EMPLOYMENT TRIBUNALS

Claimant: Ms P Olorunnibe

Respondent: Lidl Great Britain Limited

HELD AT: London South, by CVP **ON:** 6, 7, 8, 9 and 10 September 2021

BEFORE: Employment Judge Barker
Ms F Whiting
Ms N Beeston

REPRESENTATION:

Claimant: In person
Respondent: Mr C Khan, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant's application to strike out the response was refused.

2. The claimant was not subjected to unlawful direct discrimination on the grounds of her race, as per s13 Equality Act 2010.

3. The claimant was not subjected to unlawful harassment on the grounds of her race as per s26 Equality Act 2010.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. The claimant brings claims of direct race discrimination and harassment on the grounds of race by a claim form presented on 27 February 2020, having commenced ACAS Early Conciliation on 18 December 2019 and ended conciliation on 31 January 2020. The Tribunal heard evidence from the claimant on her own account and also from Ms Ling and Ms Johnson. Mr McGirr and Mr Newbon also attended ready to give evidence but the claimant indicated that she did not wish to cross-examine them and so they were not called by the Tribunal. The Tribunal was provided with a witness statement from Ms Iacomi but she was unable to attend to give her evidence in person and therefore little weight can be attached to it.

2. The claimant describes her race as "Black African" and alleged that she was subjected to unlawful discrimination on that basis. However, during the course of giving her evidence she also complained of unlawful discrimination on the basis of her national origins, which she told the Tribunal were Nigerian.

3. At a case management hearing on 23 June 2020 before Judge Harrington, the claimant's claims were clarified and an agreed list of issues drawn up. Case management orders were also made for disclosure of documents and the preparation of a hearing bundle, to be complied with on 1 September 2020 and 6 October 2020 respectively.

The Claimant's applications for disclosure, unless orders, and strike-out

4. Following these dates, the claimant made a number of requests of the respondent for further documents and information. These were brought to the attention of the Tribunal and Employment Judge Beale considered the claimant's email of 13 November 2020 timed at 1.46pm and 13 November 2020 at 6.23pm and responded with a further order for disclosure in a letter dated 15 June 2021. Judge Beale considered that three of the requests were requests for documents, and these were the subject of the order for disclosure. Judge Beale determined that the rest were requests for evidence and made no order in respect of these.

5. The respondent's solicitor Mr Creamore responded to the order in an email of 29 June 2021. Of the documents ordered to be produced, he informed the claimant that only one email was available, that being one sent between the claimant and Susan Taylor in the timeframe 16th to 20th September 2019, which was disclosed. The respondent reported that other documents were no longer available or did not exist, and the claimant was informed of this. In addition, other emails not requested by the claimant had been found during the respondent's search and were added to the bundle.

6. The claimant responded on 30 June 2021 to Mr Creamore and said *"I did not feel the information requested for by the orders have been provided, I believe the information have been withheld intentionally and I will be writing to the Employment Tribunal before the close of play today to inform them of the situation".*

7. The claimant then applied on 6 July 2021 to add new issues to the list of issues set out at the Case Management hearing on 23 June 2020. The respondent did not object to this request, but asked the claimant to agree to delay the exchange of witness statements from the original date of 16 July 2021 to allow them to incorporate a response to the new issues in their witnesses' statements. The claimant refused to agree to this without an order of the Tribunal granting both her application to amend her list of issues and the respondent's application to move the date for exchange of witness statements. She also requested that supplementary witness statements be provided to deal with the new issues introduced.

8. The Tribunal wrote to the parties on 23 July 2021 granting the claimant's application to amend the list of issues and varying the date for exchange of witness statements to 14 days from the date of the letter, so to 6 August 2021.

9. However, on 6 August 2021 the claimant made a further application to the Tribunal for an unless order. Her application stated "*as part of my application for Unless Order, please see my first email which I sent today at about 11.30am, attaching all previous emails from me to the Respondent requesting for the information and documents."* These emails were stated to be dated 9, 12, 27 and 30 July 2021. The request was for information from the respondent's SAP accounting system to show the number of invoices processed by her and her comparators per day across the period to which the claim relates. The respondent had provided the claimant with an Excel summary of invoice processing data with which the claimant was not satisfied, her reason being "*the Excel worksheet data cannot be verified, data are subject to manipulation or error".* The claimant noted that the reason for requesting this information was that it was "*relevant in establishing the true reason for why I was dismissed when my two comparators were offered permanent position".*

10. The claimant applied for an order that should the respondent not comply with this, their ET3 should be struck out. The respondents replied to this email on 12 August, objecting to the strike-out application and responding to each request for specific disclosure in turn. The claimant emailed the same day objecting to the respondent's response. There were emails from the claimant (including an application for an Unless Order) relating to disclosure on 19 and 27 August, 1 September and 6 September. The respondent responded by re-stating that it had complied with its disclosure obligations so far as was reasonable and proportionate and what the claimant was seeking each time was either unavailable, already provided, or excessive and disproportionate.

