Case Number: 3200907/2016

RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss N Lomana Otshudi**

Respondent: **Base Childrenswear Limited**

Heard at: **East London Hearing Centre**

On: **5, 6, 7 & 8 September and 28 November and in Chambers on 29 November 2017**

Before: **Employment Judge C Hyde**

Members: **Mr P Quinn**
Mr T Brown

Representation

Claimant: Mr D Walker, Counsel

Respondent: Mr D Matovu, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The application to strike out the Response was refused.**

2. **The Respondent was granted leave to amend its Response in the terms of the draft dated 10 August 2017.**

3. **The unfair dismissal complaint was dismissed forthwith on withdrawal.**

4. **The claim for notice pay was dismissed forthwith on withdrawal.**

5. **The holiday pay claim was dismissed forthwith on withdrawal.**

6. The allegations of race victimisation under section 27 of the Equality Act 2010 were dismissed forthwith on withdrawal.

7. The first to sixth race harassment allegations (detriments) were not well founded and were dismissed.

8. The seventh race harassment allegation in respect of the dismissal was well founded.

9. The Tribunal will reconvene on a date to be notified to the parties shortly to determine remedy in respect of the race harassment dismissal.

REASONS

Preliminaries

1 Reasons are provided in writing for the above judgment as the judgment was reserved. The reasons are set out only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so.

2 All findings of facts were reached on the balance of probabilities.

The Claims and Issues

3 This claim was presented on 19 September 2016. The grounds of resistance and response were presented on 21 December 2016. Subsequently the Respondent presented proposed amended grounds of resistance dated 10 August 2017.

4 The claim initially included some seven allegations of race discrimination which stood to be considered by the Tribunal including complaint about the dismissal of the Claimant on 19 May 2017 for "redundancy". She alleged direct race discrimination and race harassment detriments, and in relation to the dismissal direct race discrimination, race harassment and victimisation.

5 The Claimant withdrew her unfair dismissal allegation in a Preliminary Hearing which took place in December 2016 before Employment Judge Russell and subsequently no order was made dismissing that claim. Neither the Claimant nor the Respondent objected to this Tribunal issuing a judgment confirming that, so that was done in this hearing. In relation to the claim for notice pay, it appeared to be agreed that the Respondent paid the Claimant for a period of time which exceeded the statutory and contractual notice to which she was entitled at the time, therefore that claim was also acknowledged not to be one which was being pursued and the Tribunal accordingly dismissed that claim also. The holiday pay claim was reviewed by the parties during the hearing.

6 By the end of the hearing, the unfair dismissal, wrongful dismissal (notice pay),

holiday pay, victimisation and direct race discrimination complaints had all been withdrawn. The Tribunal therefore dismissed those claims forthwith. The only live claims therefore left to be determined by the Tribunal were allegations of racial harassment. The parties had agreed in the list of issues that there were seven allegations of racial harassment up to and including the dismissal of the Claimant. In addition, it was agreed that the Tribunal would have to determine whether it was just and equitable to extend time for each of those allegations to be determined.

7 The Claimant's case was that it was just and equitable to do so and that the acts were continuing. The Respondent disputed that and stated that these were discrete acts and that they all fell outside the relevant timeframe which was agreed and that time should not be extended.

8 At the preliminary hearing on 5 December 2016, Employment Judge Russell recorded that in respect of the claims brought under the Equality Act 2010 and the protected characteristic of race, "the Claimant is black African, born in the Democratic Republic of Congo". There were then various incidents which were relied upon including the dismissal.

The harassment allegations

9 Did the Respondent engage in unwanted conduct as follows:-

9.1 3 March 2016. Comment by Gareth that a third person looked like a "**dirty type of dreadlocks person**"?

9.2 24 March 2016. Comment by Heather that she would not choose a particular child for a photoshoot ad campaign because his mother was a gypsy?

9.3 1 April 2016. Comment by Robert to parents, children and staff on a photoshoot that the Claimant did not speak English very well?

9.4 27 April 2016. Ben, in the course of a mini-basketball game in the office stated "**If I score this one Max's baby will be black**" at which others present laughed and Max added "**or Chinese**"?

9.5 5 May 2016. In response to a message sent in error by the Claimant to a WhatsApp group chat about the London elections, Ben messaged: "**Rob hates immigrants, he thinks they are eating British swans**"?

9.6 12 May 2016. Heather and a female colleague discussing the Claimant's toiletry habits and hygiene, suggesting that she left the toilet in a dirty condition and referring to her as "**the black girl**", leading to a note being put in the girls' toilet which the Claimant regarded as targeted at her?

9.7 19 May 2016. Dismissal?

10 During August 2017, the Respondent presented a proposed amended response which to a large extent tidied up the case that had been put back in December 2016 in relation to the discrimination incidents alleged. However, it also raised a couple of new substantive matters which we had to decide.

11 In relation to the time point, it was accepted by the Claimant as is consistent with the law that the Tribunal can look at issues relating to whether there is jurisdiction to determine the claim because of the dates on which the matters complained of occurred, at any time. Determination of those issues (time points) affect the fundamental issue of whether the Tribunal has the power/jurisdiction to decide the case at all. Therefore, the fact that the Respondent raised those issues for the first time in the amended or proposed amended response was not of consequence.

12 A related substantive point which was raised in the amended response was clarification from the Respondent about the date on which they said the Claimant's employment terminated namely 19 May 2016. Various dates had been stated the documents presented to the Tribunal by both the Claimant and the Respondent as the dates on which the employment ended, but it was agreed at the beginning of this hearing, by reference to a contemporaneous document written by the Claimant, that 19 May was indeed the relevant termination date.

13 The next substantive matter raised for the first time in the proposed amended response, and the matter which had caused the most difficulty, was the altered defence by the Respondent as to what was the reason for the dismissal. The Respondent accepts that at the time they told the Claimant that she was being dismissed for redundancy and that for the first time in the proposed amended response on 10 August 2017 the Respondent put forward an alternative case namely that although the Claimant was told that she was being dismissed for redundancy, the real reason for dismissal was that they strongly suspected that she had attempted to steal stock earlier on the day on which she was dismissed.

Application to strike out the Response/resist the amendment of the Response

14 After the closed preliminary hearing which took place before Employment Judge Russell which the Respondent did not attend on 5 December 2016, a summary was sent to the parties dated 6 December 2016 in which the Judge set out the issues which had been identified. By that date a response had not been entered by the Respondent and therefore the Judge considered entering a judgment in the Claimant's favour but decided against it. She was not satisfied that the Respondent had been properly served. She directed therefore that the claim form should be reserved on the Respondent at the Woodford Green address, the branch at which the Claimant had worked. The papers had previously been served on the registered address of the Respondent.

15 The response was received at the Tribunal on 21 December 2016. There was a covering letter dated 20 December 2016 signed by Mr Granditer. He confirmed that with the form he had sent four witness statements and his own personal statement. The other statements were from Rob Bushell dated 11 December 2016 and from Ben Coe, Heather Amos and finally from Gareth Woollard (all undated).

16 Following the receipt of the response the Tribunal made a case management

order of its own initiative which was sent to the parties on 6 February 2017. By that order the case was listed for hearing in May and June 2017 for four days. Further directions were given for among other things, disclosure of documents (p.33). The Tribunal reminded itself that at this point that the Claimant was still labouring under the misconception that the Respondent was seeking to defend their decision to dismiss her as a redundancy. An application was then made by the Respondent for the hearing to be postponed as the dates fell on a religious holiday and that Mr Granditer was therefore unable to attend. This was granted and in due course the hearing was relisted for 5 to 8 September 2017.

17 The Claimant made an application through her trade union representative Mr Richard O'Keeffe by email sent on 26 July 2017 for an unless order on the basis that the Respondent had not provided disclosure and not complied with the order of Employment Judge Russell referred to above in February 2017. Under Judge Russell's order disclosure should have taken place by 2 March 2017. Mr O'Keeffe described that the Claimant had emailed and telephoned the Respondent on 5 June 2017 requesting disclosure but had been informed by Mr Granditer at that time that: "as far as he was aware there was nothing of relevance in the Respondent's possession". Mr O'Keeffe challenged his contention as he believed that there must be documents relevant to the Claimant's employment, her grievance, her possible "protected disclosure", and termination. He asserted that without disclosure of this material the Claimant found it impossible to prepare the claim any further. The email was copied to Mr Granditer at the same time.

