a colleague that Mr Harris had made comments about Nottingham being a "Polish store" as well as inappropriate comments about a colleague's sexual orientation, though we were not told what this latter comment was. Mr Harris vehemently denies that allegation, adding that he would have been stupid to make such comments. The Claimant's evidence was plainly hearsay, which whilst not put out of consideration on that count, means that it must be afforded less weight than evidence of matters she was a witness to directly. We must also take note of the fact that this allegation had not

been made before. For those reasons, because it was unchallenged evidence that the individual about whom Mr Harris is alleged to have made an inappropriate remark related to sexual orientation has since been promoted, and having heard Mr Harris for ourselves (including in relation to matters referred to elsewhere in these Reasons concerned with matters of nationality), we reject that evidence, and find that Mr Harris did not make the comments attributed to him.

Performance of the Nottingham store

29. Both Mr Harris and Ms O'Byrne emphasised in their written statements, and Mr Harris in oral evidence, the qualities the Claimant brought to her role as store manager. Mr Harris's statement refers to the Claimant's tremendous attention to detail, her excellent standards of shop-keeping and her good management of her team and of stock. He also refers to her good language skills. When asked why he had thought it necessary to refer to the last of these qualities, he said that it was because the Respondent has a practice during recruitment of asking candidates lots of questions in rapid succession, using colloquialisms, to test whether they will be able to understand the customers they would be dealing with if they were to be recruited. This is important because good customer relations are clearly and unsurprisingly essential to the Respondent's business. Mr Harris said that all candidates are put through this test, including UK born candidates. We accept this unchallenged evidence.

30. Mr Harris's criticisms of the Claimant were that the store did not generate sufficient income. In his view, this was at least in part because in her personal dealings with other people she rarely addressed points that were made to her, as she was too eager to counter with her views. This led Mr Harris to have concerns about customer reaction to what he perceived as a lack of empathy on the Claimant's part. He had observed her dealing with customers and, consistent with his views, described these interactions as "intense" and "too full on". Mr Harris's evidence is that the store started well when it first opened but it didn't continue in that vein. When a store is underperforming financially, Mr Harris and his colleagues look at every factor in the store itself, at the immediate environment and at the wider city in which it is located. It is also a standard response in such cases to increase visual merchandising. If there is still no improvement, the Respondent will then assess local management and staff. As already stated, the Respondent's case is that it is key to building a good customer base that there be warm, empathetic sales staff led by the store manager. Having visited the Nottingham store on a number of occasions Mr Harris says that he grew to realise the Claimant was "not equipped to actually recognise these qualities". He says he was faced with the "dilemma of a loss-making store run by a manager who could supply all of the skills to run the systems but none of the heart needed to succeed with the customers".

31. The Claimant's case is that she was set continually increasing financial targets for the store. She nevertheless accepts that its performance was below that of other stores and that it did not meet its targets until that which was set in the last 6 weeks of her employment. We return to that in our analysis below. The Claimant also says that Mr Harris and others made inappropriate comparisons between Nottingham and other stores, citing in evidence Norwich and Cambridge. What she appears to have meant by that was that she was advised to contact the managers at those stores for advice if she required it as they are very experienced. She did not do so. Instead she contacted people she felt more comfortable with, though she did not feel she needed a great deal of support after she had received her initial training. The Claimant went on to say that a number of her proposals for improving the store's performance were rejected. We will come to that in due course.

32. In addition to the above, the Claimant says that the Respondent interfered in what should have been local managerial decisions. She explained that what she meant by this was that a colleague was assigned to another store without her being involved in any discussion about it. She also says that road-works affected the performance of the Nottingham store, describing them as "horrendous", not least because customers could not park. Mr Harris says that at any one time 3 or 4 of the 20 stores will be affected by road-works or building work of some description. He says that his recollection is that the roadworks in Nottingham lasted for no more than 3 months, and that he had said to the Claimant not to worry as they would eventually clear and business should then pick up. We accept he made that comment, as again it was unchallenged evidence. The Claimant says the roadworks lasted from April to November 2015, but Mr Harris gave unchallenged evidence that for some of that period the works were on the other side of the road which can in fact encourage footfall for a store.

33. Finally, the Claimant also believes the location of the store, on a one-way road out of the city, was not conducive to meeting the targets set by the Respondent. Mr Harris accepts that location is always a key consideration in opening a new store, but that two other stores – Brighton and Exeter – are in similar positions and were not underperforming, which we accept.