11. At the start of the liability hearing, the Tribunal considered the claimant's application that the response be struck out and her allegation that the claimant had failed to comply with its disclosure obligations. The claimant had produced a detailed ten page statement in connection with her application and the respondent had provided a second witness statement from Ms Ling, the claimant's former manager at the respondent. The claimant also applied for an adjournment in the alternative to the strike-out application so that she would be able to consider a one-page Excel spreadsheet that the respondents

had produced on 31 August 2021 (the previous week) which she alleged was produced too late for her to be able to consider it.

12. The Tribunal adjourned to read the case management applications and supporting evidence from both parties (including the respondent's "Correspondence Bundle" and the claimant's additional extensive correspondence). The hearing resumed at 2.45pm on day 1. The rest of day 1 was spent dealing with the claimant's submissions on this issue.

13. The Tribunal initially struggled to understand the claimant's applications. The claimant was dismissed by the respondent for what the respondent said was her poor performance in being too slow and/or unable to process supplier invoices. The dispute was over the respondent's records of this poor performance, which involved "matching reports" and the availability or otherwise of raw data from the respondent's system.

14. The Tribunal noted that a significant amount of raw data was already in the bundle of documents and also that the respondent's witness and the claimant's former manager Ms Ling had produced summary Excel spreadsheets of the data. We carried out an initial comparison of the raw data with the summary spreadsheets and could follow how the spreadsheets summarised the totals for the claimant and each comparator. It was therefore difficult to understand why the claimant was insistent that she was unable to follow how the raw data had been summarised in the spreadsheets, or why a different format of the data was so important for a fair decision to be made about her case.

15. We discovered from speaking to the claimant that she refused to accept the Excel summary spreadsheets because they had been prepared by Ms Ling. She accused Ms Ling of manipulating the data, but as stated above, the Tribunal was able to see where the raw data had been accurately transposed into the summary spreadsheet.

16. The respondent told the Tribunal that the data the claimant requested from their systems was no longer available as, when individuals left their employment and were removed from the system, their key performance indicator data was not kept. The claimant refused to accept that this was correct and referred on a number of occasions to HMRC requirements for the preservation of accounting data which she said obliged the respondent to ensure that this information was kept available for a period of seven years. We accepted the respondent's explanation, and note that a business's internal performance statistics are not held to the same standards as its external reporting requirements as required by, for example, HMRC. The claimant's position on this issue was, we found, not correct.

17. The claimant asked for full daily statistical reports for twenty two days for her and her comparators. The Tribunal understands that this would require the production of hundreds of pages of data. The respondent asserts that this is disproportionate particularly given that the data has already been made available in summary form. The Tribunal notes that elsewhere in the

claimant's pleadings she broadly accepts that her performance was below the standard of her comparators, albeit that she says that the respondent's treatment of her caused this to happen. Given that this is the case, and given that even if the claimant takes issue with the accuracy of some of the figures, we found that the evidence was sufficiently clear for our purposes that no further disclosure was necessary or proportionate. The claimant disagrees with this position and told the Tribunal that the figures must be exactly right. The Tribunal told the claimant that this was not the case and that we were not auditing the respondent - our investigations do not have to be forensic and exacting provided we are satisfied that proper findings of fact can be made to allow a decision to be taken on the issues before us.

18. The Tribunal refused both the claimant's application to strike out the response and also the application for an adjournment. Striking out the response was a draconian measure only to be taken where the Tribunal concludes that a fair hearing is no longer possible. That was not the case here and having carefully considered the issues and the evidence available we conclude that the hearing could go ahead. The claimant's application for an adjournment was refused because in our view, the claimant did not require a further one to two weeks to consider a summary spreadsheet of data that she had already been in possession of for six days. She had, we note, found the time to produce a second witness statement of ten pages in support of her application. An adjournment of one to two weeks would mean that the case would need to be re-listed, which may take 12 to 18 months for it to be resumed. This is not in the interests of justice on balance. We did not consider that there was any need for further disclosure, for the reasons set out above.