18 This correspondence was then followed by the first correspondence on behalf of the Respondent from solicitors acting on their behalf, Messrs Martin Searle Solicitors. In a covering letter dated 10 August 2017 accompanying the proposed amended response, application was made for the response to be amended. Further, representations were made in relation to disclosure, the bundle and witness statements. The Respondent continued to maintain through solicitors that the relevant documents were limited to the Claimant's documents. They apologised for the delay. They were saying that there were no further documents beyond the ones that the Claimant had that they wished to rely on or that were relevant and in their possession.

19 As set out above the application to amend the response was dealt with at the beginning of the hearing in early September.

20 In an attendance note or file note which Mr O'Keeffe had made of a telephone conversation he had had with Mr Grant on 10 August 2017, he noted that Mr Grant had tried to give him advance notice of the application to amend the response and that when the Respondent had: "filed the response back in December 2016, it did so in a bit of a rush/panic, it was not quite right and obviously it didn't deal with matters properly." The Tribunal considered that this was a major understatement.

21 The Tribunal has set out this procedural history as a relevant background to the position that was pursued through to the hearing in which the Respondent put forward hardly any documents either about the termination of the Claimant's employment or indeed about the incidents that the Claimant complained about some of which the Respondent partially accepted had occurred although they disagreed about whether there was any racial or racially derogatory element to them. In the event there were for example

a couple of photographs which were added by the Respondent to the bundle.

22 The Claimant objected to the Respondent's failure to comply with orders which were made on 16 February 2017 after the Tribunal had accepted the Respondent's response which was dated December 2016. One of the points in short to which the Claimant drew the Tribunal's attention, was the way in which the Respondent had conducted the proceedings especially in relation to the issue of disclosure. The grounds on which the application was made for the strike out of the response are not repeated here as these matters had been canvassed in some detail in the correspondence. Mr Walker clarified to the Tribunal that the Claimant also objected to the Respondent being given leave to amend the response. Mr Walker and Mr Matovu both expanded upon their arguments orally. The Claimant placed considerable emphasis on the Respondent's alleged inadequate or non-disclosure to the extent that the Claimant said that a fair trial was not possible and that the Claimant was thereby prejudiced.

23 The Tribunal emphasised that the duty of disclosure lies on each party and is a very heavy duty which underpins the process of justice. It is an extremely important duty and although it is the convention that each party indicates at a particular point that they have provided such disclosure as they believe they have in terms of relevance and what is available, the duty to provide disclosure is an ongoing one until the close of the litigation. The Tribunal wished to emphasise that it was made clear to the Respondent during the course of submissions that where there had been a failure to provide any disclosure until some eight months after the Respondent became aware of the litigation, this was bound to generate some distrust in the other party. However, in considering this application the Tribunal could not go beyond the Respondent's assertion that all relevant documents had been disclosed without there being some basis for considering that that assertion was not accurate. A potential example of this was the note that Ms Amos was supposed to have written which was referred to in one of the allegations. The Tribunal ordered the Respondent to make enquiries about the availability of that note. It may have been a document generated on someone's computer, in which case that document was disclosable. Beyond that, where there was simply a general request for disclosure, the Tribunal would need to see some evidence that there was a likelihood that documentation existed which had not been provided.

24 The allegations which the Claimant made were for the most part not about the Respondent's documents. Further, given the Respondent's current position was that they accepted that it was not a redundancy dismissal, there would have been no documents generated at the time which related to a redundancy exercise. It was therefore not surprising, in a case where the defence was based on a now admitted untruth, that a good deal of ill feeling came about in the correspondence about disclosure at a time when the Claimant believed that the Respondent was asserting that redundancy was the reason for the dismissal.

25 It is a very draconian step to strike out the response and we considered that albeit belatedly on 10 August the Respondent told the Claimant the new reason for the dismissal, the Tribunal's view was that this stark inconsistency with the previous reason given was more embarrassing for the Respondent than it was for the Claimant. The Claimant's and the Respondent's witness statements had been prepared on the basis of addressing that defence.

26 The Claimant contended that she could have brought a further allegation against the Respondent if she had known earlier that this defence was the Respondent's case.

27 She had not applied to amend her claim in any way and she was unable to demonstrate what further allegation could have been made. She could clearly seek to undermine the validity of the new reason and she could rely on the inconsistency with the previous reason put forward. She was alleging direct race discrimination and race harassment in respect of the dismissal already. The Tribunal was not satisfied that she has lost any opportunity to allege a further claim. In all the circumstances, we rejected the application to strike out the response and to resist the admission of the amended response.

28 As to the time points (jurisdiction), the Tribunal clarified for the parties earlier on that our judgment was that this was best dealt with at the end of all the evidence. We considered that we would be in a better position to have regard to the merits at that point, something which we may take into account, and also to decide whether the allegations were discrete or continuing acts of alleged discrimination.

Evidence adduced and heard

29 On behalf of the Claimant the Tribunal read two witness statements [C1 and C4] which stood as the Claimant's evidence in chief. They were directed to the merits of the allegations and to the application for extension of time. Further, the Tribunal considered a witness statement from Mr O'Keeffe and the appendices to his statement which were marked respectively [C2 and C3]. Further, the Claimant relied on the evidence of Elin Morgan and Sam Newbury to verify the accounts of the allegations in her case. Their witness statements were marked [C5 and C6] respectively. Mr Newbury did not give evidence live but the Tribunal considered his witness statement.

30 Finally, on behalf of the Claimant Mr Walker presented written submissions addressing the substantive matters and the extension of time marked respectively [C7 and C8]. He attached to his submissions photocopies of a number of relevant cases. Most of these were referred to in his written closing submissions. They were:-

Chohan v Derby Law Centre UKEAT/0851/03;

G (by his litigation friend) v The Head Teacher and Governors of St Gregory's Catholic Science College [2011] EWHC 1452;

Cain v Francis [2008] EWCA Civ. 1451 [this case was not included in Mr Walker's written submissions];

CRE v Dutton [1989] IRLR 8.

31 Further, the parties relied on an agreed bundle of documents consisting of some 150 pages. As frequently occurs during the hearing, documents were added by agreement or at the request of the Tribunal. The hearing bundle was marked [R1].

32 The Respondent had prepared a case summary at the outset of the hearing which

was marked [R2] and an agreed chronology and cast list which was marked jointly [R3]. There was further an agreed plan which was drawn up by Mr Kirby which it was agreed was not to scale but which gave a fair representation of the inside of the relevant part of the premises. That plan was marked [R4]. [R5] was a timetable of the witness evidence drawn up in an effort to conclude the evidence within the time allocated. In the event as appears from the list of dates on which the Tribunal sat, this objective was not achieved.

33 [R6] was the witness statement of Robert Bushell. The witness statement of Mr Woollard was marked [R7]. The witness statements of Heather Amos, J Kirby and Marc Granditer were marked [R8, R9 and R10] respectively. The further witness statement of Mr Moore who gave evidence on the resumed hearing on 28 November was marked [R11]. Mr Potier's witness statement was marked [R12].

34 The amended cast list which included agreed descriptions of the nationality/colour of relevant people was marked [R13].

35 The Tribunal then had various further witness statements from witnesses on behalf of the Respondent who did not give evidence live. These were from Benjamin Coe, Geoffrey Martin, Rebecca Bushell and Mandy Tear. Their witness statements were marked respectively [R14, R15, R16 and R17].