Dismissal

34. Mr Harris says that his typical approach where a store is underperforming is to wait a month or two, then look at non-staff factors such as those mentioned above, then address things with the store manager, and if the store manager does not accept that there is an issue, he starts to look to replace them.

35. On 11 May 2016, Mr Harris wrote an email to Ms O'Byrne (pages 15 to 16). The email was headed, "Replace management in Nottingham". It began by referring to sales having not improved, highlighted the Claimant's strengths in terms of store appearance and then said, "but I do have to doubt her ability to generate sufficient sales to keep the store open". It referred to the road-works as "long gone", that the Claimant was trying hard, "but … she has a personality problem/trait/manner that I suspect is almost certainly the problem for customers. // … I appreciate that she does have a welcoming personality but I feel sure that her way of expressing it is not sufficiently soft and attractive for our customers". The email went on to recount Mr Harris' experience of conversations with the Claimant, and that he did not believe that she had "the intellectual capacity" to deal with the issue. It concluded, "So … despite the fact that I like Aneta and that she has done her very best I think it is time to replace her as she has not convinced me that she will be able to improve the sales to make the store viable. Accordingly, can you please recruit a replacement". Mr Harris said the email heading was intended as a question. We are far from convinced about that, but we accept his further evidence that whilst he generally has a point of view which is strongly expressed, colleagues will often have a different one and their views will sometimes prevail. In relation to the Claimant, as we will see, he did not overrule Ms O'Byrne when she sought to pursue performance improvement measures with the Claimant. At the very least however, Mr Harris was preparing for the possibility, even in his mind the probability, of the Claimant's dismissal at this stage, nearly 5 months before it took place.

36. On 15 May 2016 Ms O'Byrne replied to Mr Harris' email (page 15). The key part of that email was as follows: "Taking on board your concerns plus similar verbal feedback from other staff members, I will now highlight these concerns with Aneta and give her the chance to address them via a Shortfall in Performance meeting …". It was therefore Ms O'Byrne who handled matters with the Claimant from this point.

The Claimant describes Ms O'Byrne as neutral in that process, though she also alleges Ms O'Byrne was unpleasant, particularly in a meeting on 24 May 2016 (see below), which she attributes to the pressure Ms O'Byrne was under from Mr Harris in respect of the financial performance of the store.

37. The following day, 16 May 2016, Ms O'Byrne sent the Claimant the email and attached document which appear at pages 17 to 19, scheduling a meeting to take place on 24 May. The email was headed, "Shortfall in performance meeting" and stated, "Dear Aneta, //The Directors have expressed concerns with regards to the performance of the Nottingham store. They strongly feel that Nottingham should be performing a lot better by now. I would like to visit you to discuss why your store sales are below par and how we can address this matter. I have attached a shortfall in performance meeting [sic] to be held with you on 24 May". The document attached was headed "Shortfall in Performance". It was largely comprised of standard wording, including stating that the meeting on 24 May "is an extremely serious event and you should be aware that it has implications for your continued employment …". The performance problem was described as, "Sustained low sales performance", and then again in standard wording the document added, "The management will be anxious to hear your explanation and any extenuating circumstances", and management will consider "a timescale for your performance to reach the required standard".

38. On the same day, 16 May, Mr Harris sent Ms O'Byrne an email (page 20) headed, "Aneta Nottingham, Turnover year to date". It asked Ms O'Byrne to have to hand when meeting with the Claimant the figures for other stores, stating that Nottingham was second lowest, and that "A mistake would be to just assess the performance when compared to last year which apparently shows a big improvement … but, on disastrously low figures". The email said that the Chelmsford store had similar figures, "and I'm not absolutely thrilled with their figures either", and added "We can find nothing in the demographics to suggest that [Nottingham's] figures should be so low", that it does "have a reasonable amount of click and collect but, as we have learned in Guildford this was almost certainly because the customers appeared to have no desire for anything other than minimal contact with the staff".

39. The meeting between the Claimant and Ms O'Byrne took place as planned on 24 May. The Claimant says, and we accept, that she cited roadworks, the location of the store and staff rotation as mitigating circumstances. The Claimant emailed Ms O'Byrne after the meeting (page 21). The email consisted of a long list of suggestions for improving the stores performance which the Claimant said she would attend to over the following 8 weeks, the last of which was, "Have a warmer personal presence". She concluded by saying, "Thank you so much for your time and advice. I greatly appreciate your input and will do my best to achieve and excel on all discussed goals". The Claimant says she only added the last bullet point in her list to keep Ms O'Byrne satisfied and because she knew the email would be read at head office; she also says that her thanks for the meeting was simply to respect Ms O'Byrne for spending time with her to "give her a hand".