19. The claimant indicated that as she disagreed with the Tribunal's decisions in this regard, she was not prepared to continue with the hearing and would not attend on Day 2. The claimant was encouraged to consider the issue overnight and was informed that the Tribunal may continue the hearing in her absence if she did not attend. She was encouraged to attend the next day at 10am, which she did and she attended for each day for the rest of the hearing.

Issues with cross-examination

20. The claimant's cross-examination of Ms Johnson was measured and respectful and the claimant assisted the Tribunal by asking relevant questions and allowing Ms Johnson time to respond. Her cross-examination of Ms Ling was notably different. She often did not allow her the opportunity to answer questions put to her and had to be reminded to allow her to do so. She also had to be reminded not to give speeches but to ask questions. She was reminded that she would have the opportunity to make closing submissions in due course. She revisited the same issues previously addressed with Ms Ling. When the judge intervened on these occasions, the claimant engaged in a discussion with the judge about the correctness of her approach. The Tribunal was concerned that Ms Ling's cross-examination would be unnecessarily lengthy and confrontational and prevent the hearing from being concluded in the time available.

21. The cross-examination of Ms Ling began at 10.15am on day three of the hearing. At approximately 2.45pm that day and after a number of interventions from the judge, the cross-examination was paused, as matters had become very heated. The Tribunal returned at 3pm for a discussion with the claimant, in which the judge put a limit on the time available for the cross-examination of Ms Ling to noon the next day and reminded her that in order to finish in time, she should resist the temptation to revisit issues and ask questions of the witness rather than give speeches, for which she would be given the opportunity in her closing submissions.

The Agreed List of Issues for the Tribunal to Decide

22. The list of issues was agreed with the parties at the outset of the hearing. As indicated above, the list had been agreed before Judge Harrington at a case management hearing but subsequently added to by the claimant, to which the respondent consented. The final list of issues for the Tribunal to decide was therefore as follows:

Direct Race Discrimination s13 Equality Act 2010

(i) Ms Jadhav and Ms Ling allegedly denying the claimant the opportunity to read guidance notes in the workplace on 13 September 2019

(ii) The respondent allegedly failing to follow the claimant's training plan by failing to carry out periodical reviews, setting and reviewing relevant targets and having a job chat

(iii) Ms Iacomi allegedly monitoring the claimant's work closely by moving her chair close to her without telling her and watching her screen from behind

(iv) Ms Ling deliberately giving the claimant duplicate or foreign invoices

(v) Ms Ling deliberately giving the claimant papers to work with in unusually small fonts

(vi) The respondent failing to follow company procedures by dismissing the claimant without extending her probation period and by Ms Ling escorting her from the premises (a reference to paragraph 15 of the Grounds of Complaint)

(vii) Dismissal

Harassment: s.26 Equality Act 2010

(i) Ms Ling responding spitefully in a meeting between 23 – 27 September 2019

(ii) Ms Ling placed the claimant under undue pressure, did not allow her to stop typing and did not allow her to complete an on-line Health and Safety course

(iii) Ms Iacomi "snuck up secretly" on the claimant

(iv) Ms Jadhav shouted at the claimant when training her

(v) Ms Ling asked the claimant on 13 September 2019 where she came from originally (actually identified as 11 September 2019 in evidence)

The four additional issues added on 6 July 2021:

(i) Ms Ling moving the claimant's barcode printer (Harassment)

(ii) Ms Ling wrongly labelled the claimant as having a vision problem (Harassment)

(iii) Ms Ling and Ms Jadhav discussing the claimant's eyesight in an open plan office (Harassment)

(iv) Ms Ling inciting Ms Jadhav and Ms Iacomi to train the claimant badly (direct race discrimination)

23. The claimant has proposed that her comparators be Madara and Nicola, who were also relatively new starters in the team. They both white and not of African or Nigerian origin.

24. The parties put forward evidence which the Tribunal has considered. However, if the following findings of fact are silent in relation to some of that evidence, it is not that it has not been considered, but that it was insufficiently relevant to the issues that the Tribunal had to decide.

Findings of Fact

25. The claimant began work with the respondent on 9 September 2019 and was dismissed on 8 October 2019, having been paid for one week's notice by way of a payment in lieu. She was employed as an administrator in the "Merchant Ledger Team" in the respondent's head office. Ms Yee Ling was the claimant's line manager and Merchant Ledger team leader. The claimant was engaged on an initial probationary period of three months, but was dismissed just under one month into that period for poor performance.