36 Finally Mr Matovu's submissions on behalf of the Respondent were set out in a document which the Tribunal marked [R18]. His written submissions was also accompanied by a bundle of authorities as follows:

Tanveer v East London Bus & Coach Company Limited [UKEAT/0022/16];

The Commissioners for HM Revenue & Customs v Serra Garau [UKEAT/0348/16];

Robertson v Bexley Community Centre (T/A Leisure Link) [2003]. In relation to this case he produced a one page summary of the outcome in the Court of Appeal and then a photocopy of the transcript of the judgment in the Supreme Court;

British Coal Corporation v Keeble [1997] IRLR 336;

Bahous v Pizza Express Restaurant Ltd [UKEAT/0029/11];

Rathakrishnan v Pizza Express (Restaurant) Ltd [UKEAT/0073/15];

Grant v HM Land Registry. In relation to this report also the Respondent produced a one page summary of the outcome in the Court of Appeal followed by a full transcript of the judgment in the Supreme Court [case number A2/2010/1066];

Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336.

Relevant Law

37 There was no dispute that the harassment claims were brought under section 26

of the Equality Act 2010 and that the Tribunal had to consider the application to extend the time limits under section 123(1)(b) of the Equality Act 2010 and taking into account the effect on the time limits of the early conciliation process. As the applicable law is set out in sufficient detail in the written submissions of both Mr Walker and Mr Matovu, the Tribunal does not repeat it in these reasons. Suffice it to say that the Tribunal had regard to the case of *British Coal Corporation v Keeble* [1997] IRLR 336 and section 33 of the Limitation Act 1980 and the other case law referred to by Counsel in their written submissions.

38 The Tribunal also accepted the contentions as to the law made by Mr Matovu in relation to time limits and the effect of the conciliation process, for example, that only the first notification to ACAS is effective. Thus, if a potential Claimant subsequently notifies ACAS again about the same Respondent that does not have any effect in law.

39 Further, in relation to the statutory tort of harassment, the Tribunal had regard to the case of *Land Registry v Grant* [2011] EWCA Civ. 769. There were comments cited by Mr Matovu from the Judgment in the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 especially at paragraph 22 which the Tribunal also considered were material.

Facts found and Conclusions

40 It was agreed that the Claimant, Ms Nadia Otshudi commenced employment with the Respondent on 16 February 2016 and that her employment terminated on 19 May 2016. Her position was that of in-house photographer. She was initially employed on a three month trial basis. Mr Granditer, the managing director who was based at the same branch as the Claimant acknowledged in his oral evidence that he was happy with the Claimant's work and that she was a very talented photographer.

41 The Claimant's place of work was originally in the main office on the first floor of the Woodford Green premises of the Respondent. Off that main office at one end were the office used by Mr Granditer the Managing Director and the Accounts office used by the accountant Shital. At the opposite end of the main office was a space referred to as the studio. It could be divided from the main office by a curtain. Beyond the studio was a gap or doorway which led into an area referred to as the photo prep area. Other than the large gap where the curtain was and the smaller entry way into the photo prep area the studio was enclosed. The photo prep area similarly was enclosed on three sides. On the fourth side it was partially bounded by some sort of storage unit or furniture about seven foot high. The Claimant had asked if she could work in the studio. She initially made this request of Mr Max Potier the E-Commerce Manager and her line manager (white, French). He was not keen on this initially. The Claimant made the request to Mr Granditer as well and explained that it would allow her to work more efficiently. Both managers could see the force of this and the Claimant was then allowed to work in the studio. She worked from the studio not long after starting with the Respondent.

42 There was another member of staff employed who also worked on photography but not exclusively. Her name was Heather Amos. It was agreed that both the studio and the photo prep area were areas which anyone working in the Woodford Green site could access.

43 The Claimant's case at the hearing was that she had not been treated well by her

colleagues from early on in her employment. Indeed she had kept a record of various incidents by way of WhatsApp messages sent to a friend either contemporaneously or shortly after various incidents occurred. The first such message presented to the Tribunal was dated 10 March, just over three weeks after the Claimant started with the Respondent. The Claimant further stated that she long suspected that many of her co-workers had feelings against her and that increasingly she felt uncomfortable and isolated working there. It was common ground that in about the first week of May a conversation took place between the Claimant and Mr Granditer in which he asked her how she was getting on. The Claimant did not dispute that she did not tell Mr Granditer about her suspicion that she was being discriminated against at this stage.

44 At about this time however the Claimant also said that she was offered a pay rise orally by Mr Granditer with a promise that it would start in January 2017. This was consistent with Mr Granditer's evidence to the Tribunal that the Claimant was a talented photographer who he saw adding value and being an asset to the Respondent going forward.

45 The Respondent had both a number of retail outlets in for example shopping centres but also had a substantial internet based presence. It was not in dispute that photography was therefore core to the Respondent's trade as pictures of the clothes also had to be taken in order to be loaded on to the internet. This also explained the fact that they had employed two photographers.

46 Although the unfair and wrongful dismissal complaints had been withdrawn it was relevant to set out something of the background of the case in relation to that, as in the Tribunal's view it was relevant to the finding of facts. One of the central issues was whether the Respondent was credible in denying that the motivation for the dismissal was racial. It was agreed that at the time the Claimant was dismissed by Mr Marc Granditer on 19 May 2016, the Claimant was told that the reason for her dismissal was redundancy, and that she challenged the validity of this reason at the time. Further, the Claimant presented a grievance on 24 May 2016 in which she complained about the redundancy dismissal and also raised grievances about six matters which overlapped with the issues which were agreed in this case. Apart from complaining about the dismissal she also alleged for the first time in the grievance that there had been episodes of racial discrimination against her during her employment.

47 It was agreed that the Respondent did not respond to that grievance in any way. There was no evidence before the Tribunal that any contemporaneous investigation had taken place within the Respondent.

48 The Claimant then embarked on a rather tortuous process in purported compliance with the ACAS conciliation procedure. Fairly promptly on 1 June 2016 she notified ACAS in respect of a claim against the Respondent. There was evidence before the Tribunal from Mr O'Keeffe that she also made notifications to ACAS in respect of five named individuals only by their first name because she was not in possession of their second names. The Tribunal saw no documentary confirmation of that notification. Then on 6 June 2016 the Claimant made further notifications in respect of Ms Amos, Mr Potier, Mr Bushell and Mr Woollard by including their last names. These were the people in respect of whom notifications had been made earlier only by their first name.

49 On the following week on 15 June 2016, the Claimant made a further notification to ACAS in respect of the fifth person who had been named only by their first name, namely Mr Coe.

50 ACAS having received no response, issued certificates against the Respondent, Ms Amos, Mr Bushell and Mr Woollard on 1 July 2016.

51 On 8 July 2016, no response having been received from Mr Coe, a certificate was issued in respect of him also.

52 The Claimant then attended the office of her union (CAIWU) on 19 August 2017 and was apparently incorrectly advised that since the issuing of the ACAS certificates, they had 'expired', and that a new notification should be made and a certificate obtained, the result of which it was believed would be that the Claimant would have a further month to issue her claim within an extended time limit.

53 In pursuance of this the Claimant again notified ACAS on 19 August 2017 about a claim against the Respondent and a certificate was obtained on the same day. Believing that she would have a further month to issue, the Claimant prepared a summary of her case and the ET1 was then submitted online on 19 September 2017, a month and a day later.

54 In the document [R13] dated 9 November 2017, the Respondent had listed the various people referred to in this hearing and what their agreed race/nationality was. Of the 13 members of staff who were working at the Woodford Green premises at the relevant time. There were 12 members of staff working at the Woodford Green premises who were listed. The list also included Mr Durango who was the Claimant's trade union representative, Mr Geoff Martin who was a manager employed at one of the shopping centres and one of the models used by the Respondent and who was the subject of one of the issues raised by the Claimant and also her mother. So those names were discounted when counting up the number of people who were on R13.

55 At the time the Claimant worked for the Respondent from March to mid-May 2016, when she was employed it appears that she was the only black person working there. At the beginning of May another member of staff, referred to variously in the documents as Lara/Lora was also employed. She was black. She left the Respondent in late May 2016. She apparently had a personality clash with another member of staff, Heather Amos.

56 The Tribunal was unclear about what Lara's job was. It was certainly not connected with the photography department.

57 In her claim form the Claimant set out a narrative which covered very similar ground to that set out in her grievance. The Respondent in their original response in December 2016 very stoutly rejected the allegations of discrimination and formally confirmed the reason given to the Claimant during the meeting of dismissal on 19 May 2016 by saying:

> "*She was made redundant… and this was purely for financial/economic reasons. She was not replaced permanently, her role taken on by existing members of staff*

who had the relevant experience."