40. Page 23 sets out Ms O'Byrne's summary of the meeting, which she evidently completed on the following day. The relevant parts of the note included Ms O'Byrne saying that she "explained that although the Nottingham targets had been set quite low … we expected much more", and that the disruptive road-works in the early days had been taken into account but the figures should be much better since they ended. There were comparisons with a number of other stores, and then Ms O'Byrne recorded that she "informed Aneta that I had received feedback from other department heads that she does not have a warm welcoming personality and can

come across as defensive and sometimes a little icy. I stated this area requires improvement as well as her listening skills". The note stated that Ms O'Byrne had commended the high standards in the store's appearance, there was then a record of a discussion around steps to improve things, and the document then included a section written by Ms O'Byrne headed, "My Opinion". This stated, "I feel Aneta is trying too hard and this can make others feel uncomfortable especially our customers if she is overselling and pushy … she needs to listen more carefully … I strongly feel Aneta could turn this around and I hope she does, she would notice an immediate change with everyone she deals with". The Claimant did not sign the document as she did not agree with everything Ms O'Byrne had written as a record of their discussions, but she did agree that Ms O'Byrne had mentioned the other stores and that she described the Claimant's store presentation as impeccable.

41. As appears from page 26, on 25 May Ms O'Byrne forwarded a draft of her record of the meeting to Mr Harris for him to review. He replied on the same day: "I would only add that I can't see any real emphasis on what I suspect is her real problem … that she is ONLY interested in pushing her agenda and appears completely unable to understand, take on board, listen to, empathise with and seek to help others with their agendas. Consequently I have to wonder if potential customers leave the store feeling that their personalities have been steamrollered over … I certainly would … and do. //I approach any conversation with Aneta wearing a pair of virtual ear defenders and would be surprised if she took any point I wished to make at first, second or third mention. It's a slight case of Asperger's syndrome where the talker is incapable of noting their listener's reaction. They are therefore always surprised when there is a blow-up because they have been oblivious to the conventional non-verbal warning signs given off by a listener". Mr Harris disclosed to the Tribunal that he has a daughter with a diagnosis of mild Asperger's Syndrome, and says that he based his comment to that effect on that personal experience.

42. As appears at page 27, Ms O'Byrne wrote a note to the Claimant on 16 August 2016 inviting her to a further meeting on the following day, to discuss the store's performance since the May meeting. It said, "You were given 8 weeks to improve your store sales … We discussed that you should at least try and achieve a set target of £5k per week". The period had been extended by 4 weeks because of holiday. The note added, "I would like to discuss with you why you have failed to achieve this goal and discuss in more detail what would be the best practice in going forward".

43. Following the 17 August meeting, a "final formal warning" was sent to the Claimant by Ms O'Byrne on 22 August (the original is at page 29, and a corrected version appears at page 30). Again, the document was in standard form. The key points were the statement that the Claimant had been "made aware that [the warning] had implications for [her] continued employment"; the reference to the overall 12 weeks the Claimant had been given to improve store sales, with a minimum target of £5,000 per week, which it said she had failed to achieve; and the statement that "the ultimate end of this procedure is dismissal … should the action listed not be met". That action or "required improvement" was, "You have now been given a further 6 weeks to achieve £30k commencing from Monday 22nd August and ending on Sunday 2nd October".

44. The Claimant accepted that she was fully aware of the possibility of dismissal from May 2016. She also accepted that the store did not meet the target set in May, that another target was set in August, and that she knew the final written warning was her last chance to improve. The Respondent says it was a low target. We will come to the figures shortly, but a point to note here is that Mr Harris was insistent that £5,000 of sales had to be achieved week on week. Ms O'Byrne refers to this in

her statement, and the warning itself refers to a "set minimum target of £5,000 per week" having been set back in May. Whether the Claimant was told expressly in August that she must achieve £5,000 per week for each of the next 6 weeks is not clear, but it is in our view very much implied. The Claimant says she was told, at least by Ms O'Byrne, that if she met the target she would keep her position. The warning plainly said that if she didn't meet the target, she wouldn't keep her position – the consequences would be dismissal.

45. At around this time, Mr Harris interviewed and hired a potential replacement for the Claimant. His evidence is that this recruitment took place with no guarantee of a permanent post if the Nottingham store improved and that the Respondent made clear that it was a temporary role with the potential to manage the Nottingham store, but that if the Claimant was retained the replacement would not be. We have to say that it seems unlikely to us that the arrangement was exactly as Mr Harris describes, not least because recruiting someone for training without any concrete prospects looks like an unnecessary expense for the Respondent. That said, Mr Donavan did not challenge this evidence.