26. The claimant told the Tribunal that, since coming to the UK from Nigeria she had previously worked in several departments of the UK Civil Service, working in accounts. She had some accounting qualifications and had previously had jobs with responsibility. She accepted that the position that she took in the respondent's head office was one for which no accounting qualifications were required and that it was an "entry level" position. However, the claimant's evidence was that she had spent five years out of the workplace on a career break and intended to use this role at the respondent as a launching point for a new career in the respondent's business. It was the respondent's evidence that many employees took this role as a starting point for advancement in their

business and indeed the turnover of staff in the Merchant Ledger team was relatively high for that reason.

27. The respondent's Merchant Ledger team consisted of approximately twenty people. We accept that it was ethnically and racially diverse with significant numbers of non-white and non-British team members, including people of African origin.

28. The claimant's principal complaints are about the behaviour of Ms Ling and her alleged discrimination of the claimant on the grounds of the claimant's race. The claimant, as stated above, is of Nigerian national origin and describes herself as having a Nigerian accent. Ms Ling is from Mauritius and describes herself as also having a strong accent. We make a general comment that we have found a number of misunderstandings and communication issues between the claimant and Ms Ling that we find are related to a lack of understanding, likely due to neither person speaking English as a first language and the other person having a strong accent, even though both spoke English fluently. For example, the claimant misheard that the "day end register", a significant daily report in the Merchant Ledger team, was the "dead end register" and therefore did not appreciate its significance.

29. The claimant was recruited following a process that required her to attend a telephone interview, sit a maths test and have a face to face interview. The evidence of Ms Ling was that the claimant had performed well at interview and that she (Ms Ling) persuaded the other person who conducted the face to face interview of the claimant with her, that the claimant should be recruited. Ms Ling told the Tribunal that the claimant had been able to persuade her in the interview that she had experience of working under pressure and at a fast pace, from her civil service experience. Ms Ling told the Tribunal:

> *"My job is a big responsibility and I need to hire a good team. I am not obliged to take candidates on board if I have two candidates and they didn't impress."*

30. The claimant disputes this and alleges that Ms Ling was "forced" to recruit her due to her excellent performance in the maths test and elsewhere, despite Ms Ling being strongly opposed to the claimant from the outset.

31. We prefer Ms Ling's evidence in this regard. There was no evidence whatsoever that Ms Ling was compelled to recruit the claimant. Ms Ling was the team manager and had the final say in who joined her team. We accept that she was of the opinion that the claimant had provided evidence in the interview that she could work under pressure and at a fast pace, and had performed well in the maths test. Ms Ling also told the Tribunal, which the claimant did not dispute, that the claimant volunteered the information in the interview that she was Nigerian, as part of her answer when asked to tell the interviewers about herself. Ms Ling, we accept, was fully aware that the claimant was Nigerian at interview and this had no negative impact on her view of the claimant at interview, which had been positive.

32. The claimant gave evidence of her first day in the office, which was 9 September 2019. She said, and we accept, that she was happy and ready to be back at work and back in the office after her career break and she was keen to make a good impression. She attended a "welcome" session for her and the other new starters in the morning with Dirk Kahl, the Operations Director at the respondent. The claimant chatted with Mr Kahl at the end of the session and told the Tribunal she was pleased when he asked her to let him know how she got on in her new role.

33. However, the claimant told the Tribunal that her good impressions of the respondent did not continue when she arrived at the Merchant Ledger Team area of the office. She was met by Ms Ling, who after a very brief introduction told the claimant that they were very busy and had a backlog of invoices to process and that she would have to start work straight away. She acknowledged that she would usually have spent more time with a new starter, but that she did not have time to do so on that day. She also acknowledged that she had forgotten that Sunita Jadhav, another member of the team, was coming back with the new starter. She told the Tribunal "*maybe I did not put my best smile on*" when the claimant arrived.

34. The claimant's evidence was that Ms Ling was hostile to her when she arrived and did not ask her how she found the induction. The claimant's case has consistently been that from the first moment she arrived in Ms Ling's office, that (as stated in the claimant's claim form) Ms Ling "*premeditated my dismissal, she was unleashing her plan as soon as I stepped into the office…She didn't even want me to have a conversation with her…*" and that this was because Ms Ling was firmly of the opinion from the outset that the claimant must be dismissed, because of her national origins as a Nigerian. The claimant does not accept that Ms Ling was very busy and under pressure to tackle the backlog.

35. We find that the expectation that the claimant should sit down and start work straight away did not match her expectation of her first day in a new job and that she had great difficulty in processing the unexpected situation when these expectations were not met. Having spent many years as a civil servant we find that the claimant's expectation was that she would have a thorough induction process, including an opportunity to familiarise herself with the role, read instruction manuals, have a one-to-one meeting with her manager to set goals, and so on. However, Ms Ling told the Tribunal that the Merchant Ledger team was extremely fast paced and that on the day the claimant started work, they had an unusually large backlog of invoices to process and she needed her to simply start work straight away. We find that the claimant found this unsettling and difficult to respond to.