In addition, in the next paragraph Mr Granditer volunteered some further comments on the Claimant's allegations. He stated:

> "*Firstly, at no stage did Nadia come to me with any complaint at any time during the course of her employment. I tried to present myself as an approachable employer, and Nadia had many opportunities to discuss these issues with me as we conducted a number of 1-to-1 discussions during the course of her employment. The one and only time she raised these issues was AFTER I informed her of her redundancy, which was clearly explained as an economically driven decision. I therefore dispute entirely her comment "I hoped that I could have kept the job and they would have listened at least to my side of the situation" – as race clearly played no part in the decision making process.*"

58 Mr Granditer then set out some further comments about the ethnic profile of his company and indeed classified himself as "*a person of ethnicity*" who was married to "*a person of ethnicity*".

59 During the cross-examination of Mr Granditer in the first sitting in September 2017, he indicated that Mr Moore who was the next most senior manager at the Woodford branch, would have had a record of the movements of the items which the Claimant was alleged to have attempted to steal. This evidence was tendered during questioning about the fact that there was no audit trail or document produced by the Respondent in support of the contention that various items had been inappropriately concealed by the Claimant and that this had led the Respondent to believe that she had attempted to steal them. The hearing could not in the event be concluded at the first sitting and it resumed on 28 November 2017. The Respondent had not called Mr Moore to give evidence in the September sitting because he was on holiday. He was available to attend and gave evidence on the resumed sitting in November 2017.

60 The implication by Mr Granditer was that there had been some contemporaneous checking of records by Mr Moore to substantiate the suspicion of theft. We did not consider that Mr Moore's evidence corroborated this. For example in cross-examination Mr Granditer had said that he was told by Mr Moore that there were no records of the stock being booked out on the stock sheets. Mr Moore readily accepted that no checks had been made by him. When Mr Granditer was being questioned about this it was put to him that he had made no reference in his witness statement to having checked the stock sheets. In all the circumstances therefore we rejected his account of checking of records.

61 During his cross-examination there was understandably considerable questioning of Mr Granditer about whether there were any documents or what sort of investigation, if any, the Respondent had conducted before reaching the conclusion that the Claimant was likely to have been involved in an attempted theft of stock. He accepted that he had taken no photographs of the items and there were no notes made.

62 Further, the Tribunal also queried Mr Granditer about the Respondent's systems and what paperwork would have been available to verify even the presence of certain items within the Respondent's stock. In answer Mr Granditer said that he believed that Mr Moore had a note of the items in question. When Mr Moore came to give evidence in

November he very clearly said he had made no checks whatsoever.

63 The most detailed description of the items given by the Respondent's witnesses was that there were five items and they were from designers Ralph Lauren and Boss and that they were in sizes which were larger than the size 12 which the photographer would use.

64 This was another reason why the Tribunal rejected the Respondent's entitlement to draw the conclusion that the Claimant had probably been involved in an attempted theft given that there was so little precision about the potential offence.

65 Also when Mr Granditer was asked about the fact that he had given what he now says was a false reason, which was also clearly unsustainable because there was absolutely no evidence of a redundancy exercise being conducted in or in the run-up to May 2016, he indicated that he now appreciated the significance of the false reason having been given and being maintained through to 10 August 2017. He indicated that the information he had given to the Tribunal in December 2016 was clearly false and he stated that he would "stand by my current reason".

66 Because of the significance of the time limit provisions the Tribunal found it helpful to adopt the summary set out in Mr Matovu's submissions at paragraph 15 as to the effect in respect of each of the allegations. Thus it appeared that the allegations were between 49 days and one day out of time. Accordingly, the time limit provisions needed to be considered separately in relation to each allegation:-

66.1 Allegation 1 ("dirty dreadlocks comment") took place on 03.03.16. The mandatory EC period from 01.06.16 to 01.07.16 should not be counted. By operation of EqA 2010 s140B(4) time would have expired on 01.08.16. Therefore the claim presented on 19.09.16 was 49 days late.

66.2 Allegation 2 was said to have taken place on 24.03.16. Time would likewise have expired on 01.08.16. This claim, too, was presented 49 days late.

66.3 Allegation 3 was said to have taken place on 31.03.16. Again, time would have expired on 01.08.16 so that this claim was presented 49 days late.

66.4 Allegation 4 took place on 27.04.16. EqA 2010 s140B(4) would have no impact and so time would have expired on 26.08.16. This claim was therefore presented 24 days late.

66.5 Allegation 5 took place on 05.05.16. EqA 2010 s140B(4) would have no impact and so time would have expired on 04.09.16. This claim was presented 15 days late.

66.6 Allegation 6 was said to have taken place on 12.05.16. EqA 2010 s140B(4) would have no impact and so time would have expired on 11.09.16. This claim was presented 8 days late.

66.7 Allegation 7 took place on 19.05.16. EqA 2010 s140B(4) would have no

impact and so time would have expired on 18.09.16. This claim was presented 1 day late.

67 The Claimant did not complain about any of the events in allegations 1 – 6 above to anyone at work until after she had left.

Allegation 1: 3 March 2016 – the dirty dreadlocks comment

68 The Claimant alleged that one of her former colleagues, Gareth Woollard, had said that a third person looked like an "dirty type of dreadlocks person". Some of this allegation was accepted. Mr Woollard agreed that he made a comment on the condition of the hair of an individual who he was viewing on his computer screen.

69 Mr Woollard was described in [R13] as White, British. From January 2016 he worked as a Digital Analyst, having commenced work for the Respondent in the Head Office as a photography assistant in February 2012, he had subsequently held various other positions.

70 The Respondent produced photographs of an individual who is a White Swedish musician who has dreadlocks and who Mr Woollard believed he was referring to when he made a comment on the appearance of his hair.

71 The Claimant wore her hair also in dreadlocks and she confirmed to the Tribunal that her hair was worn in the same style that she had for the hearing during her employment. This was a style whereby the sides of the hair were shaved and the dreadlocks were in the middle of her head.

72 The Claimant accepted that at the time she did not see who Mr Woollard was looking at on his screen as she worked on the opposite side of the table and the comment was made to others. She also conceded in her witness statement that she did not think at the time that it was aimed at herself specifically.

73 The Claimant accepted that the way in which she characterised the comment that was made by Mr Woollard had varied at different stages but at each stage the words 'dirty' and 'dreadlocks' had featured. The Tribunal accepted that this discrepancy did not affect the integrity of her allegation not least because Mr Woollard accepted that he had made a comment about someone's dreadlocks looking dirty.

74 The Claimant had sent a note about this to her friend Sam by way of a WhatsApp message on 10 March 2016, a week after the date of the comment.

75 This was the only incident Mr Woollard was involved in about which the Claimant complained.

76 The Tribunal first had to consider whether it was appropriate to extend time to make a determination about this incident. The Tribunal also noted that although the Claimant's case was that she had challenged Mr Woollard about this at the time, he disputed that this was the case. The contemporaneous record of this incident that the Claimant produced (p.120A) namely the WhatsApp message made no reference to Mr

Woollard having been challenged.

77 This allegation was brought some 49 days out of time. The Tribunal took into account that it was an allegation which was committed to writing and submitted to the Respondent in the Claimant's grievance which was sent on 24 May 2016. In deciding whether to extend time the Tribunal also took into account the principles in the case law already referred to, namely that the exercise of the discretion is exceptional and not usual. There have to be proper grounds for it.

78 There were no grounds on the evidence before us to find that any action by Mr Woollard on 3 March 2016 was continuous with any later act which would then bring it in time.

79 The next question to consider was whether it was just and equitable to extend time in order for the claim against Mr Woollard to be considered.