46. Some improvements in the store's performance materialised, but they were not enough for Mr Harris. We will come to the figures shortly. Mr Harris thus instructed Ms O'Byrne to replace the Claimant because, he says in his statement, "it made no sense to continue on a failing course without trying something new". Mr Harris says that Ms O'Byrne did not want to let the Claimant go because of her various qualities and because she felt the Claimant's lack of empathy (as Mr Harris saw it) was not her fault. Ms O'Byrne says something similar in her statement. It was thus Ms O'Byrne's preference to offer the Claimant a reduced role rather than dismissing her, and Mr Harris did not veto that proposal.

47. The Claimant says that when Ms O'Byrne was due to visit the store on 4 October, she expected to be congratulated on meeting the 6-week target, but knew her position would still not be safe as the financial performance needed to continue to improve. She says that she was therefore very much surprised when Ms O'Byrne told her she could no longer be store Manager, and that she could be Assistant Manager, but if she did not accept that offer she would be dismissed. We accept that this was the broad outline of what the Claimant was told. The Claimant says Ms O'Byrne told her it was Mr Harris's decision – it plainly was, and so we accept that evidence also.

48. The Claimant alleges that she said to Ms O'Byrne that the target had been achieved and that Ms O'Byrne replied, "Unfortunately we've employed someone more experienced and because you have less than 2 years' service it is easy to dismiss you". Although we did not hear from Ms O'Byrne, and whilst we accept that the Claimant referred to the target having been met, we find that Ms O'Byrne did not reply as described, on the basis that she had already said privately that she wanted to retain the Claimant and was also in fact seeking to retain her. The Claimant was introduced to her replacement on the same day. That person was White British. She did not last very long at all in the role. Eventually another manager was appointed – Mr Harris says that this person is also white but he does not know their nationality.

49. The Claimant says Ms O'Byrne only offered her the Assistant Manager role because it suited the Respondent to have the Claimant train the new manager; the Claimant says she believed she would be dismissed once this was done. Mr Harris's view is that this is not how the Respondent operates. We find it was in fact a genuine offer by Ms O'Byrne, principally on the basis that there is at least one other example of this being done at another store, as we will explain below.

50. The day after their meeting, Ms O'Byrne sent the Claimant the letter at page 32. It reads, "This letter confirms our discussion yesterday that your employment as Store Manager with Futon Company is terminated effective immediately from 4th October 2016. // Although we have been grateful for all your effort the overall poor performance of the Nottingham store requires attention. //You have been offered a new role as Assistant Manager [on a reduced salary plus commission] which I hope you except [sic]". // You have also been given time off on your current full pay until the end of this week to think about whether or not you wish to accept this new position …". In relation to the opportunity to step down to assistant manager, Ms O'Byrne says in her statement, "I didn't want her to feel totally rejected and I felt that her skills and experience could be useful for the new Manager".

51. We turn now to the figures. The Claimant says she met the target set on 17 August 2016 of £30,000 of sales in 6 weeks. It was the fact that she was dismissed despite reaching this target, and the suggestions of her friends and family, which led to her believe that her nationality was the reason for her dismissal. The Claimant produced her own spreadsheet to the Tribunal – something she forwarded from Respondent's IT system after she had been dismissed when she went to collect her personal belongings. The Respondent's figures are at pages 14 and 14a. The Claimant agrees that the figures at page 14a are accurate, except that the total target for 2015/16 (the financial year preceding her dismissal) was actually higher than the Respondent states. Mr Harris says, and we accept as being abundantly clear, that the targets for 2016/17 were low compared to what the Respondent actually wanted – they were set as 10% above the equivalent period's sales for the previous year. As already noted, Mr Harris's expectation was that each week of the last 6-week period should see sales of at least £5,000 which he thought should be very easily achievable. Although the store achieved sales in this 6-week period of £30,000 overall, it did not achieve the weekly target each week. That is clear from the spreadsheet produced by the Claimant – the last 3 weeks of the period were all well below £5,000. This was important, Mr Harris says, because he wanted to see a consistent, ongoing improvement at the store. His evidence was that the higher figures for the first 3 weeks of this crucial period were achieved by offering free deliveries to customers, carried out by the Claimant's husband, which he did not regard as sustainable. The failure to achieve the weekly sales target meant that in his view that the Claimant had to go.