36. One of her submissions during the hearing was that she would have liked to have had an "*in depth discussion with [Ms Ling] about the work and to understand the work of the team*". However, we find that this was not what the claimant's role required and that Ms Ling did not have time to do this that afternoon.

37. The claimant accepted in cross-examination that she understood when she applied for the job that it was a fast paced job with lots of deadlines and that it was all about processing the invoices, as an entry level position. We find that her expectation of the role appeared to be that she would have a degree of independence and autonomy. She complained during cross-examination that she had not been able to plan her working day and that this had caused her stress, and that she was harassed and pressurised in the office. She did not appear to appreciate that her role, and the route to advancement at the respondent, was simply to master the role that she had been recruited to do, which was processing invoices at speed and with accuracy and that other than this task, her position had no real authority and no real responsibility.

38. When in the office, the claimant appeared to prioritise familiarising herself with the system as a whole in an attempt to understand it. She also made some suggestions and comments about improvement of the system to Ms Ling, which Ms Ling rejected. The claimant alleges that this rejection was "*spiteful*" and took place in a team meeting between 23 and 27 September. The claimant takes this as further evidence of Ms Ling's discrimination and harassment of her. Ms Ling's evidence was that the suggestions were not unwelcome but that they would not have worked in practice.

39. It was also put to the claimant that she did not integrate herself into the team, and by way of example it was put to her that while her team members ate lunch together, she did not join them, which she accepted she did not do. She also rejected offers of help from her colleagues when she was struggling to complete tasks. She objected to Ms Ling moving the barcode printer around on her desk unannounced while she was working, which Ms Ling said she did to try to arrange her desk in a more efficient manner. We accepted Ms Ling's evidence that she would "*try to encourage the entire team to be nice as you appear to be hyper sensitive*".

40. On her first afternoon in the office, we accept Ms Ling's evidence that the claimant was struggling to log on to her computer for quite some time and did not ask for help. Instead, Ms Ling's evidence was that she noticed that the claimant was peering very closely at her computer screen and was then on the phone and she asked her what she was doing. The claimant's evidence was that she was attempting to telephone IT for help.

41. Ms Ling's evidence was that the claimant would have needed help to speak to IT and that Ms Ling thought she should speak to IT on her behalf. Ms Ling took the phone out of the claimant's hand and took over the phone call. The claimant took this as an act of hostility. We consider it to be an illustrative example of the clash of office cultures and attitudes between the claimant and Ms Ling. The claimant considers it insulting that Ms Ling did not allow her to resolve the IT issue at her own pace and on her own. Ms Ling's priority was in getting the claimant on the system and helping with the backlog as quickly as possible, and this was to be achieved by her speaking with IT rather than leaving the claimant to do it, which would have wasted valuable time, in her view.

42. Ms Ling told the Tribunal that in an attempt to discover what might have been causing the problem she noticed that the claimant was peering at her computer screen with her face very close to it, and she asked if the claimant might need reading glasses and recommended that the claimant go for an eye test straight away. There was then a discussion about which was the nearest opticians to the respondent's office.

43. The claimant's evidence to the Tribunal was that Ms Ling "weaponised" the issue of the claimant's eyesight to harass and discriminate against her. The claimant clearly, we find, took great personal offence at the suggestion she might need reading glasses. She repeatedly told the Tribunal that she had perfect eyesight and even at her age at the time (52), when a significant percentage of people wear reading glasses, she insisted she did not need them. The claimant's evidence was that the fonts were too small on the respondent's documents and the invoices themselves and that the problem was not with her eyesight. We note that on visiting the optician, she was prescribed with reading glasses albeit with a low degree of magnification.

44. We accept that this would have been an unexpected turn of events for the claimant on her first day at work. She had a hurried and brief greeting from Ms Ling, had the phone taken out of her hand while on a call to IT, and was then told that she really ought to go for an eye test. We accept that this may have been somewhat undignified for the claimant and it was certainly unexpected. We accept that this did not match her prior expectations of how her first day at work would be, and that she struggled to adapt to the new working environment. However, we find no evidence whatsoever that this was in any way connected with the claimant's race. We find that any other new starter would have been treated in this manner by Ms Ling, had the same circumstances arisen.