80 The three month time limit in relation to an event which took place on 3 March 2016 would have expired on 2 June 2016. At that point the Claimant had initiated the ACAS notification process. The certificate was issued in relation to the Respondent and Mr Woollard on 1 July 2016. The majority of that period therefore was a period during which time had already expired. Even if one assumed that the Claimant believed that she had a month from the date on which the certificate was issued she should still have presented the claim by the beginning of August 2016. She did not present it until mid-September. Also the evidence was that she got advice from Mr Durango on 19 August 2016 and that was the advice that appears to have been erroneous in that it led her to believe that she could wait for a further month before presenting her claim. In the event she waited a month and a day.

81 The Tribunal had regard to the case of *Chohan v Derby Law Centre* in which a decision to find that the claim was out of time was overturned on the basis that the Claimant had relied on incorrect legal advice which caused her to be late in presenting the claim. On the chronology of this case that is not what occurred. By the time the incorrect advice was given the Claimant was already sometime outside the time limit even allowing for an extension of time under the early conciliation processes.

82 In the circumstances, the Tribunal did not consider that there were sufficient grounds to extend time. That allegation was therefore not well founded and was dismissed.

Allegation 2: 24 March 2016 – comment by Heather Amos that she would not choose a particular child for a photo shoot at a campaign because his mother was a gypsy

Allegation 6: 12 May 2016 – Dirty toilet/Black girl comment

83 The Claimant's case was that Heather Amos an employee of the Respondent who was also involved in photography on the E-Commerce side said: "I wouldn't pick that kid as I did the casting and saw that his mother was a gypsy, and you know …" She contended that she then asked Ms Amos: "What does that have to do with anything?" "Genuinely what does that have to do with anything? Explain the Gypsy comment".

84 Ms Amos's formal title was Social Media Executive. She had originally been employed in November 2014 as an E-Commerce photographer until April 2015. She was responsible for managing the Respondent's social media, which included managing their Facebook, Twitter and Instagram accounts, as well as creating and photographing all images/content for these pages. She also helped on other photography shoots and inputting into the catalogues and online materials.

85 Once again in relation to this allegation we had no documentary evidence about the number of people involved in the castings or any other matters relating to the day. We also had no evidence about Ms Amos' involvement with a similar exercise the previous year. The process was that the models or the young people would attend at one of the stores and be photographed for a competition. Before each child was photographed one of the team took a note of their name, age, address and parents' contact details so that they could be notified if they were short-listed. Ms Amos' case was that she only attended the casting at White City on 21 March 2016, not the date of the alleged comment. The Respondent's case was that castings had taken place on 21, 22 and 23 March at various locations.

86 Although there was some discrepancy between the accounts of the Claimant and Ms Amos as to the exact circumstances of the reviewing of the photographs it appeared that the Claimant was referring to an occasion when she was reviewing photographs with another member of staff either Ms Amos or Mr Bushell who was a buyer as to which of the young people who had been photographed in the previous days would be put forward as finalists in the competition.

87 Ms Amos described (para 6 of her witness statement) that she was not directly involved in the selection of the finalists and viewed some of the images as she was passing the computer screen out of curiosity only. Mr Bushell who she describes carrying out this exercise with the Claimant gave no evidence in his witness statement of this incident. It did not appear that the Claimant was present at the White City session which Heather Amos attended.

88 There was thus a real issue about whether the comment alleged had been made by Ms Amos.

89 The Tribunal had to decide the issue of time/jurisdiction first.

90 In relation to Ms Amos there were two allegations made. The first being this one on 24 March and the second being the sixth allegation that on 12 May 2016 Ms Amos and a female colleague had been overheard discussing the Claimant's toiletry habits and hygiene suggesting that she left the toilet in a dirty condition and referring to her as "the black girl" leading to a note being put in the girls' toilet which the Claimant regarded as targeted at her. The person who was supposed to have overheard Heather Amos speaking to somebody was the Claimant's former colleague Lara. In her witness (para 23) the Claimant stated: "Lara did not tell me specifically whether it was Heather or the other girl who had actually used the phrase "the black girl"." The Claimant complained about this as an act of harassment and contended that Heather knew her name and should have referred to her by name. The Tribunal considered that this allegation was somewhat undermined by the fact that the Claimant was not asserting that it was Heather Amos who had made this comment. In her witness statement she also described that the

other participant in the conversation was the most recent employee of the company. The person fitting this description on the evidence before the Tribunal was the other Black employee, Lora.

91 It was fair to say that in defending this particular allegation Ms Amos' case about what she had been protesting about changed somewhat. Whilst in the statement which was attached to the first Response she accepted that she had complained about what she considered to be the less than satisfactory condition of the women's toilet which she said was a recurring issue around this time. She contended however that she had spoken to all the female members of staff individually to raise her concerns over this repeating the same message to all. She then said that she left a note in the ladies' toilet similar to the one which was currently in the men's toilet asking everybody to contribute to the upkeep of the bathroom. She had not intended to single out any individual.

92 In her witness statement she did not include any reference to asking for the toilets to be kept clean but focused on the element which the Claimant referred to about toilet rolls. The Claimant in her witness statement had said that she found a note in the women's toilet saying: "Keep toilet clean and change toilet roll" and that following the conversation with Lora she believed that this had been put up for her benefit. Indeed the Tribunal also had before us in the bundle some WhatsApp pictures which had been taken to record the state of the women's toilet. There were also pictures which had been taken about the men's toilet, not by Ms Amos.

93 In her witness statement Ms Amos focused on the changing of the toilet roll issue (para 15). She stated that she was not concerned about the state of the toilet itself only the fact that the toilet roll had been left unchanged. She denied having gossiped about the Claimant and also referring to anybody as "the black girl". It was not disputed that the Claimant and Ms Amos worked together more closely than the Claimant worked with any other member of the Respondent's staff.

94 Even if the two episodes were incidents of continuing discrimination, namely on 24 March and 12 May, time would have expired in respect of the later one (three months plus early conciliation) by 11 September 2016 which would mean that the claim was presented eight days late. Treating the two allegations as continuing acts would not in any event bring the earlier complaint within time. The Tribunal therefore had to consider whether it was just and equitable to extend time in respect of each.

95 The Tribunal did not consider that we had adequate grounds for the extension of time. We therefore had no jurisdiction to determine allegations 2 and 6.

96 We also considered that those were discrete from the other allegations. Although Ms Amos was present when another incident happened she was not implicated in it in any way.

Allegation 3: 31 March 2016 – Not speaking English very well comment

97 The third complaint was that on 31 March 2016, Rob Bushell who was employed as a buyer at a photo shoot had announced in front of everyone else at the photo shoot: "please excuse her she doesn't speak English very well". The Claimant complained that

the comment impacted on her to the extent that she felt insulted and was extremely upset for the whole day.

98 There was first of all an issue about the dates on which this incident was alleged to have occurred. The Claimant had originally stated both in the preliminary documents and in her claim form that this matter had occurred on 1 April 2016. When she produced the WhatsApp messages which made reference to this, she believed she had got that date wrong and that the incident had happened on 31 March on which date reference was made to the comment in a message. In the course of the hearing the Claimant applied to amend the date of this allegation from 1 April to 31 March 2016. The Tribunal granted that application to amend.

99 The Tribunal also noted that the person who was alleged to have made this comment, Mr Bushell, accepted that he made a comment about the way the Claimant was speaking and gave an explanation of the context, which was very similar to that described by the Claimant.

100 Mr Matovu on behalf of the Respondent urged the Tribunal to consider that the Claimant had not made out her allegation that this incident had happened on 31 March 2016. The Tribunal's attention was drawn to the documents which related to the incident which Mr Bushell recollected and which the Respondent produced which indicated that a young girl by the name of Aulbany had been photographed and attended a photo shoot on 1 April 2016. Then Respondent also relied on an email which was addressed to another young girl to inform her that she was now needed for the girls' photo shoot on 1 April 2016. The Tribunal considered that the most likely situation was that the conversation referred to by Mr Bushell was the same conversation that the Claimant made reference to in her WhatsApp message sent to her friend on 31 March 2016. Any other conclusion was extremely unlikely. That would have required the Claimant to have anticipated or predicted on the day before the conversation took place that Mr Bushell would make comments of a sort which he largely agreed that he had made. We rejected that proposition.

