



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Batista de Souza Dunsire

Respondent: Coty Services UK Limited

Heard at: East London Hearing Centre

On: 3, 4, 5, 6 and 11 August 2021

Before: Employment Judge Russell

Members: Mr P Lush
Ms J Clark

Representation

Claimant: Mr M Dunsire (Husband)

Respondent: Mr R Moore (Counsel)

JUDGMENT

1. The claim of discrimination because of race fails and is dismissed.

REASONS

1. By a claim form presented on 6 March 2019 the Claimant brought a claim of race discrimination, relying on her Brazilian nationality. The Respondent resists the claim in its entirety.

2. The issues were identified at a Preliminary Hearing before Employment Judge Massarella on 24 June 2019 and the alleged acts of discrimination were identified as follows.

2.1 ~~Between 25 June and end of August 2018, the Respondent delayed the Claimant's transfer from the Synergy agency. The comparator relied on is Hollie Sylvester (British).~~

2.2 On 5 September 2018 team members Esther, Belinda, Hannah and Gina

(surnames unknown) complained about the comprehensibility of the accent of one of the trainers, who was French. They did this knowing that the Claimant had a strong accent as a Brazilian.

- 2.3 On 7 September 2018 Hannah Williams provided the Claimant with less support than was provided to Hollie Sylvester (British), namely (a) accompaniment to the ID Centre; and (b) pay.
- 2.4 On or around 16 October 2018 Katie Mundy complained about the Claimant and undermined her authority as a Burberry consultant, whilst she was supervising a British agency worker, who was working for Burberry. The comparator is a hypothetical British Burberry consultant.
- 2.5 On or around 23 October 2018 Hannah Williams made a false and malicious allegation against the Claimant in her probationary report of the same date. She accused the Claimant of falsifying sales figures and she accused her of not communicating with and/or integrating into the team. She later refused to retract the allegation. The Claimant alleges that British team members Esmeralda, Esther (surnames unknown) and Hollie Sylvester were manipulating sales figures but were not subjected to any action.
- 2.6 Between 23 and 25 October 2018 the team ignored the Claimant's Secret Santa proposal. The comparators are the other, British members of the WhatsApp groups.
- 2.7 Between 23 and 27 November 2018 the Claimant was criticised for making trivial comments in a WhatsApp business group and told use a different, non-business group; shortly afterwards the same employees themselves made trivial comments in the same group without any criticism being levelled at them.
- 2.8 Around the same time Jo (surname unknown) approached the Claimant on the shop floor and told her aggressively that she had no right to speak to her in that manner in the WhatsApp group. The comparator is a hypothetical British employee.
- 2.9 On 23 November 2018 the British team members made derogatory comments on the WhatsApp group about the Claimant intelligence and her comments, comparing her with a two-year-old. The comparator is a hypothetical British employee.
- 2.10 At a meeting on 27 November 2018 Hannah Williams sided with the British woman who had made derogatory comment about the Claimant. The Claimant relies on a hypothetical comparator.
- 2.11 On 30 November 2018 Hannah Williams and other team members refused to accept the Claimant's health and safety alert in relation to used nail files and facial brushes as valid and failed to take appropriate action. The Claimant relies on a hypothetical comparator.

2.12 Hannah Williams and Diane Farrow dismissed the Claimant. Ms Williams and Ms Farrow discriminated against the Claimant by relying on the unfounded complaint of Katie (existing issue 2.4) and Jo (existing issue 2.8) because they were British. In particular, the Claimant contends that the Respondent applied the Coty principles in a way they had not applied them to the British team members during the time of the Claimant's employment. The Claimant will also argue that the Respondent impermissibly had regard to language and/or cultural factors in dismissing her. The Claimant compares herself in part to Hollie Sylvester, who performed less well than the Claimant but passed her probation.

3. At the outset of the first day, the Claimant applied to amend issue 2.12 to include two further points. Firstly, in reaching the decision to dismiss, Ms Williams and Ms Farrow had discriminated by relying on the unfounded complaint of Katie (existing issue 2.4) and Jo (existing issue 2.8) because they were British. For reasons given orally at the time and due to the lack of prejudice to the Respondent, leave was granted. The Claimant clarified that issue 2.3 comprised two aspects of support: accompaniment to the ID Centre and pay. During the hearing, the Claimant withdrew the pay part of issue 2.3 and also issue 2.1.

4. In closing submissions, Mr Moore confirmed that the Respondent no longer relies on the statutory defence that it is not vicariously liable for any discriminatory acts committed by its employees because it took all reasonable steps to prevent them from doing those acts, or acts of that description.

5. We heard evidence from the Claimant on her own behalf, with the assistance of a Brazilian Portuguese interpreter on occasions when required. On behalf of the Respondent we heard evidence from Ms H Williams (Retail Specialist), Ms D Farrow (formerly a key Account Manager), Ms J Walker (Beauty Consultant), Ms E Salmon (currently Team Leader), Ms V Morales-Munoz (formerly HR Manager). The Respondent had produced a witness statement for Mr N Morel but as he did not attend to give evidence, and with the agreement of the parties, we entirely disregarded the content of his statement. We were provided with an agreed bundle of documents, we read those pages to which we were taken in the course of evidence.

6. This case was characterised by a significant number of disputes of evidence the Tribunal has only resolved those disputes necessary to reach our conclusions on the issues before us particularly as many appear to be on very minor points.

Findings of Fact

7. The Respondent is a global beauty business, which manufactures and sells cosmetics, skin products, fragrances and hair products within the UK. It operates in a number of locations including at Stansted Airport in the duty-free/airside retail concessions. There are numerous different Coty stands, one of which sells Burberry products. Overall management for the duty-free area at Stansted is the responsibility of World Duty Free (WDF).

8. Prior to her employment with the Respondent, the Claimant worked for an agency, Synergy, in the duty-free area at Stansted Airport from around July 2017 and so was familiar with the various beauty concessions and their employees, including

employees of the Respondent. Prior to that, the Claimant had worked with the Best of the Best Luxury Car Promotion at Stansted for six months.

9. The Claimant was interviewed by Ms Williams on 21 June 2018 for the role of Beauty Consultant. Also interviewed on the same day and for the same role was Ms Hollie Sylvester. Both candidates were successful at interview, both were given an offer of employment to start in September 2018. Their appointments brought the size of the Stansted team to 11. Other than the two longest serving consultants (Katie and Zeynep with over ten years' service each), Laura had about two years' service, Belinda had between one to one and a half years' service, Gina had joined from Synergy at about the same time as Esther in February 2018.

10. The Stansted team were managed by Ms Williams, who was only appointed to the role in April 2018. Ms Williams was also responsible for managing teams of sales consultants at Gatwick, Luton, London City and Norwich as well as ferries, including P&O Cruises. Due to the large area she covered, Ms Williams attended Stansted only once or twice a week and largely communicated with her team there by WhatsApp messages. Ms Williams was a member of the Stansted team WhatsApp group but not the separate "Fab 11" WhatsApp group used by the Beauty Consultants.

11. The operating hours at Stansted were from 5am until 8pm. The Beauty Consultants largely worked alone on their concession, with an overlap handover period of about two hours in between shifts. Due to their limited face to face contact, there was a constant stream of WhatsApp messages between the various Beauty Consultants throughout the day in order to share relevant operating information with each other. Ms Williams arranged for the Claimant and Hollie to be added to the WhatsApp groups on commencing employment.

12. In order to work airside at an airport, a security pass issued by the relevant airport ID Centre is required. The Claimant had a security pass whilst working for the agency but required a new pass as an employee of the Respondent. She applied online and received a confirmation message stating that her application was successful and giving a collection time of between 8:10am and 8:20am on her first day, Friday 7 September 2018. World Duty Free is responsible for the administration of paperwork for permanent passes and the Respondent uses an agency, Red Kite, to perform its duties in arranging a pass.

13. Contemporaneous emails between the HR administrator at World Duty Free and Red Kite, copied to Ms Williams, show that they were aware of the Claimant's application and appointment to collect the pass. As of 29 August 2018, the Tribunal finds that the Claimant and Ms Williams anticipated that there would be no difficulty in the Claimant obtaining the necessary pass. She would simply need to go to the ID Centre on arrival on her first day, at the allocated time, and collect it before starting work. However, on or around 29 August 2018, Ms Williams sent the Claimant a text message warning her that just in case the full pass was not ready, they had arranged for a temporary pass to be available for collection at 8:10am on 7 September 2018. The Claimant replied to say that she understood.