52. Mr Harris said in evidence that when there is a change in manager, the store in question will usually see an upturn of up to £2,000 per week within 30 to 60 days. The growth at the Nottingham store since the Claimant's dismissal has not been of this order, though there has been growth of around 13%. He confirmed that the store is still required to make £5,000 per week, and because this has still not been achieved, it has been decided that it will close in April 2018.

Comparators

53. The Respondent says that it would and did apply the same procedure and outcome to all other employees in similar positions to the Claimant. Mr Harris referred in oral evidence to a Syrian employee who was manager in another store and who at an unspecified time but apparently before the Claimant's dismissal, was removed from his position as manager for reasons of store underperformance. He offered and accepted a role as Assistant Manager, in which he stayed for some time until recently leaving to go abroad. We accept that unchallenged account.

54. Mr Harris also gave uncontested evidence, which we therefore accept, that a White Welsh store manager was dismissed because of store performance at some point before 2008, and a White English store manager was dismissed from the

Chelmsford store much more recently for the same reason. At the Guildford store, performance problems have been addressed, and a Polish Assistant Manager has been hired.

Law

55. Section 39 of the Act provides, so far as relevant to this case, "*(2) An employer (A) must not discriminate against an employee of A's (B)— … (c) by dismissing B*". Section 13 of the Act provides, again so far as relevant to this case, "*(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". The protected characteristic relied upon in this case is race, which according to section 9 of the Act includes nationality and ethnic or national origins. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

56. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(6) A reference to the court includes a reference to—

(a) an employment tribunal …".

57. The fundamental question we are required to determine is the reason why the Claimant was treated as she was, i.e. the reason why she was dismissed. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Lord Nicholls also observed that in most cases answering this question will call for some consideration of the mental processes (conscious or otherwise) of the alleged discriminator. Whilst in some cases, the ground, or the reason, for the treatment complained of is inherent in the act itself, in other cases – such as **Nagarajan** and such as the present case – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes which led the alleged discriminator to act as they did.

58. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances, where necessary with the assistance of the burden of proof provisions – as to which see below. In **Amnesty International v Ahmed [2009] IRLR 884**, it was said that, "… The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of". In determining the reason why the alleged discriminator acted as they did, the tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. Rather it has to consider whether it was one of the reasons for the treatment – that is enough to establish unlawful discrimination. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan**).

59. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. This

has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** In giving oral judgment in this case we stated that the **Igen** guidance had now to be read in the light of the Employment Appeal Tribunal's recent decision in **Efobi v Royal Mail Group Ltd [2017] IRLR 956.** In that case it was held that, given the wording of section 136 – which the EAT said had not been considered in earlier authorities – it is not necessary for the Claimant to establish a prima facie case, or prove facts as such. What the Tribunal must do is consider all of the facts and decide whether they are facts from which it could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant.

60. Since we gave oral judgment, the Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that **Efobi** was wrongly decided and that **Igen** remains appropriate guidance in respect of the burden of proof. Singh LJ summarised the position by saying that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage [i.e. demonstrating that there are facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant]. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage [the second stage being the Respondent having to establish that it did not discriminate]".

61. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an act of unlawful discrimination. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246** "could conclude" refers to what a reasonable tribunal could properly conclude from all evidence before it. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. The inferences a tribunal may draw can include, in appropriate cases, any that it is just and equitable to draw from an evasive or equivocal reply to questions.

62. It is important however for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant, and may emerge for example from the context considered by the Tribunal in making its findings of fact.

63. First of all then, we are required to determine what occurred, including by way of relevant background). Secondly, we must determine what inferences may be drawn and why – these determinations may emerge for example from the background facts, from the context of the Claimant's dismissal, from the Respondent's general practice, and from statistical information where relevant. Thirdly, we must then ask whether the burden of proof has shifted to the Respondent, i.e. whether the matter moves beyond the first stage. **Madarassy** makes clear that the first stage includes the Respondent's evidence on matters such as whether the act complained of actually occurred (not contested in this case), the situation of comparators (including whether they offer a like with like comparison), and the reasons for the allegedly

discriminatory treatment. The Respondent's explanation for the alleged less favourable treatment does not have to be a reasonable one; it may be that it has treated the Claimant unreasonably, but that is not enough to justify an inference of unlawful discrimination which would satisfy the requirements on the Claimant at the first stage.

64. Fourthly, if the burden of proof moves to the Respondent, it is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race. That would require us to assess not merely whether the Respondent has proved an explanation for the facts from which the relevant inferences can be drawn, but also that the explanation is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. A tribunal would normally expect cogent evidence to discharge that burden of proof. The reason why the Respondent acted as it did need not be only the protected characteristic in order for discrimination to be made out and the protected characteristic certainly need not be the "on the face of it" reason.

65. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof. In **Hewage v Grampian Health Board [2012] ICR 1054,** the Supreme Court said that the burden of proof adds nothing where there are positive findings by the Tribunal on the evidence one way or other. It is not necessary therefore in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

66. As to comparators, which is part of the factual matrix for us to consider, we have already set out the provisions of section 23 of the Act. The comparison must be like with like, in other words with someone whose circumstances are the same or not materially different to those of the Claimant. Where as in this case, it is a hypothetical comparator which is relied upon, not wholly dissimilar (as opposed to identical) circumstances can be used to create that hypothetical comparator. In other words, evidence in respect of individuals who would not be actual comparators may nevertheless be useful in determining the hypothetical comparator.

67. As with the burden of proof the Courts have made clear that tribunals should not get bogged down with issues relating to a comparator where the issues in the case can be determined by focussing on why the Respondent acted as it did. The comparator question can be useful to consider; it is the reason why question which is fundamental.

Analysis

68. We considered the facts of this case very carefully. In doing so, we took the approach set out in **Efobi**, namely that there was no burden on the Claimant to prove a prima facie case; our assessment was in that sense neutral. As set out above, **Ayodele** has since overruled **Efobi**. As will become clear however, taking the **Efobi** approach which could be said to be more generous to the Claimant does not affect the overall outcome of the case at all.

Ms O'Byrne's comments

69. As mentioned above, it is necessary for us to resolve as an important background issue the principal conflict of evidence between the parties, namely whether Ms O'Byrne made or did not make the comments attributed to her by the Claimant relating to recruitment in August 2015 and September 2016 respectively. That is an appropriate place at which to begin our analysis of the case. The comment about the Greek candidate could be construed as a race-based comment, and certainly the comments about the Polish candidates could also be construed as such, although the comment about the Chinese candidate was not in our view race-based, and nor was the comment about another candidate's mental health. The question is whether Ms O'Byrne made the alleged comments at all.

70. In resolving this evidential conflict, we were conscious that we had not heard from Ms O'Byrne in person, which as we have indicated means that we had to attach less weight to her evidence than might otherwise have been the case. We were also conscious that no-one else from the Respondent's side was able to give evidence about the conversations in which these comments were allegedly made. All of this means that we only had the Claimant's evidence standing as a direct account of what took place, but in deciding this issue, it was also necessary for us to take account of what might be described as indirect evidence, specifically the following:

70.1. There was nothing of a race-based nature in the transcript of the one-to-one meeting in April 2016 when Ms O'Byrne and the Claimant discussed the possible dismissal of other employees in the Nottingham store, a transcript which arises from a recording which Ms O'Byrne did not know was taking place, such that it is safe to assume she expressed her views very openly.

70.2. Ms Lajdecka actually remained in the Respondent's employment until recently.

70.3. The Respondent employs many Polish people, and has a nationally and racially diverse workforce generally.

70.4. It has Polish store managers and assistant managers elsewhere.

70.5. Ms O'Byrne says in her statement that the Respondent's business is only viable with a diverse recruitment pool and workforce, something Mr Harris confirmed. As we see it, this is almost an operational imperative for the Respondent.

70.6. We were struck by Mr Harris's comment that he and Ms O'Byrne had concluded that "Poles do rather well in Futon Company".

70.7. The Claimant was herself made store Manager, in a new store.

70.8. Ms O'Byrne did not want to lose the Claimant and sought to retain her when Ms O'Byrne was under pressure from Mr Harris to find a replacement.

71. Weighing up all of this evidence, on the balance of probabilities, we conclude that whilst Ms O'Byrne may have made the point to the Claimant that the Respondent did not just want to recruit Polish people, thus reflecting the Respondent's normal recruitment practices as described to us by Mr Harris, we find that Ms O'Byrne did not make the comments attributed to her by the Claimant. The indirect evidence as we have described it outweighed in our minds the claims made by the Claimant about what was said, making it less than likely that Ms O'Byrne made those comments. We also reiterate our finding that Mr Harris did not make the comments the Claimant sought to attribute to him. The Tribunal noted Mr Harris's long-standing commitment to inclusion within his business, regardless of race.