101 The Tribunal invited Mr Matovu in closing to clarify if he was asking the Tribunal to find that the Claimant was unable to rely on Mr Bushell's account of what had taken place and that of the Respondent's witnesses on 1 April 2016 in support of her allegation. He declined to do so.

102 The context of this conversation was that the Claimant was taking photographs of various models and Mr Bushell observed that she did not appear to be pronouncing the name of the model correctly and/or was using the wrong name and saying a name which was similar to but not the model's name. He observed that the mother of the model was becoming somewhat upset about her daughter's name not being referred to accurately. That was the background to his intervention trying to avert any sort of adverse consequences for the Claimant by asking the mother to excuse the Claimant as she did not talk English very well. His case was that he wanted to protect the business and wanted to calm the situation down.

103 The Claimant in her evidence contended that her inability to remember models' names had nothing to do with her English. In her witness statement (para 15) the Claimant stated that in a photo shoot involving some 15 children she "got her name

wrong" and that this is what prompted Mr Bushell to make the comment. There was therefore little dispute between the Claimant and Mr Bushell as to what had led to his making the comment. The Claimant alleged that this constituted harassment in that it was offensive and was not related to her being able to speak English. She believed that she was undermined in her role in front of everyone else.

104 The WhatsApp message which the Claimant sent about this (p.120y) on 31 March 2016 was to her friend Sam again. She confided in him about a sense that Ms Amos was not being of assistance to her in the course of her work and that there was some tension because of the work the Claimant was being given to do. She then went on to refer to feeling upset and stated: "Those f…… village morons borderline racist starting seriously getting under my skin".

105 In closing Mr Walker submitted that the comment on the Claimant's poor standard of English and her not speaking English "very well" related to English not being the Claimant's mother tongue and was part and parcel of her being a foreign national and was thus directly related to the protected characteristic of race.

106 It was accepted that the name of the model was unusual.

107 This was the only incident in which allegations were made against Mr Bushell. There were no other acts with which it could therefore be continuous as Mr Bushell was not implicated in any of the later events.

108 The Tribunal therefore had to consider whether it was just and equitable to extend time.

109 Once again as with the earlier complaints it did not appear that there were any adequate grounds which would justify the extension of time. The Tribunal noted in relation to the individual people against whom complaints were made that although the Claimant sent a grievance to the Respondent on 24 May there was no evidence that Mr Granditer had investigated it at the time and it appeared that the relevant people were only asked to give an account of what had occurred in December 2016. Mr Granditer had a recollection of having discussed it with one person at some point between May and December 2016. It was unclear whether or not that was Mr Potier.

110 The Tribunal considered that this was relevant in terms of the overall exercise of the discretion as well. Given that the Claimant had not alerted her colleagues during her employment about the incidents, they had not had a fair opportunity to recollect them within a reasonable time.

111 The Tribunal concluded that in all the circumstances, we did not have jurisdiction to determine these complaints.

Allegation 4: 27 April 2016 – comments made by Ben Coe and Max Potier during mini-basketball game

112 The fourth allegation was that on 27 April 2016 during the course of a mini basket ball game in the office between Ben Coe and Max Potier (the Claimant's immediate line

manager), a comment was made by Mr Coe to the effect that the consequence of missing the shot was that Max Potier's wife who at that point was expecting a baby would give birth to a black baby. Mr Potier then added 'or a Chinese baby. This was a game which was played frequently by these two members of staff at least and was meant to be light-hearted. One person would call out potentially negative consequences of missing the shot in an attempt to put the other person off. The Claimant referred to this game in paragraphs 17 and 18 of her witness statement. It was apparently a game which played frequently. The Respondent's case was that the reference to the race was another way of saying that the baby would not be Mr Potier's. Both Ben Coe and Max Potier were White of English and French heritage respectively. Mr Coe was Brand Marketing Manager and Mr Potier was Ecommerce Manager.

113 The Claimant was shocked by the comment and considered it to be racially discriminatory. She believed that at the very least it was completely unacceptable in the workplace and that it hurt her feelings. She sent a WhatsApp message to her friend about this on 29 April 2016 (pp.120).

114 The Claimant told her friend:

> "They playing basketball in the office (they bought a little basket thing) so they're game is every time they trying to mark they say ex [for example]: if you score this one you going to be rich or you will loose the job some dumb stuff like that"

She then explained to her friend that her manager was going to be a Dad in a few months and that one of her colleagues had said that if he missed the basket his baby was going to Black. And then her managers added or Chinese. She questioned in the WhatsApp message whether being Black was something wrong or negative.

115 Mr Potier gave evidence and accepted that the comments had been made as the Claimant contended. Mr Coe did not give evidence but a witness statement was tendered.

116 This fourth allegation was presented 24 days out of time. The Tribunal did not consider that there were adequate grounds in respect of this allegation either to extend time. Although Mr Potier was present on the occasion when the dismissal took place, Mr Granditer brought him in as a witness after Mr Granditer had told the Claimant of his decision to dismiss her and after the Claimant had questioned whether the decision was being made on racial grounds. There was no evidence that he had been involved in formulating or arriving at the decision to dismiss her, or indeed that he was aware of it before being called into the meeting. His evidence was that he first heard of the termination of her employment when he was called into the meeting.

117 Ben Coe was involved in the fifth allegation which is dealt with below. As that allegation was not brought in time either, even if this allegation was continuous with that one, it was still brought out of time. As set out below, the Tribunal did not consider that there were adequate grounds to extend time in respect of the fifth allegation.

118 The Tribunal did not consider that there were adequate grounds on which we could extend time. The Tribunal therefore did not have jurisdiction to determine this

complaint and it was therefore dismissed.

Allegation 5: 5 May 2016 – WhatsApp comments made by Ben Coe about immigrants eating British swans

119 The fifth allegation was about comments made by Mr Coe about his colleague Mr Bushell during a WhatsApp group chat on Election Day 2016. The Claimant had started a discussion on a WhatsApp group by asking what people's voting intentions were. The group members were staff from the Respondent and the group was predominantly used for work purposes. She had entered the question on this group accidentally. The following exchange (p 96) then took place:

> "Rob Bushell: Ben's probably voting green or Labour.
>
> Nadia Otshudi: sound good
>
> Ben Coe: Rob hates immigrants. He thinks they are eating British swans.
>
> Nadia Otshudi: the ducks taste better"

120 The Tribunal had before it copies of newspaper clippings which indicated that there had been an article written in March 2010 alleging that there were reports of Eastern European immigrants having plundered and pillaged local wild life (pp.97-109).

121 The Claimant's initial enquiry had been made at about 8.30 in the morning and the conversation obviously restarted with her raising the question of Mr Bushell voting for the Labour and Green Parties. Mr Coe's comment about Mr Bushell eating British swans was made at 5:05 and the Claimant responded with her comment about ducks at 5:09pm. The Respondent relied on the Claimant's participation in this chat as an indication that she considered it to be amusing at the time, and did not object to it. The Claimant's position was that she had felt uncomfortable and discriminated against and felt that by this reference to immigrants her colleagues were letting her know that she was not English or part of this country, let alone part of the team.

122 It was not in dispute that in her grievance and in the claim form the Claimant had not included in the account of the exchange her own comment which concluded the exchange.

123 In her oral evidence she indicated that she had made the comment about the ducks to be sarcastic. That intention was not apparent.

124 Once again this allegation was out of time. It was presented 15 days out of time. The Tribunal did not consider that this was a matter which was continuous with any other later act and that it was a discrete act. The question therefore was whether we had the jurisdiction to determine it by exercising our discretion on the grounds that it was just and equitable to do so. It did not appear to us that there was any feature of this particular allegation which distinguished it from the earlier allegations which we have considered in the context of whether it was just and equitable to extend time. In those circumstances therefore, the Tribunal concluded that we did not have jurisdiction to determine this claim

and it was therefore dismissed.

Allegation 7: 19 May 2016 - Dismissal

125 On 19 May 2016, early in the afternoon, Mr Granditer called the Claimant to his office and informed her that he was dismissing her. This came out of the blue for her. He told her that she was being dismissed for redundancy and that there were financial reasons for this.