14. Ms Williams conducted an induction day on 5 September 2018 for both the Claimant and Hollie. Esther and Gina also attended. One of the trainers was French. It is not in dispute that subsequently at least one of those attending had commented

that the trainer had a very strong French accent, that people often could not understand her and that the training was boring. English is not the Claimant's first language. The Tribunal considered her emails and WhatsApp messages and whilst there were inevitably some spelling and grammar errors, there is nothing in them to suggest that she had any significant problem in communicating with her colleagues clearly and effectively. Similarly, the Claimant speaks English with an accent but this does not affect her ability to communicate clearly and effectively. The Claimant accepted that nothing was said at the training or later about her accent or to suggest that she was boring. The Tribunal finds this consistent with the Claimant's effective communication in English, when engaging with colleagues or making sales (at which she excelled). On balance, the Tribunal finds that the comment about the trainer's accent had nothing whatsoever to do with the Claimant's accent or communication in English.

15. The Tribunal accepted as credible and reliable the evidence of Ms Williams that Hollie went to the ID Centre to collect her pass on 5 September 2018 and was told that she would only have a temporary pass as World Duty Free had not signed her paperwork. Hollie then telephoned World Duty Free to arrange a temporary pass. This is consistent with an email she sent two-days later referring to her temporary 5-day pass. Hollie then telephoned Esther, whom she knew as a friend outside of work, to arrange for her to act as her escort. The Tribunal finds on balance that it was not Ms Williams who organised the temporary pass or escort, it was Hollie acting on her own initiative.

16. On 5 September 2018, the Claimant offered to work overtime in October. Ms Farrow replied to say that this would not be possible as she would only have a temporary pass. The Claimant replied that she had expected to have her permanent pass by October and questioning the delay, she was unhappy that a temporary pass would require her to be escorted whilst airside. The Tribunal finds that the Claimant, whilst unhappy with the restrictions of a temporary pass, was aware before her first day that she would not have a permanent pass and would require an escort.

17. Ms Williams was on holiday outside of the UK between 6 and 16 September 2018. She informed the Claimant and Hollie to communicate with her line manager, Ms Farrow, in her absence.

18. By email dated 6 September 2018, Ms Brocklebank at Red Kite explained that the delay in issuing a permanent pass was because World Duty Free had not signed the paperwork as complete as the reference provided by Synergy did not include her start date. Ms Brocklebank explained that World Duty Free had received the required information, signed off the application and sent it to the ID Centre immediately but there was a long waiting time for appointments at the ID Centre which could not be speeded up. Ms Brocklebank again confirmed that the Claimant would be on a temporary pass for a short period of time until the permanent pass was cleared, whereupon she would be informed and an appointment made for her.

19. The Claimant's first day at work was 7 September 2018. She attended the ID Centre at the previously arranged time of 8:10am but was told that she did not have an appointment and her documents were incomplete. The Respondent had not arranged for a temporary pass to be at the ID Centre, nor was anybody waiting to meet her. The Claimant had not arranged an escort either. As a result, she returned home and did

not work her shift. At 9:12am she sent an email to Ms Farrow, copied to Ms Brocklebank and the World Duty Free HR administrator, to tell them what had happened. It is clear from the email that the Claimant was unhappy. The Tribunal is not surprised as she had got up early to attend her first day at work, aware that she would be on a temporary pass but expecting that Ms Williams had arranged for it to be ready for collection at the 8:10am appointment, only to find that none of this had been done. It was a disappointing start to her new job.

20. There was an exchange of emails between Ms Farrow and the Claimant later on 7 September 2018 about whether she intended to start work before the issue of her permanent pass. Ms Farrow told the Claimant to attend work with her passport so that Esther or Gina could arrange a temporary pass. The Claimant told Ms Farrow that she did not understand why nobody had been at the ID Centre to meet her with the required papers and to escort her, but she agreed to attend again the following day and asked her to confirm who would meet her there. Ms Farrow replied that it was too short notice to arrange for the following day. In the meantime, Ms Farrow contacted Synergy to see if the Claimant could use her former pass. The agency agreed, commenting on how slow the ID Centre was.

21. When Ms Farrow told the Claimant of the solution, she replied by email copied to Ms Williams, Hollie, Esther and Synergy in the following terms:

“Diane,

this would be great, BUT I handed in my full synergy pass this morning at the ID Centre at 8:10am!

I do have the receipt of handing it in – so I do not know if it would still be possible to use it??!

I will be at the ID centre tomorrow at 9:30am so if someone could meet me as per my other email?

**thanks
Andreia”.**

22. In fact, the Claimant’s husband drafted the email although there is nothing in it to indicate to Ms Farrow that it was not from the Claimant herself. The Tribunal accept that at the time Ms Farrow received this email and those earlier in the day about whether the Claimant would work without a permanent pass, Ms Farrow was surprised to be addressed in a tone which she regarded as demanding and critical by a much more junior employee who was only just starting in the Respondent’s employment. Upon reflection in the course of giving her evidence, Ms Farrow accepted that with hindsight there was nothing particularly objectionable but the Tribunal accepts as genuine her initial reaction at the time she received the emails.

23. In due course, the permanent pass was arranged and the Claimant started work on 11 September 2018. Despite the Claimant alleging in her claim form and in her witness statement that the delay caused her to lose three days’ pay, she accepted in evidence that she had in fact been paid for those days. That allegation of race discrimination was therefore withdrawn as set out above.

24. Unlike Hollie, the Claimant had no previous experience on a make-up counter and therefore Ms Williams asked Esther to give her training. The Claimant's evidence is that Esther refused and she had to gain experience by practising on Gina; Esther denied this in her evidence. It is not necessary to resolve that dispute as failure to provide the training is not one of the issues before this Tribunal, however we consider the Claimant's case relevant insofar as it is more consistent with Ms Williams being supportive of the Claimant, whom she had only recently appointed, and trying to ensure that her employment was a success. It is inconsistent with the Claimant's evidence that from the very outset, Ms Williams failed to provide her with appropriate support and created a hostile environment for her. The Claimant's case that there was an atmosphere of hostility from the outset, particularly from Esther, is also inconsistent with her email to Ms Williams dated 31 October 2018 in which she said that she had been very pleased to work with Esther recently, that Esther had been "wonderful" and shown her various make up tricks and how the stock papers work. The Tribunal considers that this undermines the reliability of her evidence more generally in terms of her relationships with her colleagues.

25. Both the Claimant and Hollie were subject to a probationary period in which they were assessed against Coty Values, Compliance, Coty Engage (a training programme) and Attendance. One of the Coty Values is "*win for the team*". In the Respondent's employee handbook this is described as:

"Coty is my work family and to win is only a win if it is for the entire team.

This means that while I'm personally driven to succeed; I will never do so at a colleague's expense. We are a meritocracy and see Coty as a treasure house of diverse talent and a family of skilled professionals. I assume good intent in others and my glass is half full. I don't do politics and I don't want consensus. I disagree openly but then fully back the decision made."

26. Hollie's probation reviews dated 8 October 2018 and 6 November 2018 are positive: congratulating her on working well with the team, using her initiative and being proactive in supporting the team. Hollie passed her probationary period on 4 December 2018, with the final report stating that she was building good relationships with store management teams, communicating key messages between Ms Williams and them when necessary.

27. The Claimant's first probationary review was on 10 October 2018. Ms Williams' comments are broadly positive, complimenting the Claimant on her great sales. However, under "*win for the team*", Ms Williams reminded the Claimant that the team included higher management and that she needed to use a professional tone in all communications (including email), advising her to be aware of who she was speaking to and adapting accordingly. The Tribunal finds that this comment refers to the email sent from the Claimant's email address to Ms Farrow in connection with the temporary pass. It reflects Ms Farrow's belief at the time that the tone of the Claimant's emails and in particular the use of capitals, question marks and exclamation marks was inappropriate in communication with a more senior manager.

28. On 16 October 2018, Esther sent an email to Ms Farrow setting out concerns about the Claimant's ability to work well as a team, suggesting that Ms Williams had made a mistake in recruiting her as she was known from her time at the agency not to

work well in team. The email referred to particular issues which arose when the Claimant worked for Synergy but the Tribunal attaches no weight to these as they pre-date employment and appear to be largely gossip. However, Esther goes on to say:

“now we seem to have to be dealing with someone who is particularly difficult on the counter. I know she’s not working well with Gina and Hollie. I don’t know whether any feedback has been given to you yet?”

29. The Tribunal find this email significant as the Claimant had only been employed for approximately five weeks and it provides contemporaneous evidence that there were concerns amongst her colleagues about the Claimant’s interaction with them as a team. This is the *“win for the team”* value about inter-personal skills. The reference to the Claimant being perceived as difficult is consistent with Ms Farrow’s assessment of her in her dealings with the Claimant about the permanent pass. It lacks detail and it would have been better had there been a record of more specific complaints raised and if these had been put to the Claimant. However, we accept as genuine the belief that Ms Farrow and Ms Williams had formed from an early stage that there was a problem with the relationship between the Claimant and her team. This is also consistent with a later email sent by Gina on 10 December 2018.