The reason for the Claimant's dismissal

72.The key issue to be resolved in this case is the reason why the Claimant was dismissed. As noted, according to **Hewage** where a tribunal can make positive findings of fact on this question it need not go through the two-stage burden of proof procedure referred to in other cases. We return to the burden of proof below, but in this case, we were clear that we were more than able to make positive findings of fact as to the reason why the Claimant was treated as she was, i.e. why she was dismissed. It is the mental processes of Mr Harris that we have to focus on in making those findings. He was the decision-maker. Thus, even if, contrary to our conclusions set out above, Ms O'Byrne had made the comments attributed to her, that would not lead to a finding that the Claimant was dismissed on discriminatory grounds. Ms O'Byrne was essentially the messenger. The question we have to focus on is what were the grounds for Mr Harris's decision. Why did he act as he did?

73. We are clear that Mr Harris's focus, and his reason for dismissing the Claimant, was the performance of the Nottingham store. He clearly had concerns about the bottom line. It is not for the Tribunal to say what was an acceptable level of turnover for the store, but even if it were, the following was clear:

73.1. The Nottingham store was performing less well than other stores.

73.2. It had lower targets than Mr Harris really wanted, especially in 2016/17.

73.3. It did not achieve sales of £5,000 per week in the final 3 of the last 6 weeks of the Claimant's employment – even if the Claimant was not clearly told by Ms O'Byrne that this was the requirement, it is clear that this was what Mr Harris wanted and that the failure to achieve it was the reason why he eventually decided the Claimant had to be dismissed.

73.4. We return to process below, but it is also clear Mr Harris did not move quickly to dismiss the Claimant when concerns about turnover began to emerge – he was persuaded by Ms O'Byrne to give the Claimant an opportunity to improve.

73.5. It is correct that roadworks had been an issue for the store in the initial stages but they were no longer a material factor during the 2016/17 financial year.

73.6. As for the location of the store, Mr Harris honestly acknowledged in his submissions that it may not have been ideal, but we note that the performance of the store has improved since the Claimant's dismissal and have also accepted that Mr Harris took these factors into account in deciding on his course of action.

73.7. We also note that Mr Harris was quite prepared to acknowledge the Claimant's qualities. It is true that he was critical of the Claimant's manner – we will come back to that below – but acknowledging her qualities is suggestive of a fair-minded appreciation of her and her abilities and is another factor supportive of the Respondent's case that its decision to dismiss was based on store performance.

74.Taking all of the above into account, it is clear that the store's financial performance was the key for Mr Harris. He did also focus on the Claimant's manner as a likely reason in his mind for the unsatisfactory performance, and some of his comments in this regard we find to be ill-advised, particularly those in the email at page 26. We found the Claimant to be very professional in her presentation to us. Nevertheless, there is no suggestion in the evidence we have seen that Mr Harris's views of the Claimant's manner and personality were race-based or racial stereotyping, and indeed the Claimant did not seek to argue that was the case. We

also note that the Claimant invited someone she knew to interview, even though Ms O'Byrne had said not to do so; and that she sought advice from people she trusted rather than the experienced Norwich and Cambridge managers who had been recommended to her. Though only small details, at least in part these instances support the view Mr Harris had formed of her.

75. We are in no doubt that staff warmth and manner is crucial for the Respondent's business – it wants to engender a good customer experience and this is a key part of it. Ms O'Byrne said as much in the recorded meeting in April 2016. Also telling is that the private emails between Ms O'Byrne and Mr Harris, which they could not have anticipated would be scrutinised in an employment tribunal, are very clear that it is the store's finances and how the Claimant's manner might affect that, which were the reasons for managing her performance and eventually dismissing her.

76. Taking all of the above into account, it is beyond question in our view that the Respondent's focus, specifically Mr Harris's focus, in performance managing and then dismissing the Claimant, was store performance. In his submissions Mr Harris said, "At the end of the day it wasn't making money", in an environment where there is pressure to get results. It was, he said, "a non-viable store", and it was decided that the Respondent would see if a new manager could make it work. We were particularly struck by his analysis that position (of a store), product, price, and people are crucial, but that the last of these is the only indispensable factor for success.

77. All of that being said, we must nevertheless still ask whether the Claimant's dismissal was because of her race. This is because, in order for her complaint to succeed, her race would not have to have been the main factor in the dismissal decision; it need only have been a more than trivial factor.