126 Her account in her witness statement at paragraph 28 was not disputed in any material respect. She stated that at the end of May she was at work on the 19th and that Mr Granditer was also there that day. When she went to Mr Granditer's office at his request Mr Granditer and Gary Moore, one of the managers from downstairs, were present in the room. Mr Granditer asked her how things were going and when she said they were fine he said that he was afraid that he was going to have to let her go and that it was a redundancy and that was why he had Mr Moore there to be his witness. The Claimant questioned this. He said that she was last in and so she would have to be the first out. The Claimant knew that that was not true as the Respondent had hired at least one other member of staff after her. The Tribunal had certainly heard undisputed evidence that Lora was employed from the beginning of May.

127 The Claimant was then told by Mr Granditer that she had to collect her belongings and leave. She asked what the problem was and referred to the fact that she believed she had delivered a good performance and that she had recently been promised a pay rise by him and that she had done everything that he had asked of her. She speculated that this was a personal issue. This was one respect in which the Respondent challenged her account and put that she had said it was a racial issue.

128 Mr Granditer denied this and said that it was just the way it was. Ms Otshudi described him as "very hard and cold". She said that she continued by telling him that she believed that she was the subject of discrimination from her team and that he was not brave enough to listen to her which was a shame because she had not done anything wrong and that he did not have the courtesy to give her a real excuse or explanation. She reiterated that she did not believe that this was a redundancy and that she thought it was discrimination.

129 As the Respondent eventually conceded some 15 months later, Mr Granditer was indeed telling the Claimant a bare faced lie and one which she was able to see through immediately.

130 Mr Granditer responded by calling the Claimant's first line manager Mr Potier into the meeting. Thus the Claimant was now surrounded by three of the most senior managers in the Respondent. She started to cry. Mr Granditer said to Mr Potier: "We are having a redundancy aren't we?" and Mr Potier confirmed that this was the case.

131 In the Tribunal hearing the Respondent's witnesses, especially Mr Potier and Mr Moore accepted that the first they had heard of a redundancy was during the course of that meeting from Mr Granditer. The Tribunal was somewhat concerned by their ready complicity in this lie.

132 The Claimant continued that Mr Granditer told her that he dared her to say that this was a discrimination case and that he was really upset. He said that he was disappointed that the Claimant said this. The Claimant was then required to collect her belongings and leave immediately.

133 The Tribunal found that even at the hearing when Mr Granditer had confessed that he had given the Claimant a false explanation for dismissal, he could not understand why she might have considered that this was a discriminatory dismissal.

134 Ms Otshudi complained in her grievance that she could not help feeling that her race was a reason why she was treated differently to her other colleagues based on the way the redundancy was carried out and particularly as hers was the sole position that was made redundant (p.114). She stated that she considered her dismissal to be both unfair and a discriminatory act. She repeated this in her claim form.

135 The Claimant's account which the Tribunal has quoted from extensively above in her witness statement was corroborated in the event by the evidence from the relevant Respondent's witnesses. However the Tribunal noted a number of issues. In Mr Granditer's witness statement where he gave an account of the dismissal meeting at paragraph 8 he initially failed to make any reference to the Claimant having accused him of race discrimination or of asking Mr Potier to come in to witness the meeting. These were details which the Claimant gave in her witness statement and which Mr Granditer subsequently asked to be added to that paragraph when he gave his evidence in chief.

136 Also, Mr Potier who, it was the Respondent's case was called into the meeting to witness the Claimant having made the allegation of discrimination and to hear Mr Granditer's rebuttal of it, did not give any account of that role in his own witness statement. However, when he affirmed the contents of his witness statement he also asked the Tribunal to alter the account in paragraph 8 in which described the events of 19 May to include that Mr Granditer called him in to witness the meeting between the Claimant, Mr Granditer and Mr Moore. The Tribunal considered that it was noteworthy that Mr Potier who was described by the Respondent as E-Commerce manager and who was broadly speaking one of the three or four most senior managers at Woodford Green had been called in to witness a meeting at which someone who directly reported to him was being dismissed for redundancy ostensibly and yet Mr Potier had not included this in his witness statement but had also made no contemporaneous notes of the events. It was inconsistent with his role as a witness that he had failed to do this. The Tribunal also was concerned that even though the redundancy of his direct report came as a surprise to him that he was apparently untroubled about this going forward and did not question Mr Granditer subsequently about how the Claimant came to be made redundant.

137 According to Mr Moore, Mr Potier and Ben Coe were asked by Mr Moore to keep an eye on the five items which had been discovered in the studio. In Mr Potier's witness statement he simply referred to having been shown the items. He did not describe being given the role of standing guard or watching over the items. Certainly judging by the evidence of Mr Kirby who described about an hour later seeing the Claimant move items from the studio to the warehouse, no-one appeared to have stayed on the scene keeping an eye on the items.

138 The evidence about Mr Potier's role on 19 May highlights a fundamental defect in

the Respondent's case about the suspicion that the Claimant had stolen certain items. Thus the Respondent was unable to demonstrate that the items which Mr Moore and Mr Kirby found in the photography area belonged to the Respondent at all. They were further unable to demonstrate what these items were in order to substantiate their point that the items were too large a size to be used in photo shoots. Then even if it were right that they found five items which were then left on a crate in the photo area, this area was then left apparently with no-one watching it for about an hour and at that point the evidence was that Mr Kirby saw the Claimant come out of what was part of her usual working area, and walk towards the warehouse with clothes over her arm.

139 The Tribunal considered that the evidence that whatever clothes she may have had over her arm were the same as the items that had been left on top of the crate was similarly flimsy. The Tribunal took into account the evidence about the layout of the upper area which has been referred to briefly above. Mr Kirby's evidence at its best was that he came upstairs and was facing away from the area that the Claimant was walking from and that he turned around and saw her walking with goods which were randomly placed in the warehouse. The Tribunal did not consider that the Respondent was able to provide any cogent explanation for the complete absence of any documentary evidence about these goods. Indeed it was part of Mr Moore's evidence that when he reported this matter to Mr Granditer and they discussed it, the idea of redundancy came up because they realised they could not prove that the Claimant had been attempting to steal the items.

140 Mr Matovu in submissions relied on Mr Granditer having a picture which implicated the Claimant and on which he could genuinely rely in justifying the dismissal. The Tribunal reminded itself that the question was not whether the Claimant had actually stolen the items or attempted to do so or indeed whether in accordance with an unfair dismissal case, this was a case in which the Respondent had reasonable grounds for believing that she had done so. The issue was whether the belief that the Claimant had attempted to steal the items was genuine and was reached in a way which was influenced by the Claimant's race and constituted harassment.

141 Mr Moore unsurprisingly confirmed that there are periodic issues about stock going missing and possible theft. The Tribunal was given no evidence about how the Respondent generally deals with such instances. Further, neither of the other two managers in Mr Granditer's office during the meeting, had ever been involved in a similar situation before in which an employee was told they were being made redundant out of the blue.

142 The Respondent relied on the circumstances in which the items were found to explain Mr Granditer's suspicions and the action taken. Mr Moore and Mr Kirby had decided to use some time to clear out the photo prep area. They described that while they were clearing out some items from under a bench, they came upon a crate in which the five items were. It was part of the Respondent's case that these items appeared to have been concealed. Mr Moore described that the Respondent usually had stock takes about every three months.

143 There was no documentary evidence put forward about when the last stock take had happened and the Tribunal has already pointed to the fact that there was no evidence at all that items matching the description that were found under the counter had ever belonged to the Respondent. It was at least possible that these items had been under

that bench before the Claimant was employed. There was some evidence given that the items of clothing were unpackaged. However the Respondent had a system of logging in items when they came into the warehouse with labels attached. The Respondent certainly as one would expect had a system whereby at least the description of the clothes could be identified from lists of items which were logged in. No such evidence was put before the Tribunal and certainly no such evidence was consulted or reviewed by the Respondent before they reached the conclusion that it was likely that the Claimant had attempted to steal items.