30. Ms Williams completed a further probationary review form for the Claimant on 23 October 2018. This was not a formal probationary review but an additional review due to issues which had recently arisen. Ms Williams had been told by Katie that an agency worker, Rachel, had complained that the Claimant had told her off on a date on or around 16 October 2018. The Claimant was working on a promotion on the Burberry stand with Rachel providing agency support. Rachel was talking to another Beauty Consultant and, as she considered it to be a breach of the Code of Conduct and required standards, the Claimant asked her not to chat on the shop floor. Rachel said that the Claimant did so in an offensive manner; the Claimant says that she simply asked in a friendly way for Rachel to chat elsewhere and had not escalated the breach of conduct to more senior managers. Rachel had also complained that the Claimant had asked for her sales receipts to put on her own sales for commission purposes. The Claimant denies that this happened.

31. In advance of the meeting on 23 October 2018, Ms Williams had completed part of the probation review form. This included, again under the value of *“win for the team”*, a comment that the team includes agency staff. Her note then reads:

“telling off an Agency BA in the way you did is unacceptable + is damaging relationships the team have worked hard to build. They work with you not for you.

Asking agency for receipts to put on your sales for ‘commission’. This is the exact reason why you do not have commission - causes unnecessary conflicts i.e. falsifying figures”.

32. During the meeting, and in her evidence to the Tribunal, the Claimant made clear that she disagreed strongly with both comments. Ms Williams added onto the probationary review form the following: **“wasn’t telling off in way said, friendly”** and **“Andreia - receipt issue never happened”**. Ms Williams recorded her belief that the Claimant needed to make an effort to Claimant needed to make an effort to build trust, repair relationships, involve herself with the team and improve communication before

concluding that an immediate improvement was required to pass probation. Finally, Ms Williams noted that the Claimant had read but refused to sign the form as she did not agree with the comments. Ms Williams did not investigate any further. As far as she was concerned, the matter was closed, a line had been drawn and no action was taken against either the Claimant or Rachel.

33. In issue 2.4 and in her witness statement, the Claimant refers to her authority as a permanent employee to supervise an agency worker even describing it as being withing her “normal rights to be assertive” with agency workers to ensure that they are promoting the product properly, relying on her previous experience as an agency worker. However, the Tribunal accepts the evidence of Ms Williams and finds that the Respondent has a different and non-hierarchical approach which does not regard permanent employees as senior to agency workers. This is consistent with Ms Williams’ contemporaneous note in which she makes clear her view that agency workers are to be seen as part of the team, working with and not for the Beauty Consultants. There was no evidence before the Tribunal from which we could find or infer that the issue would not have been raised with Hollie or a hypothetical British comparator still in their probationary period had a similar complaint been made.

34. In cross-examination, the Claimant’s evidence was that the complaint by Katie was not an act of discrimination itself, instead the discrimination was by Ms Williams in accepting Katie’s version of events rather than the account given by the Claimant, asserting repeatedly that she had not been given a voice and that there had been no discussion about it on 23 October 2018. The Tribunal disagrees. Whilst Ms Williams had written down the complaint as relayed to her by Katie, she also recorded the Claimant’s account. This account could only plausibly have been provided in the meeting on 23 October 2018, as Ms Williams stated, as there was no evidence of any other way in which she would have known of the Claimant’s position in order to record it on the form. The Claimant knew what had been alleged, was able to respond to it and her account was properly recorded. Whilst the Claimant genuinely believes that permanent staff have authority over agency staff, the Respondent and Ms Williams do not. In that context, it was entirely appropriate for the matter to be discussed during a probationary period and recorded as part of the probation process, especially as the Claimant’s denial was clearly recorded too.

35. On balance, the Tribunal does not accept that that Ms Williams’ note about sales receipts was a false and malicious allegation. The complaint had been made to her by the agency worker, via Katie, and was a matter to be discussed with the Claimant. We understand why the Claimant would be upset to see the note on her probationary review and accept that she genuinely believed that a serious allegation of dishonesty (falsifying figures) had been made against her. However, when read properly the Tribunal finds that the reference to falsifying figures was not an accusation made against the Claimant but an example of conflict which could be caused by personal sales targets. The Respondent calculated commission on group sales figures instead. This is consistent with Ms Williams’ evidence that the Claimant’s request for the receipts was not a significant issue for her. The Tribunal infers that her concern was that it related to the Claimant’s working relationship and communication with the team (including the broader category of agency workers). This was not concern about the standard of verbal or written English but the manner in which the Claimant dealt with team members. Ms Williams’ note is simply a record of what she had been told and the Claimant’s denial.

36. In a text message sent to Ms Williams on 31 October 2018, the Claimant said that the accusation about receipts was seriously ridiculous and unacceptable and that she did not need receipts from somebody who only made automatic sales and chatted with their best friend (clearly a reference to the agency worker who had made the complaint). In response, Ms Williams said that they had discussed the matter the previous week and as far as she was aware the situation was dealt with and was finished. She was confused by the Claimant's message and asked that there be a further discussion. This is consistent with Ms Williams not undertaking further investigation; she regarded the matter as closed and had not reached any finding adverse to the Claimant in respect of the agency worker's receipts.

37. The Claimant's evidence was that Ms Williams placed a deliberately false and malevolent allegation in her probationary review report which was designed to belittle and demoralize her, make her feel inferior and to tarnish her probationary report at a critical time. The Tribunal does not agree. Ms Williams was keen to appoint the Claimant only four months earlier and, as we have found, was supportive of her and wanted to ensure that her employment was a success. It is not plausible that she would seek to tarnish the Claimant's probationary period (the inference being that she did not want the Claimant's employment to be confirmed). Nor that she would make a false and malicious allegation only then to leave it unpursued. We accept Ms Williams' evidence that the note had nothing whatsoever to do with the Claimant's race and was simply a record of a discussion about a concern raised with her about the Claimant's interaction with the broader team.

38. The Claimant alleges that other members of the team, Gina, Esther and Hollie were manipulating sales figures but were not subject to any action. The Tribunal did not derive any assistance from the Claimant's analysis of the respective sales figures as it was not in dispute that general sales from other tills could be recorded by the Beauty Consultants. Indeed, the Claimant's evidence was that on one occasion she had asked Ms Williams whether it was acceptable for her to record in her figures the general sales from other tills and was told that she should. This is consistent with the Respondent's practice of paying commission based upon group sales and not individual sales and was not evidence of manipulation. Whilst the Claimant asked because she had seen others doing so and was not sure that it was correct practice, she did not make any suggestion to Ms Williams that other Beauty Consultants were manipulating sales figures as she now alleges. In any event, Ms Williams had instructed the Claimant to act in the same way as the others so there is no evidence of difference of treatment or approach to the recording of sales amongst all members of the team.

39. Despite disagreeing with Ms Williams' assessment that there was a problem with her interaction with other members of the team, the Claimant took on board the feedback to some extent. In a WhatsApp message to the Stansted team group sent at 21:05:18 on 23 October 2018, the Claimant proposed organising a Secret Santa with gifts to be exchanged at a Christmas party. Early the next morning, Ms Williams replied that it was a lovely idea, asked if she could get involved and replied to the Claimant's suggestion about the appropriate level of gift values. In a second message sent later that morning, Ms Williams asked the other team members to let her know if they would like to do a Secret Santa and expressly referred to it as the Claimant's suggestion. Hollie replied within half an hour to say that she was happy to get involved

with Secret Santa. The majority of the messages on the Stansted WhatsApp group that day concerned customers playing a piano in the airport and sales; there were no other responses to the Secret Santa suggestion. The Claimant contributed to the other chats about the piano and sales and received replies which do not suggest that she was being ignored or that the others were only talking amongst themselves.

40. The Claimant repeated her Secret Santa proposal on 25 October 2018 and, this time, received replies over the course of the day from her colleagues. Some were keen to do the Secret Santa, some were neutral and Esther was not keen but agreed to go with the majority.

41. In the course of the evidence, the Claimant's complaint about the Secret Santa expanded to include a complaint that it had ultimately not taken place. Although not one of the alleged acts of discrimination, the Tribunal found the Claimant's attitude and evidence on this point to be instructive when considering her case overall. In brief, the plan had been to exchange gifts at a Christmas lunch due to take place at the Hilton hotel on 13 December 2018. The day before, Ms Williams proposed deferring the lunch until January as Joanne (one of the Beauty Consultants) and she had just been required at short notice to attend a meeting which could not be rearranged, she still clearly expected the Secret Santa to go ahead but with gifts dropped off at work instead. The Claimant asked her colleagues to confirm who would be attending on 13 December 2018 and also suggested that if numbers were small it may be better to leave Secret Santa until January. Unsurprisingly, there then followed a series of messages in which different people had different views as to the best way to proceed: whether to exchange gifts openly or retain secrecy and whether to do it before or after Christmas.