45. The claimant alleges that Ms Ling deliberately reduced the fonts on the respondent's documents and instructed Ms Jadhav to do the same. There is no evidence whatsoever that this is the case. We note that the respondent accepts that the fonts were quite small and also note the respondent's evidence that the rest of the team all wore reading glasses. We accepted Ms Ling's evidence that the invoices were mass-printed and that other documents such as her training plan were produced by HR. We find that Ms Ling was very busy and driven by efficiency and completion of the team's tasks and that it is not credible that she would have taken time out of her day to do such things as re-size fonts to harass or discriminate against the claimant. We also accept that the fonts were the same size for all of the documents used by the team.

46. The claimant alleges that Ms Ling and Ms Jadhav discussed her "*health matter*" (that is, her eyesight) in the open plan office and thereby harassed and discriminated against her. We accept that this discussion took place and that it was done at a very general level about the claimant's possible need to wear reading glasses. Ms Jadhav had been allocated as the claimant's trainer on her arrival in the team and we find it highly likely that Ms Ling would have informed her that she suspected the claimant may need to wear glasses. However, we find it unusual that the claimant considered this to be a confidential "health matter". This is an issue that is openly discussed and provided for in the

workplace by responsible employers, and legislated for in display screen regulations that oblige employers to care for the eyesight of employees who use display screen equipment. Indeed, the respondent had the provision of eye tests and basic reading glasses as an occupational benefit. We therefore find that there is no evidence whatsoever that this was done because of the claimant's race or national origin and that anyone in the claimant's situation would have been offered an eye test, and that this would have been discussed by the team leader and the employee's trainer.

47. We accepted Ms Ling's evidence that on her first day in the office, the claimant was required to do very basic matching of a pile of paper invoices with a small number of categories of information on the screen in front of her and that a Ms Jadhav was available to show her how to do this. Once the matching was done, the claimant was to print off a barcode from a small printer/scanner on her desk and attach it to the processed invoice. Ms Ling estimated that, after a short time, the average new starter would be able to process two or three such invoices in a minute. However, the claimant only matched 17 invoices in the whole of her first day processing, which was her second day in the office. She only matched 33 invoices the day after that, on the Wednesday. Ms Ling's evidence was that the claimant was already identified as underperforming by the end of Wednesday, for this reason.

48. Ms Ling's evidence, which we accept, was that she struggled to understand what was taking the claimant so long with the invoice matching. Ms Ling's evidence was that no new starter had ever taken such a long time to master the basic steps of invoice matching. She called the claimant into a meeting room on the afternoon of the Wednesday. Ms Ling, having assumed that the problem must be the claimant's eyesight, initially told her not to come into work until her glasses were ready from the optician, which was Thursday evening. She was therefore told not to attend work on the Thursday. Ms Ling's evidence to the Tribunal was that this was because she did not want the claimant's poor performance to be recorded on her performance statistics, if the issue was down to her eyesight. However, Ms Ling did not explain this to the claimant. We accept that the claimant would have found this humiliating, particularly given her particular sensitivity to suggestions that she did not have good vision.

49. Ms Ling acknowledged that this had not been the right thing to do and so shortly after telling the claimant not to come in the next day, changed her mind and told her that she would be taken off invoice processing and given "ad hoc" tasks to do such as photocopying and printing on the Thursday, which she did. Again, the claimant alleges that this is part of Ms Ling's harassment and discrimination of her due to her Nigerian national origin, but we find no evidence whatsoever that this was the case.

50. It is also the claimant's evidence that during a conversation on this day, Ms Ling asked the claimant where she was from originally. The claimant says this is an act of racial harassment. Although the claimant referred very little to this issue in her ET1 claim form, and very little in her closing submissions to the Tribunal, during her own cross-examination she told the Tribunal that she started crying in answer to this question and was repeatedly saying "*I'm sorry, I'm sorry for my*

accent, I'm sorry I am from Nigeria" to Ms Ling. Ms Ling's evidence was that she was considering how the claimant's issues to do with settling into the work and the team may be addressed and she wondered if the claimant may speak French and that this may be something that could be tried to improve communication. Ms Ling also said that the claimant had told her in her initial interview that she was from Nigeria, which the claimant does not dispute. Ms Ling told the Tribunal that she herself has a pronounced accent and that wondering where the claimant was from and where her accent came from was not intended to be a criticism of the claimant.