144 Another matter which led the Tribunal to view Mr Granditer's evidence with some considerable scepticism was that he persisted with the false explanation for dismissal. He said that this was said on 19 May 2016 to soften the blow and that he believed it would avoid confrontation. The agreed evidence was that the Claimant did not accept it as a genuine reason as she was being told it on 19 May. Then Mr Granditer received a detailed grievance in which the Claimant complained about her redundancy dismissal and also repeated her view that her race had been a factor in the dismissal as well as setting out details of other events which she believed had been racial. Mr Granditer can have been in no doubt either at the end of the meeting on 19 May or indeed when he received the grievance by email on 24 May 2016 that giving the false explanation for the dismissal would not avoid confrontation and had not softened the blow of the dismissal on the Claimant.

145 Further, the Claimant presented a claim form as the Tribunal has set out above which echoed the terms of the grievance. Despite this and against this background Mr Granditer repeated his falsehood but this time in the formality of an Employment Tribunal document. He did not simply make a bare assertion that the Claimant had been dismissed for redundancy but elaborated on this as set out in the quotation above repeating the false assertion that this was for purely financial/economic reasons.

146 Of the three witnesses who gave evidence to the Tribunal who asserted that they had seen the items which they believed that the Claimant had stolen or was attempting to steal, Mr Potier describes that they were "unpackaged" (para 8 of R12); Mr Moore described finding "five items of new stock in their original wrapping" (R11 para 3) and Mr Kirby confirmed also that the items were new and unpackaged and of Ralph Lauren and Hugo Boss brands.

147 The Tribunal considered that once again it was extremely surprising especially given that in the dismissal meeting the Claimant had accused Mr Granditer of being motivated by race that the Respondent did not at the time keep a record of the items and their particulars or even photograph them, so that Mr Granditer would be in a good position to answer the Claimant's accusation. In reaching that view the Tribunal also had regard to Mr Granditer's strident assertion in the penultimate paragraph of his statement which was attached to the initial response in December 2016: "finally I would like to state that I am deeply saddened at the accusation. Racism is a vile accusation, and hence I have decided to personally defend myself against this accusation." He set that out a mere couple of paragraphs below continuing to maintain that he had dismissed the Claimant for redundancy. If he had suspected the Claimant of stealing stock from him and that had been the reason for the dismissal the Tribunal cannot think of a more appropriate time to set out that true explanation at the very latest. The Tribunal considered that he only accepted that he could not sustain the defence of redundancy when it became absolutely

clear, particularly after the Claimant's representative's requests for disclosure of relevant documents about redundancy, that there was no prospect whatsoever that he could establish that redundancy was the reason for the Claimant's dismissal.

148 Making an allegation of suspected theft for the first time some fifteen months after the dismissal meant that the Claimant was prejudiced in attempting to respond.

149 This allegation about the dismissal was also out of time by one day.

150 The Tribunal considered however that different considerations applied to this allegation which was essentially against Mr Granditer, which did not pertain in relation to the other parties against whom allegations were also made and in respect of which the Tribunal had concluded that we did not have the jurisdiction to hear those cases.

151 Mr Granditer was not just Managing Director, but this was a family business which had been passed down to him by other family members. It has been operating since the early 1900s and Mr Granditer became joint managing director in 1990 alongside his father. He then became sole managing director in 2014 when his father left the business. This was relevant because the Tribunal considered that it was within Mr Granditer's control and in his self-interest to have responded truthfully if the reason for the termination was because it was believed that the Claimant had stolen items. On the face of it, this would have been a good answer to her allegation that he had discriminated against her. He could have said this either in the meeting on 19 May or when she submitted her grievance on 24 May.

152 The grievance was sent by email to Mr Potier who forwarded it to Mr Granditer within five minutes of receiving it (p.114). Mr Granditer told Mr Potier that he should not act on the letter. Mr Granditer was therefore, within a week of the dismissal, on written notice that the Claimant believed the dismissal was an act of race discrimination. He would have been in a position to preserve the evidence, or to conduct investigations into the issue and certainly to ask his staff to make a record of their involvement so that there were contemporaneous records. Indeed Mr Granditer's instruction to Mr Potier not to respond to the grievance letter confirms that he had the authority to and took responsibility for the Respondent's response to the Claimant's allegations.

153 The Tribunal also took into account that the Claimant's account of what occurred during the dismissal meeting was not in dispute. With some of the earlier allegations there were disputes as to the facts asserted by the Claimant.

154 There was little prejudice to Mr Granditer in extending time beyond the obvious one that he would have to face the allegation outside of the primary time limit. The Tribunal took into account the prompt and repeated notice he had been given of the allegation. In all the circumstances we considered that it was just and equitable to exercise our discretion to extend time to consider the harassment complaint in relation to the dismissal.

155 The Tribunal considered that the continued reliance on a false account which Mr Granditer not only put forward but elaborated upon in the subsequent response form and the complete failure to respond to the Claimant's allegations by setting out what on his

case was a valid reason for the breakdown in trust between himself and the Claimant raised a huge question mark.

156 The Tribunal considered that the Claimant had established the primary facts alleged, not least because they were largely undisputed. Further, the Tribunal had to consider whether these were facts from which the Tribunal could conclude that Mr Granditer's and the Respondent's action in dismissing her was racial harassment. The central issue was whether there were facts from which the Tribunal could conclude that race was a factor. The Tribunal considered that the reaction of Mr Granditer to the discrimination allegation on 19 May and in a context where he knew he was not being truthful with the Claimant and his subsequent reaction to the discrimination grievance and the allegation of discrimination in the claim form not simply by a denial but by the asserting of a contrary false case when his current case is that he had a valid defence for his actions led the Tribunal to the inference that he was trying to cover up what was a dismissal which was tainted by considerations of the Claimant's race.

157 Although Mr Granditer had indicated in the first response that he was "a person of ethnicity", in the document R13 he was listed as "White British". He had also described his wife as "a person of ethnicity". He clarified when he was giving his evidence that his wife was North African – French, mixed White and that she was dark skinned not black. He gave no evidence of his own ethnic origins beyond the entry on R13.

158 There was no dispute that the dismissal was unwanted conduct. Indeed the Respondent's current case was consistent with them being aware of this – 'trying to soften the blow' by saying it was redundancy. The decision to dismiss the Claimant out of the blue from a job which she justifiably believed she was performing well had the effect of violating her dignity. Delivering this news to the Claimant in a meeting with the Managing Director and the second most senior manager and then calling in the Claimant's line manager to reinforce the untruthful message was further evidence of the violation of the Claimant's dignity, and appeared intimidatory. Mr Granditer's challenge to the Claimant on 19 May when she accused him of discriminating against her was evidence of an attempt to intimidate her into not pursuing her allegation. When she did so, he ignored her grievance.

159 The Tribunal was also mindful when considering this issue, that the Claimant had withdrawn her victimisation allegation and indeed the agreed account of what had occurred on 19 May was that Mr Granditer had already made the decision to dismiss her before she did the protected act of stating that she believed that it was an act of race discrimination. The decision to dismiss could not therefore have been an act of victimisation.

160 Mr Granditer's strong reaction to the allegation of discrimination followed by his unsatisfactorily explained failure to make use of what he says was the genuine reason for dismissal until three weeks before the hearing some 15 months later led the Tribunal to reject the suspected theft explanation for the dismissal on the balance of probabilities.

161 The Tribunal considered that a big question was raised about why the Respondent reached such an adverse conclusion so readily about the Claimant's integrity based on rather flimsy evidence and no investigation.

162 It was appropriate in all the circumstances to infer that there was a racial element which had contributed to or caused the dismissal.

163 The Tribunal took into account in assessing whether it was appropriate to draw the inference of race in Mr Granditer's favour that there was no background of Mr Granditer treating the Claimant unfavourably indeed on the contrary he had given her permission to work separately as she had requested. The Tribunal considered that such background evidence was highly material but was not determinative of the question whether it was appropriate to draw the inference. In this context the Tribunal also took into account Mr Granditer's ready acceptance that the Claimant was a talented photographer and was an asset to the company. There was therefore no good reason why he should not have treated her well up to that point.

Employment Judge Hyde

21 December 2017