42. Whilst the Claimant was undoubtedly disappointed that her planned Secret Santa did not work out as she planned, and we infer that it was because she regarded it as her way of demonstrating the "*win for the team*" value discussed in her probation reviews, it is clear from contemporaneous WhatsApp messages that this had nothing to do with the fact that she had organised it. The Tribunal see nothing sinister in the conduct of Ms Williams or the other Beauty Consultants. The manager and at least one other person in a relatively small team could not attend the lunch, Beauty Consultants worked different shifts and Christmas is a busy time to try and find an alternative date. The fact that the Secret Santa did not go ahead was simply a reflection of the circumstances and the difficulty in getting together such a disparate team. The Tribunal regarded the Claimant's reaction as disproportionate and her evidence as lacking credibility. No objectively reasonable employee could have a justified sense of grievance, far less to then conclude that it was because of race.

43. Issue 2.9 also arises out of the Secret Santa arrangements. On 23 November 2018, the Claimant sent a WhatsApp message on the Fab 11 group giving instructions for the Secret Santa including that they should make sure that they only took one name each so they "**don't mess the game**". Esther Salmon replied the following day: "**Andreia, I think only 2 year olds could mess up Secret Santa**". Katie then sent a photograph of her grandson playing with a toy tea set stating: "**this 2-year-old can make tea**". There were then the following replies:

Joanne: "**love him**"

Belinda: "**lol so sweet xx. Love kiddies**"

Esther: "haha"

Gina: [emojis of a child and a kissing face]

Claimant: "he so cute Katie"

The Claimant refers to her colleague's messages as being derogatory comments about her intelligence, comparing her with a two-year old child and even showing a picture of a two-year old making tea, and finding it funny at her expense.

44. Ms Salmon gave evidence that she felt patronised by the Claimant's original message, suggesting that she and her colleagues were incapable of carrying out a Secret Santa without messing it up. The Tribunal accepts that this is the natural reading in context of Ms Salmon's subsequent reply to the Claimant, with the "two-year olds" being herself and her colleagues, not the Claimant. In other words, that the Claimant regarded them as if they were such children that they could not do the Secret Santa properly. This was followed by what the Tribunal regards in context as a light-hearted and entirely innocuous exchange between colleagues about the grandson of a colleague and which had nothing to do with the Claimant. The Tribunal does not accept the Claimant's case that these were derogatory comments about her. Indeed, it is indicative of the Claimant's over-sensitivity and tendency to react disproportionately to her colleagues that she has interpreted these messages as being about her intelligence and worth.

45. Despite Ms Williams making clear that the issue about Rachel's complaints had been discussed and was closed as far as she was concerned, the Claimant continued to feel aggrieved. On 31 October 2018, the Claimant sent Ms Williams a lengthy email setting out her version of events. The Claimant accepts that she did ask Rachel to continue her conversation another time and to focus on the sales promotion and that Rachel later complained to her that she was not accustomed to being told off. The Claimant stated that a manager at the agency had agreed that Rachel's conduct had been disrespectful and an attempt to undermine the Claimant's authority. The Claimant complained that when she offered to calculate Rachel's sales receipts for her Rachel had said that she did not want the Claimant including them in her own sales report. The Claimant regarded this as an extremely serious false accusation, intended to cause a negative effect on her character and professional standing in her probationary period. After commenting favourably on her interaction with Esther (see above), she said that she was otherwise very happy at the Respondent. Ms Williams did not respond.

46. On 21 November 2018, Laura suggested to all of the Beauty Consultants that they should start to use the Fab 11 WhatsApp group more as there were so many messages in the Stansted team chat that sometimes Ms Williams did not see or reply to them. Esther and Hollie both agreed. The Claimant did not comment at all but subsequently used the Stansted team chat for her message sent at 01:32:35 on 23 November 2018 about not messing up Secret Santa. Ms Joanne Walker replied later that morning to suggest that they move messages about non-important issues to the Fab 11 group and use the Stansted group more for business and to keep Ms Williams in the loop. Ms Walker also proposed a time curfew as 1:30am was too late for messages; she suggested that they all agree on a reasonable time proposing 6am until 8pm. This was a clear reference to the Claimant's Secret Santa message but the curfew and move to Fab 11 were proposed to all members of the team.

47. By way of context, on 16 November 2018 the Claimant had sent a WhatsApp message to the Stansted team chat at 03:29:20. The Tribunal accepts as credible and reliable Ms Walker's evidence that she had proposed the curfew because she had been woken by both of the Claimant's chats and had had difficulties getting back to sleep.

48. The Claimant replied to Ms Walker's WhatsApp message in terms and tone which made it clear that she did not agree and was upset by it. The Claimant's message was 16 lines long, an unusual length from the Tribunal's experience of WhatsApp messages and by comparison with other messages in the Stansted group chat. The Claimant accepted in cross-examination that she was probably angry when she sent the message. The Tribunal finds from the length, tone and content that the Claimant had taken Ms Walker's suggestions personally and reacted in a way which was defensive and even abrasive, stating that she did not give anyone the right to tell her what was important for her.

49. Ms Williams intervened in the chats to propose that they agree a time frame of 5am to 8pm, covering the hours worked on the shop floor, but saying that she was happy with the content of the Stansted group chat. It was a diplomatic message: agreeing with Ms Walker on the timeframe and agreeing with the Claimant on the content. The Tribunal finds that it was intended to defuse the evident tension, consistent with her subsequent message that the group chat was not a place for defensiveness and that everyone could share their opinions on what was or was not working well. Ms Williams considered a time frame sensible, not least as shortly after commencing her own employment with the Respondent, members of the team at Stansted had raised with her the inappropriateness of sending messages outside of sociable hours. Neither Ms Walker nor the Claimant replied.

50. The Tribunal accepts the Claimant's evidence that the following messages sent by other members of the team did not result in a suggested curfew, namely:

26 August 2018 at 23:46 from Katie;

21 September 2018 at 23:57 from Laura (in response to an 23:35 message from Gina to say that her son was not well and she would not be in the following day);

22 September at 06:19 from Kayleigh (hoping that Gina's son was ok);

23 October 2018 at 04:53 from Esther;

26 October 2018 at 04:28 from Hollie (replying to the Claimant's reminder about Secret Santa);

14 December 2018 at 05:36 from Kayleigh;

1 January 2019 at 00:43 from Laura (wishing the team a happy New Year).

51. The Claimant also relied on a chat from Belinda sent to the Stansted WhatsApp group on 26 November 2018 and the replies from other Beauty Consultants as being unrelated to work but which drew no criticism as evidence of less favourable treatment. In her appeal against dismissal, the Claimant refers to these as "a trivial issue about flowers". The Tribunal had regard to the chat in question. Following the death of her mother in South Africa in circumstances where Belinda had been unable to see her, all members of the team, including the Claimant and Ms Williams, had understandably arranged for flowers to be sent. Belinda had thanked members of the team for the flowers and for being such a caring team. The subsequent messages from other Beauty Consultants, including the Claimant, were to express their support for a

colleague. The Tribunal did not regard this as a particularly strong or attractive comparison for the Claimant to make given the very different circumstances surrounding the messages on 26 November 2018. Moreover, the Claimant's description of this as a trivial issue tends to support the Respondent's concerns about her attitude towards her colleagues in the team.

52. On 26 November 2018, the Claimant and Ms Walker were working at Stansted when they had a disagreement. There is a dispute of evidence between the Claimant and Ms Walker as to what happened.

53. In her contemporaneous text message sent to Ms Williams at the end of her shift, the Claimant said that Ms Walker had been very aggressive, disgraceful and absolutely unprofessional to her on the shop floor. Ms Walker had told the Claimant not to say "hello" to her after attacking her and that nobody would speak to her in such an aggressive tone. The Claimant denied attacking anyone and said that it was Ms Walker's attitude in deciding what is important for team messages, and copying in the rest of the team, which was disgraceful. The Claimant complained about what she described as silly jokes being made in the other WhatsApp group chat. She indicated an intention to complain to HR about the conduct of some of the team and said that she was being singled out, saying that she had never had to work with people so small as that. Ms Williams replied to say that she would discuss the incident with her when she was at Stansted the following day.

54. On 27 November 2018, Ms Williams attended Stansted and took a statement from both the Claimant and Ms Walker. The Claimant's statement was consistent with the content of her message on the day itself, adding that she told Ms Walker that she did not have the right to speak to her in the way that she had in the group message. She denied attacking Ms Walker and said that she had simply defended her position. In neither her original message nor this statement did the Claimant allege, as she did in her evidence, that Ms Walker had physically come very close to her and placed her hands on the Claimant's shoulder.