51. We find that Ms Ling did ask the claimant this question, but that the claimant did not respond in the way she described when giving her answers to cross-examination questions, in that we do not find that she started crying or repeatedly apologised for her accent, although she may have said sorry once. We accept that the question was asked in the context of a conversation to try to resolve the claimant's issues in getting up to speed with her work. We also accept that the claimant's national origin was not an issue for Ms Ling, in that she had known about it when she recruited the claimant. Also, the claimant was able to complain about issues that she was not happy with in the office, such as Ms Jadhav as her trainer. She was, she told the Tribunal, a trained harassment officer when she worked in the civil service. There is no evidence before us that she considered this an unwanted act of racial harassment at the time. She did not complain about it during her employment. She first raises the issue in her grievance letter to Mr Kahl sent a week after her dismissal, in which she alleges that Ms Ling asked her the question "*with a huge hateful expression on her face*".

52. The claimant was put back on invoice matching on the Friday of her first week, using her reading glasses. She still only matched 77 invoices that day, which was far short of the expected target of 150 by that point. She told the Tribunal that her trainer, Ms Jadhav, did not do a good job of training her. Indeed, on the Friday morning the claimant had a private conversation with Ms Jadhav where she outlined Ms Jadhav's shortcomings, including that her tone of voice needed to be lowered as it was too loud and high-pitched for her.

53. The claimant alleges that it was an unlawful act of discrimination for Ms Ling and Ms Jadhav to prevent the claimant from reading the manual of guidance notes in the office on 13 September 2019 when others, including her comparator Madara, were allowed to do so. Ms Ling's evidence was that the claimant had no need to read the guidance notes at this stage – the work that she had been given to do covered only the first two pages of the booklet. Ms Ling was also concerned that taking time to read the guidance notes would slow her down further.

54. The claimant and Ms Ling had a meeting with Ms Jadhav the same day in the afternoon. Ms Ling told the claimant that it had not been appropriate for her to speak to Ms Jadhav and that it was not her place to do so. She said that team members should not have private meetings. The claimant was affronted by this. Although we find that what the claimant said to Ms Jadhav was perhaps ill-advised, in that she complained about Ms Jadhav's personal attributes and told her they were difficult for her to tolerate, we also find that it was remarkable that

Ms Ling told the claimant and Ms Jadhav that they were not allowed to have meetings. We find that this is evidence of the culture of Ms Ling's team, which is that the harmony of the team and avoiding conflict at all costs was paramount in her mind. This did not sit well with the claimant, who wished to establish herself as an independent and autonomous member of staff and who was happy to provide direct feedback to those whose actions she considered to be unwanted. Ms Ling told the claimant that she would nevertheless have a new trainer, Ms Nicola Iacomi, as of Monday the next week.

55. Ms Jadhav left the meeting and the claimant was reminded by Ms Ling of her initial target of 150 invoices per day and told that as she had not met this target yet, she would have week one of her training written off and would start again with week one the following Monday. Her training would therefore be delayed. Her target was however increased to 200 invoices per day.

56. The claimant's evidence to the Tribunal was that week two was much better. She said that Ms Iacomi was an "*angel*" and she was happy with her. The evidence of the matching statistics shows that the claimant's performance improved that week, although it did not reach her target of 200 per day. Ms Ling's evidence was that she and Ms Iacomi were still giving the claimant easier invoices to process and that the claimant still occasionally "told off" Ms Iacomi when she tried to help her.

The Respondent's Statistical Information

57. As set out above in relation to the claimant's applications for disclosure and strike-out, the claimant has always contested the accuracy and reliability of the statistics disclosed by the respondent for her daily performance, and that of others. As was discussed with the claimant during the hearing, the Tribunal is asked by her to investigate the reason why she was subjected to the less favourable treatment she alleges, and to investigate whether the was subjected to harassment on the grounds of her race/national origin. The Tribunal is not tasked with approaching the figures forensically, as an auditor would, and must instead take a reasonable and proportionate approach to the evidence available.

58. The evidence disclosed by the respondent shows broad, clear and consistent patterns of markedly lower daily performance by the claimant in her first four weeks with the respondent when compared with the initial weeks of her comparators, and that she never, on any measure, met her target of 200 per day. The claimant both disputes the accuracy of these figures and also says that the less favourable treatment and harassment were the cause of them.

59. The respondent's summary table shows that the claimant processed 132 invoices in her first week, 687 in week 2, 307 in week 3 and 434 in week 4. By contrast, Nicola's figures for her first four full weeks were 1376, 1012, 891 and 1596 respectively. Madara's were 665, 694, 884 and 684 respectively, even though Madara was absent for four days during that period.