78. Mr Harris had clearly communicated in May 2016 that the Claimant was likely to have to leave, and in August went as far as recruiting a replacement. Both of those steps were in our judgment ill-advised, but that does not in our view change the reason for his actions or hint at race discrimination as part of his mental processes. The process of managing the Claimant's performance and dismissing her certainly had its faults – we will come to that below – but it was clearly not a charade to cover up conscious or subconscious race discrimination. There are a number of factors which lead us to the conclusion that the Claimant's dismissal was not because of her race at all. These are as follows:

78.1. The fact that the Claimant herself recognised that the Nottingham store's performance was not satisfactory.

78.2. The fact that this is supported by the figures as we have set them out.

78.3. The general diversity of the Respondent's workforce and the other positive inclusion factors we have already noted.

78.4. The clear evidence that the Respondent wanted the Claimant to succeed, for example suggesting she contact experienced managers for help.

78.5. The positive comments about the Claimant's work which, we conclude in assessing Mr Harris's oral evidence, were freely and genuinely made.

78.6. The fact that Ms O'Byrne clearly wanted to retain the Claimant.

78.7. The offer of another role, which against his better judgment Mr Harris was prepared to agree to, which shows that the Respondent wanted to retain the Claimant.

78.8. Finally, Mr Harris's email at page 26 is also important to note. That email was candid to say the least and included comments some would regard as improper, for example related to Asperger's syndrome. This was a private email between senior managers. In both its context and its content it was so unguarded, that if the Claimant's race had been a factor in Mr Harris's decision it seems likely to us that he would have said so in this email. He clearly didn't; his concerns were as we have identified them – the store's performance, and the Claimant's approach as a key factor in it.

79. In summary therefore, there may well have been some unreasonable actions on the Respondent's part in terms of the process it followed in managing the Claimant's performance and dismissing her – we come to that presently. But the case law is clear that it does not follow, without more, that the Respondent thus discriminated against the Claimant. Our conclusion, for the reasons we have given, is that it did not.

80. We are confirmed in that conclusion when we look at the question of comparators. The Claimant relied on a hypothetical comparator, but in fact it seems to us that the other store managers we have referred to are actual comparators, or at the least others whose circumstances are sufficiently clear as to inform what would have happened in the case of a hypothetical comparator. The Respondent dismissed – specifically, Mr Harris dismissed – three other store managers, one Syrian, one White Welsh, one White English, all because of store underperformance. As Mr Donavan said in submissions, the Respondent might be said to have a policy that if all else fails, they dismiss the store manager: that essentially demonstrates that there was no direct discrimination in this case.

81. Answering the "reason why" question and looking at the position of comparators is sufficient to conclude that the Claimant's complaint is not made out. Returning however to the burden of proof, we asked ourselves whether there are there facts from which we could decide, in the assumed absence of an adequate explanation, that the Claimant was dismissed because of her race. We conclude that there is nothing based on which a reasonable employment tribunal could properly conclude from all of the evidence as presented to us that there was. There was not even a difference in treatment compared to others, but even if there was, there is no hint in the facts as we have found them that this was because of the Claimant's race. The Claimant has not established the necessary prima facie case at the first stage. Furthermore, even she had, such that the burden of proof passed to the Respondent, we are satisfied for all of the reasons we have given that Mr Harris's decision to dismiss the Claimant was in no sense whatsoever on the grounds of race.

82. In concluding, we would add that if this had been an unfair dismissal complaint, we would have found the dismissal to be procedurally unfair. There are questions about whether the decision to dismiss had been made back in May 2016, though we would be prepared to give the Respondent the benefit of the doubt in that regard given what transpired from that point. More importantly, the Claimant may well not have been told that sales during each of the 6 weeks from the August meeting had to be at least £5,000. More concerning than that, she was called to the August meeting and given a final written warning without being told beforehand that this was a possibility. Most concerning of all, she was dismissed on 4 October without any due process being followed in respect of that meeting itself. And in respect of neither meeting – August or October – was the Claimant given the right to be accompanied, nor the right of appeal. We are not surprised that the Claimant has a sense of grievance against the Respondent and we agree with Mr Donavan that things were not properly handled. That said, as we have already made clear, we are wholly

satisfied that the Claimant was not dismissed because of race. As already indicated, it was at no point part of her case – nor would it have been made out on the evidence had it been argued – that the process leading to dismissal discriminated on the grounds of race. Accordingly, the Claimant's case must fail.

83. As a final postscript, we note that the Claimant will be entitled to recover any fees she paid in bringing these proceedings, as a result of the government's reimbursement scheme which followed the Supreme Court's decision in **R (on the application of UNISON) v Lord Chancellor [2017] ICR 1037**.

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Employment Judge Faulkner

Date: 12 December 2017
JUDGMENT SENT TO THE PARTIES ON

6 January 2018

FOR THE TRIBUNAL OFFICE