55. The Tribunal accepts Ms Walker's evidence that she typed her own statement on the 26 November 2018 and provided it to Ms Williams the next day. She says that sometime between about 10am and 11am, the Claimant greeted her by saying "hello Jo" but in an awkward and cold manner. Ms Walker accepted that she said to the Claimant that she had never been spoken to in the way the Claimant had in her WhatsApp message, describing it as being like a personal attack. The Claimant then said that Ms Walker had attacked her first in her message. Ms Walker described the Claimant as ranting and, as this was on the shop floor and to stop the conversation quickly, she told the Claimant not to talk to her for now and walked away. As the Claimant continued to talk at her, she turned round and told her that they needed to calm down. Ms Walker believed that if she had not walked away, the Claimant would have carried on with what she described as the torrent of abuse. The statement concludes that the Claimant never takes criticism, always responds with verbal attacks and that her behaviour was breaking down the team. In a separate statement, Ms Walker explained that the reason for her WhatsApp message was that she had been woken up on two occasions by the Claimant's messages about Secret Santa.

56. This was clearly a very unpleasant exchange for both the Claimant and Ms Walker. Each had been upset by the WhatsApp messages sent the previous day and

each believed that it was the other's fault. There is no dispute that Ms Walker challenged the way in which the Claimant had addressed her in the WhatsApp message, saying that she had felt attacked. On balance, the Tribunal finds that Ms Walker was not aggressive but did show annoyance to the Claimant. The Claimant replied defensively and angrily, challenging Ms Walker's initial message and justifying her subsequent post. This is consistent with the anger even now displayed by the Claimant when giving evidence about the messages and the altercation on 26 November 2018. The Claimant accepted in cross-examination that she continued to talk at Ms Walker even as she walked away. The Tribunal agrees with Ms Williams' assessment when asked in cross-examination which of the women was to blame, she replied that it was roughly even. Ms Walker should not have initiated the conversation on the shop floor but the Claimant had reacted in a disproportionate way to Ms Walker's initial message and had retaliated on the shop floor.

57. The following day, Ms Williams contacted HR to ask whether there was sufficient to terminate the Claimant's contract. Ms Williams referred to ongoing issues with communication, which she described as being in poor tone, appearing rude or abrupt, and two altercations on the shop floor with different members of the team (Rachel and Ms Walker). Ms Williams said that the Claimant denied any wrongdoing and accused the other member of staff as the cause. The Tribunal consider this to be a balanced email. Far from not giving the Claimant a voice, as she repeatedly alleged in evidence, it is clear that Ms Williams had heard, considered but rejected the Claimant's denials. It is not a question of the Claimant not being given a voice but a question of who Ms Williams believed to be causing the problem. The Tribunal infer that it was the number of incidents and different individuals involved that caused Ms Williams to conclude that the problem was the Claimant. This had nothing to do with the Claimant's race nor to do with her language skills or any communication issue more generally linked to nationality; the concern was the Claimant's rude and abrupt tone.

58. The Tribunal accepts that Ms Williams subsequently told Ms Walker that it was inappropriate for her to have such a conversation on the shop floor. Ms Walker was not subjected to any disciplinary action but the Tribunal accepts that if she had been in her probationary period, the incident would have been included in the probationary review report. Ms Walker's circumstances were different to the Claimant in two material respects: she was not still in her probation period and she had not been the subject of complaint from another source. This was the reason for the disparity in treatment and not race in any way whatsoever.

59. In a meeting with Ms Williams on 27 November 2018, the Claimant complained about the WhatsApp messages which she says compared her to a two-year old and said that she thought that the team were bullying her. The Claimant's case is that Ms Williams discriminated against her by siding with the others and suggesting that it was funny. Ms Williams accepts that she told the Claimant that the staff were trying to build rapport and have a bit of a laugh. The Tribunal accepts as plausible Ms Williams' evidence that she decided not to get involved because the messages were on the Fab 11 group of which she was not a member and because she believed that the Claimant had misinterpreted the comments and had blown the situation out of proportion. That is consistent with the Tribunal's findings about the messages as set out above.

60. The Claimant submitted a grievance to Ms Farrow and HR on 28 November 2018. She starts by explaining that she is proud to be the top salesperson with

Burberry at Stansted and sets out her efforts to integrate into the team, before then complaining that she has been subject to “group” bullying and discrimination and that Ms Williams has not supported her, instead siding with the group. The Claimant gave six specific examples: not being shown where the stockroom was, the false accusation about Rachel’s sales receipts, delay in response to her Secret Santa proposal, the WhatsApp messages from Joanne (time/content) and comparing her to a two-year old, Ms Williams regarding this as a joke, Christmas decorations for the counter produced by Esther and Hollie. The Claimant suggested that: **“a number of members of staff would appear to feel threatened by myself purely due to the fact that I am highly competitive and professional when it comes to boosting sales.”** She describes a team atmosphere of continuous conflict despite her efforts. At no point in the grievance does the Claimant refer to her race or language skills. In a subsequent statement in support of the grievance, the Claimant added a section stating that it may have been her conduct as a whistle-blower which could be the motivation of those wishing to remove her. Again, there is no reference to race or language skills.

61. On 30 November 2018 the Claimant put a message on the Stansted WhatsApp group asking who had left a nail file in the drawer, stating that it was not hygienic and that polishing nails on the counter is “absolutely unacceptable”. The Tribunal considers the tone of the Claimant’s message consistent with the view of Ms Williams that she could come across as rude and abrupt. The tone is also consistent with the earlier Rachel complaint and subsequent Gina email about the Claimant telling them off. There followed a difference of opinion amongst the team about whether nail files could be kept in the drawer. Ms Williams intervened to state that she regarded it as acceptable to have a nail file in the drawer but that one should not be used in front of customers. As with the earlier disagreement on WhatsApp, Ms Williams’ response was neutral and diplomatic, seeking to defuse the dispute. The Claimant was not content and her response to Ms Williams may fairly, we find, be regarded as sarcastic even if not intended to be. She referred to an earlier conversation in which it was said that nail files should not be in pouches with make-up brushes. Esther agreed with the Claimant but felt that they could be kept in the drawer. This response is not consistent with the Claimant’s case that Esther in particular was constantly hostile to her.

62. The Claimant describes the above exchange as Ms Williams and team members refusing to accept her health and safety alert and to take appropriate action. She relies in her evidence on the Health and Safety at Work Act 1974 and the risk of transmission of fungal and viral infections, not points which were raised at the time. The Tribunal finds that the Claimant has materially overstated the situation and that, as in other situations, her reaction is disproportionate. Undoubtedly, the Claimant genuinely did not think that it was hygienic to have a used nail file in the drawer, others disagreed. The issue of nail files in pouches with brushes did not generate a difference of opinion and Esther openly agreed with her. The issue being discussed in the messages was about used nail files being in the drawer at all. The Tribunal finds that the Claimant’s unhappiness with this exchange was that the others did not agree with her on a matter where she so clearly believed that she was right.

63. On 2 December 2018, Ms Walker sent a message to Ms Williams concerned about a message from the Claimant on the Fab 11 group chat about agency workers’ right to pay. The Tribunal accepted Ms Walker’s evidence as reliable that she interpreted the message as a veiled threat to her (with its reference to knowing the Stansted regional manager, bullying and going to HR) and she had a panic attack, was

unable to attend work and that the tension with the Claimant was taking its toll on her. The Tribunal find on balance that the message sent by the Claimant did not relate to Ms Walker at all but it is relevant insofar as it indicates the extent to which the working relationship between the Claimant and at least some of the other members of the team had deteriorated and the difficult situation facing Ms Williams as their manager.

64. This is the context to a probationary review meeting between the Claimant and Ms Williams on 5 December 2018. Ms Williams praised the Claimant's sales, effort in arranging the Secret Santa and participating in the WhatsApp group but informed the Claimant that the probationary period would be extended by a month with an expectation of continued improvement. The Claimant denied that she was not a team player, relying on her agreement to swap shifts to help her colleagues. This happened in August and November 2018 for Hollie and again in September and November 2018 for Gina. The Tribunal finds that swapping shifts on four occasions, for two colleagues, is not evidence sufficient to cast doubt on the broader concerns which Ms Williams had about the Claimant's interactions with the team in light of the complaints made against her and the first-hand evidence of the tone of the Claimant's WhatsApp messages on 23 November 2018 and 30 November 2018.

65. The Claimant accepted in the meeting that she had told Gina that she is very competitive, but said that she understood that Gina may not be, describing her as wasting time and losing sales as a result. The Claimant said that she did not know what the Respondent expected as other companies motivated staff to compete with each other. The Claimant's view that it was important to be competitive was expressed more than once in the meeting. The Tribunal infer from this that the Claimant had failed to appreciate that the Respondent valued a spirit of teamwork and a collective approach to increasing sales, rather than a focus on individual sales performance. The Claimant asked Ms Williams whether the criticism of her communication was about her English and Ms Williams made clear that it was her tone and not her standard of English that was an issue. The Claimant did not deny that there were problems, but she blamed the team for being hostile and not welcoming her.

66. The Tribunal find on balance that before the review meeting, Ms Williams had decided that the Claimant's contract should be terminated by reason of the issues with her conduct up to and including 27 November 2018. This is consistent with her email to HR on 27 November 2018. We find that had it was because of the Claimant's grievance submitted on 28 November 2018 in which she made serious allegations of bullying and a lack of support by Ms Williams, that the Claimant's probation was extended rather than her contract terminated.

67. On 10 December 2018, Gina sent Ms Williams an email to report an incident that morning in which the Claimant had told her and an agency worker that they were not meant to apply make up on the counter and must go to another brand. When Gina disagreed, the Claimant asked a passing World Duty Free manager for her view and Gina intervened to ensure that the agency worker did not get involved. Gina describes the subsequent atmosphere as awkward and uncomfortable. She asked the Claimant: "why do you have to be like this, you cannot make enemies we have to all get on with each other like a team". Her email says that the Claimant replied: "I am not here to make friends, I am here for sales only". Gina says that she moved stand but that the Claimant was constantly staring at her with a sarcastic smile and waving.

68. In cross-examination, the Claimant accepted that she had told them that agency workers were not allowed to apply make up in front of customers and should do so elsewhere but denied that this was telling them off. The Claimant accepted that she had told Gina that she was not there to make friends but for sales, saying that Gina had earlier made fun and laughed at her.

69. Although not an issue to be decided, the Tribunal finds the incident to be significant as an aid to reaching conclusions on relationships within the team and the reason why the Claimant did not pass her probationary period. It is a further disagreement between the Claimant and a (different) member of the team. As before with Rachel, it involves the Claimant telling an agency worker what they can or cannot do even though she is not a manager and has previously been told to treat agency workers as part of the team. The final comment by the Claimant gives a clear indication of the Claimant's attitude to her job and her colleagues, consistent with her comments in the meeting on 5 December 2018. The evidence before us made clear that the Claimant is a very committed and highly performing salesperson. However, it was equally clear that the Claimant measured achievement by the level of sales and that she was very competitive and sales driven. In some environments this would be a highly desirable quality but it failed to take into account the nature of the Respondent organisation which prized a group work approach to sales and teamwork over personal performance. The Claimant could not adapt to the way in which the Respondent operated, consistent with Ms Williams' concern about her "*win for the team*" value in the earlier probationary review reports.

70. The grievance meeting was conducted by Ms Morales-Munoz on 14 December 2018. The Claimant attended the hour meeting without her husband or a translator but was able to communicate effectively and clearly. The Claimant said that the girls (as she put it) did not like to compete with her because she is very strong at making sales. The Claimant described difficulties working with Gina from the very outset of her employment and alleged that she was malicious and the cause of the problems. She volunteered information about a dispute with Gina about cleaning the counter, in which she described Gina as very aggressive, and another occasion when she had told Gina and Katie that they could not have a conversation in front of customers and should go to a different room to discuss it. This is inconsistent with the Claimant's evidence in cross-examination when she was adamant that she had got on well with Gina, Katie, Teresa and Hollie and that it was Esther who was the source of hostility. For the first time, the Claimant raised her race, stating that as Latin American she was used to a team wanting to be a team. In other words, the Claimant relied on race as the basis for her expectations of the team and not their behaviour to her.

71. Following the grievance meeting, there was very little independent investigation by Ms Morales-Munoz who largely relied upon the information provided to her Ms Williams and Ms Farrow. By letter dated 8 January 2019, the Claimant was told that her grievance had not been upheld, although she was told that the probation review notes with the comments about sales figures had been deleted from her personnel record. This was done at the Claimant's request and, we find, was not an admission by the Respondent that the notes were inaccurate but instead a recognition of the strength of feeling demonstrated by the Claimant about something which Ms Williams regarded as a non-issue.

72. Due to Ms Farrow's absence from work, Ms Morales-Munoz produced the

decision and reasons for rejecting the grievance, albeit Ms Farrow agreed with its contents and signed her name to it. The Tribunal find that Ms Morales-Munoz was an appropriately trained and experienced HR representative and was a suitable person to conduct the grievance. In some ways, we consider it preferable that Ms Morales-Munoz dealt with the grievance as Ms Farrow already knew some of the members of the team about whom the Claimant was complaining and was Ms Williams' line manager. Ms Morales-Munoz was objectively more independent and decided the grievance impartially and with an open mind.

73. On 11 January 2019, Ms Williams and Ms Farrow met the Claimant and informed her that her employment was terminated. The Tribunal accepts that the reason for termination was the Claimant's communication style and difficulties working with the team such that she did not meet the "*win for the team*" value and that they relied at least in part on the complaints by Rachel (as relayed by Katie) and Ms Walker. By December 2018 the working relationship had deteriorated to such an extent that they could no longer work together as a team, something that the Claimant accepted (albeit arguing that it was the fault of the others and not her).

74. The Claimant strongly disagrees that the criticisms are well founded and in her witness statement sets out a table of six examples of her meeting the value in question: two about the level of her sales, swapping shifts, Secret Santa, nail files issue and sub-standard Christmas decorations. The Tribunal does not accept that any of these undermines the genuine concerns of Ms Williams and Ms Farrow. The Claimant's focus on her sales throughout was a contributing factor towards the tension in the team: for example, when admonishing Rachel for talking rather than focusing on the promotion and referring to Gina as wasting time and losing sales as a result. The rude and defensive way in which the Claimant communicated with her colleagues was evident in the WhatsApp messages about Secret Santa (telling them not to mess it up) and then the reaction when Ms Walker suggested that the messages should be on the Fab 11 chat as well as the nail files. Swapping shifts on four occasions, for two colleagues, is commendable but does not undermine the Respondent's concerns for the reasons given above. The manner of the Claimant's messages and interactions with her colleagues, in which several perceived her as telling them off, had nothing to do with her race or her language skills. This was not about unfortunate expression in English but about the underlying belief of the Claimant that her colleagues were not focussing sufficiently and exclusively on generating sales rather than, say, chatting and her willingness to make that belief clear to those within the team.

75. The Tribunal finds that there was sufficient contemporaneous evidence to render plausible and credible Ms Williams and Ms Farrow's genuine belief that the Claimant had not integrated into the team by reason of her personality. We find that the Claimant's race played no part at all, whether consciously or sub-consciously, in their decision to dismiss.

Law

76. Section 13 of the Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial

question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

77. Unfair or unreasonable treatment of itself is not sufficient, but where there is a comparator who is treated more favourably the absence of an explanation for the unreasonable treatment may amount to the 'something more', **Anya v University of Oxford** [2001] ICR 847, CA.

78. Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any unfavourable treatment.

79. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

80. In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, **Laing v Manchester City Council** [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the only inference which could be drawn from the facts, **Pnaiser v NHS England and Coventry City Council** [2016] IRLR 170, EAT.

Conclusions

The Issues

81. As set out in our findings of fact, the comments about the comprehensibility of the accent of the French trainer and that the training being boring were both made by at least one of those attending. Nothing was said to suggest that the Claimant's comprehensibility was affected by her accent or that she was boring. The Claimant was and is able to communicate clearly and effectively in English even though it is not her first language despite her accent, this much was evident during her employment and during this hearing. We have found that the comment about the trainer's accent had nothing whatsoever to do with the Claimant's accent or communication in English. Indeed, it appeared in the course of the evidence that the Claimant's principal complaint was not so much the comment itself but that she was dissatisfied with the induction training provided (consistent with it being described as boring by another person present).

82. On balance, we prefer the submissions of the Respondent and find that the Claimant has not indicated or shown any primary facts from which we could conclude that such comments amounted to race discrimination. There is no harassment claim. There is no act of inherent race discrimination in referring to the comprehensibility of an individual with an accent, be it due to another first language or even a regional accent where English is the first language. For a direct discrimination claim, we would need to be satisfied that an actual or hypothetical comparator in the same or not materially different circumstances would have been treated more favourably. That comparator, it seems to us, must be another employee with an accent which they also believe is strong. There are no facts from which we could conclude that such a comment about the trainer's accent would not equally have been made to such a comparator.

83. There was undoubtedly a delay in providing the Claimant with a permanent pass and she had to start her employment with a temporary pass instead. The same delay applied to Hollie. In the Claimant's case it was due to external causes: missing information on the agency reference, failure by Word Duty Free to provide the full papers to the ID Centre in good time and then delay in the ID Centre itself. None of this was the fault of the Respondent and an explanation was provided to the Claimant at the time. It had nothing to do with her race but it did cause the start of her employment to pass less than ideally.

84. The real issue, however, was that on her first day of employment there was no temporary pass ready for the Claimant and no-one accompanied her or was ready to escort her. As a result, she was unable to start work and this was clearly frustrating for her even if ultimately she did not lose out in terms of pay. The Tribunal does not accept that the Claimant received less support than Hollie. Ms Williams had not arranged for the temporary pass for Hollie either. Nor did she accompany or escort Hollie or arrange for anyone else to do so. Hollie was proactive in making the necessary arrangements with both World Duty Free and Esther to collect the temporary pass on her first day when the permanent pass was not ready. Furthermore, Ms Williams was out of the country on the Claimant's first day at work. We conclude that this was poor management planning and communication but it was not less favourable treatment and it had nothing whatsoever to do with the Claimant's race.

85. The Claimant accepted in evidence that there was no allegation that the complaint by Katie was an act of race discrimination. To this extent, the issue is not live before the Tribunal. However, it is relevant when considering later issues insofar as it demonstrates the Claimant's attitude towards her own sales and those of her colleagues. The Claimant had not committed an act of misconduct and Ms Williams did not treat it as such, it was just a misunderstanding about the dynamics between agency workers and permanent employees of the Respondent which was properly addressed in an ongoing probationary period where the Claimant was being assessed by reference to the Respondent's values. It had nothing to do with race whatsoever.

86. The Claimant is particularly upset by the inclusion in the 23 October 2018 probationary review of the note about sales figures, describing them as a false and malicious allegation. The Tribunal has not agreed that Ms Williams placed a deliberately false and malevolent allegation in the probationary review report. It was to address the Claimant's upset and not for any admission of wrongdoing that the probationary report was eventually removed from the Claimant's personnel file. The

Claimant has adduced no evidence that Gina (Esmeralda), Esther and Hollie were manipulating sales figures. To the contrary, she was given an instruction by Ms Williams that she should also do what she terms as manipulation, namely to include general till sales figures in her own sales figures. Even if the Claimant, with her strong focus on personal sales, regards this as manipulation the Respondent did not as it paid commission on group sales and not individual sales. The note about sales figures was, as set out in our findings of fact, nothing whatsoever to do with the Claimant's race and was simply a record of a discussion about a concern raised with her about the Claimant's interaction with the broader team. It would have been included for any employee in the Claimant's circumstances.

87. The Claimant also relies upon the reference to improved communication in Ms Williams' note of the 23 October 2018 probationary review as an act of race discrimination. In the issue it is described as an accusation of not communicating with or integrating with the team. In fact, the note is that the Claimant needed to make an effort to build trust, repair relationships, involve herself with the team and improve communication. The reference to repairing relationships is material from which we have inferred that the communication comment, in context, referred to the Claimant's working relationship and communication with the team (including the broader category of agency workers). This was not concern about the standard of verbal or written English but the manner in which the Claimant dealt with team members, a manner which was perceived by others as unduly critical and difficult. It had nothing whatsoever to do with her race.

88. The Claimant also relies upon the reference to communication as a fact from which we could infer that her race, in particular language and cultural differences, was a material factor for treating her less favourably in the ways alleged in this probationary review note. The Tribunal does not consider this a safe inference to draw. Whilst communication may sometimes refer to language ability and, therefore, race we find that it was not the case here. The concern was that the Claimant was not working closely with the team and had upset some of them, as set out in Esther's email to Ms Farrow on 16 October 2018. This was why Ms Williams also referred to a need to build trust and repair relationships. It had nothing to do with race but with personality.

89. The Claimant's case is that the 48-hour delay in a response to her suggested Secret Santa shows that she was being ignored and isolated by her colleagues and that it was an act of discrimination. The Tribunal does not find that such a perception is objectively reasonable. Ms Williams was openly and swiftly supportive of the Claimant's proposal, a stance not consistent with the Claimant's case that she had deliberately sought to undermine and demoralise her in the probationary review only two days earlier. The initial proposal was sent by the Claimant after the end of the working day and, in any event, two days is not an unreasonably long period of time to reply for Beauty Consultants working different shifts and dealing with a number of operational matters. There is no evidence from which we could find that a similar suggestion by any other member of the team would have elicited a quicker response. The Claimant contributed to the other chats about the piano and sales and received replies which do not suggest that she was being ignored or that the others were only talking amongst themselves. The Claimant's reminder on 25 October 2018 received prompt replies. It is not plausible that if her colleagues were ignoring her or seeking to isolate her as she alleges that they would reply so quickly to the second message. This had nothing whatsoever to do with her race.

90. The Claimant describes being criticised for making trivial comments in the Stansted WhatsApp group chat when other members of the team made trivial comments shortly afterwards and were not criticised. The Claimant's message was about a workplace Secret Santa and other sales related matters; Belinda's were to thank colleagues for flowers sent after the death of a parent. The Tribunal's view is that Belinda's messages and her colleagues' messages of support in the circumstances cannot properly be described as trivial. Concern about work-related content of the Stansted chat which did not need to be shared with Ms Williams had been expressed generally by Laura on 21 November 2018, to all members of the team. The reason that no objection was taken to Belinda's messages was not because she was of a different race but because her mother had died and she was expressing gratitude for the flowers and support of her team. There is no evidence from which we could conclude that the Claimant would have been criticised had she been in materially the same circumstances as Belinda. This had nothing to do with race.

91. Criticism in the use of the Stansted WhatsApp chat is framed in the issues in respect of content only but in evidence the Claimant also relied extensively on Ms Walker's proposed time restrictions. The Tribunal considered whether this provided evidence from which we could infer less favourable treatment more generally. The Claimant had sent two messages within a matter of days at 1.30am and 3.30am (the morning shift at Stansted started at 5am). Ms Walker had proposed the curfew because she had been woken by both of the Claimant's chats and had had difficulties getting back to sleep. The proposed curfew applied to all members of the team. Ms Williams proposed a 5am to 8pm timescale (operating hours), having been previously spoken to by team members about sending messages at anti-social hours. It appears that all agreed. The only exception thereafter was the chat sent by Laura at New Year. In the experience of the Tribunal, it is not unusual for messages to be shared between colleagues around midnight on New Year's Eve/New Year's Day. There is nothing to suggest that if sent on an ordinary day, Laura would not have been reminded of the agreed time for messaging.

92. There were examples of messages sent by other members of the team before 23 November 2018 which had not prompted a proposed limit on the time for posting on the group, one in August 2018, two on 21 September 2018 and two in October 2018. They were from different members of the team, no other Beauty Consultant had sent two messages at anti-social hours in short succession. The two on 21 September 2018 dealt with an urgent matter affecting the following day's shift (Gina's son was unwell). The two in October 2018 were sent a short while out of the ultimately agreed timescale (7 minutes and 32 minutes respectively). The Tribunal concludes that these are qualitatively different to messages sent at 1.30am and 3.30am which might reasonably be expected to wake somebody up. The Tribunal draws no inference from the issue about the hours of use of the chat. It was the combination of two messages within a matter of days disturbing Ms Walker's sleep that led to her message. It was not less favourable treatment because of race.

93. As for the incident between the Claimant and Ms Walker on 26 November 2018, the Tribunal views with caution the Claimant's case that Ms Walker behaved aggressively. We have found that the incident was very unpleasant for both the Claimant and Ms Walker, with each having been upset by the other the previous day. In our view, the Claimant had a tendency to over-exaggerate her evidence at times and

that this was one such occasion, for example suggesting that Ms Walker had actually laid hands on her shoulder. Ms Walker was annoyed but not aggressive. The Claimant was also angry and demonstrated that anger to Ms Walker, continuing to talk at her as she walked away. The blame for the unpleasant incident falls roughly equally. The Claimant has failed to adduce any evidence from which we could conclude that a hypothetical British employee who had sent the same message on a group chat directed to Ms Walker would not equally have been approached by her the next day. Again, this had nothing to do with the Claimant's race whatsoever.

94. In respect of the issue about derogatory comments about the Claimant's intelligence and comparing her to a two-year old, the Tribunal has found as a fact that when she sent her message with the reference to a two-year old, Ms Salmon felt patronised by the Claimant's message telling them not to mess up the Secret Santa. Her "haha" message was a response to the photograph and comment about Katie's grandson and we draw no inference from it. In context, the two-year old comment referred to those told that they must pick only one name for the Secret Santa, in other words the team members, and not the Claimant herself. There were no derogatory comments about the Claimant's intelligence, if anything, the Tribunal considers that it was the Claimant who was questioning the intelligence of the team and upsetting Ms Salmon in the process. What followed was a light-hearted and entirely innocuous exchange between colleagues about the grandson of a colleague which had nothing to do with the Claimant. The Claimant has interpreted the messages as being about her when she was the cause and not the subject. This was nothing whatsoever to do with race.

95. In the circumstances set out, the Tribunal does not accept that Ms Williams "sided with the British women who had made derogatory comments about the Claimant". Ms Williams decided not to get involved because the messages were on Fab 11 group of which she was not a member and because she believed that the Claimant had misinterpreted the comments and had blown the situation out of proportion. This had nothing to do with the Claimant's race whatsoever.

96. There was a disagreement between members of the team on 30 November 2018 about whether used nail files should be stored in the drawer but no apparent dispute that they should not be stored in pouches with facial brushes. Esther openly supported the Claimant on the latter point and nobody disagreed. In any event, the mere fact that colleagues disagree is not indicative of discrimination. The Claimant may well believe that she is right and that the others should have agreed with her. However, that alone is not indicative of less favourable treatment because of race. The Claimant relies upon a hypothetical comparator and the Tribunal carefully considered whether or not there would have been any difference in the stance taken by Ms Williams and others in the team if she were British (or indeed of any race other than Brazilian). In doing so, we took into account the tone of the Claimant's messages. It is not a question of English language or comprehension, but the tone of her initial message comes across as if she is telling off her colleagues. In his submissions, Mr Dunsire accepted that the message could possibly be seen as bossy. In other words, it is not the content of the message which causes concern but the manner in which it is expressed. The Tribunal conclude that any other Beauty Consultant broaching the manner in the terms that the Claimant did, berating her colleagues, would have equally resulted in them openly expressing their disagreement irrespective of race.

97. Furthermore, we do not accept that Ms Williams failed to treat the Claimant's concerns as valid. She clearly did in responding to the Claimant in the group chat and to clarify circumstances in which nail files can be used. Again, it may well be that the Claimant did not agree with this position, but it was appropriate for Ms Williams as the manager to adopt it and it had nothing to do with the Claimant's race.

98. In reaching the decision to dismiss, Ms Williams and Ms Farrow relied at least in part upon the Rachel incident (as relayed by Katie) and the complaint by Ms Walker. We conclude that this is not because they were British but because the Claimant's behaviour was consistent with examples of concern raised also by others, such as Esther and Gina, and gave rise to genuine cause for concern about her ability to work with her colleagues as part of a team. In other words, this was not a single one-off incident or personality conflict with one member of the team but a pattern of concern more generally. It is clear that by December 2018 the working relationship had deteriorated to such an extent that they could no longer work together as a team. The Claimant was still in her probationary period and had upset a number of colleagues. It is not surprising in the circumstances that her employment was not confirmed. Nor is there evidence that Hollie had performed less well than the Claimant. Her probationary review reports indicate no concerns about her interaction with colleagues, quite the opposite as she was commended for her relationship with the team.

99. As set out in our findings of fact, the Tribunal finds that there was sufficient contemporaneous evidence to render plausible and credible Ms Williams and Ms Farrow's genuine belief that the Claimant had not integrated into the team by reason of her personality. We find that the Claimant's race played no part at all, whether consciously or sub-consciously, in their decision to dismiss.

Overview

100. This is a case where the Claimant relies upon multiple allegations, largely based upon a central theme that she did not "fit" within the team because of her race and, in particular, language and/or cultural factors. The Tribunal was mindful that it is important to look not only at the individual allegations but also holistically at the overall evidence to see whether there are facts from which we could infer that race was a material factor in the problems within the team.

101. Looked at overall, the cumulative effect of the evidence leads us to the conclusion that the Claimant was competitive and measured successful performance by reference to sales. She had high standards for herself and for her colleagues and was not afraid to make this known. The Claimant had failed to appreciate that the Respondent valued a spirit of teamwork and a collective approach to increasing sales, rather than a focus on individual sales performance. This misunderstanding was the root cause of the conflict between herself and her colleagues, not least as the Claimant was prepared to tell her colleagues openly when she believed that they were not trying sufficiently hard or were behaving in a manner with which she did not agree (for example, chatting on the sales floor rather than concentrating on selling or putting on make-up whilst at the counter). The Claimant's manner of expression was direct and, we conclude, could be regarded as critical, demanding and at times rude. This caused conflict with other members of the team at Stansted and, even, agency workers. As Mr Moore submitted, her pride and competitive nature got in the way of collegiate working and the value of "*win for the team*".

102. We have not found it necessary to make any findings or reach conclusions based upon racial or cultural differences. Indeed, it seemed to us dangerous to make stereotypical assumptions of how a person from one national culture or another may behave based on their nationality alone. Not least as there was no expert evidence or other evidential basis beyond the general assertions of the Claimant and Mr Dunsire, on her behalf, that cultural factors were a material factor in the problems within the team. The people of any country will comprise a vast mixture of personality types and manners of communication: introvert, extrovert, competitive, non-competitive, confrontational, avoiding disagreement, direct or tactful.

103. Insofar as the Claimant's communication style made matters worse, this was not a question of English language skills but her manner: critical of others but disproportionately defensive when she perceived herself to be subject to criticism. The WhatsApp message sent to Ms Walker is indicative of that defensiveness and something which Ms Williams picked up on at the time. Furthermore, concern about the Claimant's communication was raised in the very first probationary review meeting based upon her email sent to Ms Farrow, with its tone and use of capital letters and exclamation marks. This was an email drafted by the Claimant's husband on her behalf and his first language is English. We conclude that none of the causes of conflict between the Claimant and the team were related to language skills but were behavioural traits arising out of the Claimant's very sales driven mentality.

104. Based upon our findings of fact and conclusions as set out above, it is not necessary to consider the interesting submissions made by Mr Dunsire and Mr Moore about whether language and nationality are inherently inseparable as part of the protected characteristic of race.

105. Nor have we accepted the Claimant's case that there was underlying hostility towards her. Whilst still employed, the Claimant referred to Gina as the cause of the hostility and yet in evidence maintained that they had no problems. In this case, the Claimant maintained that Esther had been hostile towards her throughout, yet in contemporaneous documents she refers positively to the support which Esther gave her in make-up tips and Esther was also openly supportive of her in the dispute about nail files. There is no evidence of hostility without sufficient basis which could support an inference as envisaged in Anya.

106. The Tribunal heard extensive submissions from the representatives about credibility, each urging us to find that the other side's evidence lacked credibility and providing detailed analysis of what were said to be inconsistencies. The Tribunal bore in mind the fallibility of human memory and the time that has elapsed since the events before us. We have considered the oral evidence and tested it by reference to contemporaneous documents.

107. Overall, the Tribunal found to be particularly credible the evidence of Ms Walker and of Ms Williams both of whom we found to be clear, honest and straightforward witnesses. Inconsistencies in their evidence were not material and were consistent with the fallibility of memory and a willingness to accept where they may have been incorrect in something previously said.

108. By contrast, the Claimant was prone to over-exaggeration and there were

material inconsistencies throughout her evidence which were not matters of detail but were significant (such as whether it was Gina or Esther who was responsible for the hostility and whether Ms Walker put her hands on her during the shop floor incident). The Claimant could not, or would not, accept that her evidence was anything other than correct or that she could be mistaken in any way. This is not to say that the Tribunal thought her evidence to be untruthful. We have no doubt that she believes to be true all that she has said on oath. It is clear from the lengthy and detailed pleadings, statement, opening submission and closing submission that the Claimant and Mr Dunsire have spent a great deal of time preparing for this case and re-living what happened during this very short period of employment. She is naturally hurt about the way in which the employment relationship ended and has reflected upon her experience of the Respondent through that prism of hurt. As a result, she is not able objectively to accept that others may have genuinely believed her to have been the cause of the problems or may have perceived her conduct in a way which she no doubt did not intend.

109. It is for the Tribunal to consider objectively on the evidence before it only whether or not race was in any sense a material factor in the treatment which we have found to have occurred. It is not our role to decide the unfairness or unreasonableness of the various pieces of criticism. Overall, there was nothing in the evidence we heard or read which would lead us to conclude that race was a material factor at all. Indeed, Ms Williams made significant efforts to support the Claimant and it is simply not plausible that having decided to recruit the Claimant, supported her even when criticised by others in the team and disregarded the gossip from her time with Synergy, that Ms Williams would have behaved in the way that is now being alleged.

110. For all of these reasons, all claims fail and are dismissed.

Employment Judge Russell

4 January 2022