60. The claimant put the allegation to Ms Ling in cross-examination that she had hidden and manipulated the statistical data to make the claimant look bad, and

as part of her plan of discrimination. However, we have taken note of Ms Ling's second witness statement which explains where the summary figures were taken from, which source data was before us in the bundle. We do not find any evidence that there was manipulation or inaccuracies in the data. There was some disagreement over the various indicators in the statistics; some were "invoices processed" and some were of "invoices matched". The former category was higher as this referred to all invoices considered, which included those with outstanding queries that had not been resolved. The latter was a lower figure as this referred to only those invoices that had been completely processed. We are therefore satisfied that the respondent's statistics and the summaries of those are accurate and a fair representation of the claimant's performance on those measures, and the performance of her comparators, for our purposes.

61. The evidence before the Tribunal was that the claimant's third week was markedly less successful and productive. The claimant acknowledges this and the respondent's statistics also show this. An element of week two training had been introduced, which was price differentials and involved the use of a calculator, and this appears to have slowed the claimant down. Ms Ling's evidence was that price differentials take on average approximately thirty seconds to calculate using a calculator.

62. The claimant told the Tribunal that Ms Ling gave Ms Iacomi tips to pass on as to how to improve her performance, but that these did not help her and being given tips made her anxious and disengaged and under pressure. We find that the claimant felt under pressure to improve and that this did cause her anxiety and that feeling anxious in such circumstances was understandable.

63. We find that being given these tips was perceived as unwanted conduct by the claimant. This is because we find there was a big discrepancy between her expectations of the job and the work environment and she felt her dignity was affected. She also, we find, found herself overwhelmed by the busy office and the pace of the work and frequently was unable to process very simple tasks as a result. We accept that she found this humiliating and that this would have been very stressful for her. However, there is no evidence whatsoever before us that this was anything to do with the claimant's race. We find instead that the respondent's office environment, management culture and the nature of the work was, unfortunately, entirely unsuited to her.

64. The claimant alleged that Ms Ling turned Ms Iacomi against her, having noticed that they were getting along well in the second week. She alleges that Ms Iacomi was encouraged to be "*sneaking*" around the claimant, looking at her screen from behind while she was working. The claimant says this was not happening to anyone else in the team. For example, their colleague Madara was "*approached from the front with respect and able to learn*". We accept that this was happening to the claimant and not to anyone else, as alleged. However we find that the reason for this was because the claimant's performance, as shown on the extracts of the team's matching statistics, was markedly worse than anyone else's. This was, we find, nothing to do with the claimant's race.

65. The claimant's evidence was that intervention in her training by Ms Jadhav and Ms Iacomi was harassment and that it was a further act of harassment not to allow her to work on her own. We find that the claimant was used to working unsupervised in her previous roles and we accept that she may well have felt harassed and under pressure by being under such close supervision. However, given the nature of her role and the work of the team, working quickly under pressure was a key job requirement and she was not fulfilling that requirement. This was, we find, the reason for the intervention of her trainers and not anything to do with her race.

66. In the claimant's fourth week, her performance did not improve. By this stage, the claimant told the Tribunal

    "*I was too worried what other people were thinking about me. I wasn't engaging with my trainer.*"

67. The claimant's evidence was that Ms Ling would interrupt her if she was looking at her screen for more than a minute and that this was harassment. Ms Ling's evidence was that this was not harassment but an attempt to help her. We note that in the circumstances, for the claimant to have been staring at her screen for one or two minutes at that time would have been a long time without working, in Ms Ling's view. The claimant was in her fourth week of training and had still not reached the processing speed expected of her. Ms Ling was moving things around on the claimant's desk, trying to help her speed up, but the claimant took this as further acts of harassment. The claimant's evidence was "*she was making me look unimportant and to degrade me and to devalue me"* by moving things around on her desk, including her barcode printer. The claimant alleges that these are acts of discrimination and harassment on the grounds of the claimant's race, but we find no evidence of that.

68. The claimant was due to have a review meeting with Ms Ling, which was moved to Friday 4 October 2019, then Monday 7 October then Tuesday 8 October 2019. Ms Ling however had already spoken to the respondent's HR on Friday 4th October and the decision to dismiss the claimant had been taken by then. We find that the claimant had not been warned by the respondents of the consequences of her failure to improve, in that she did not appreciate that dismissal was imminent. The respondent had introduced small elements of further training in week four such as credits and debits, which gave the claimant a false sense of security. Her dismissal lacked dignity and she was not, we find, treated well by the respondent in connection with this. However we accept Ms Ling's evidence that she had never had anyone with such poor performance in her 12 years of management and that she had only had one failed probation to deal with in that time. We therefore find that Ms Ling was not experienced in dealing with such a situation.

69. However, we find that this was in no sense whatsoever on the grounds of her race or national origins and that any employee in the same situation as her would have been treated the same way. The dismissal was based on her lack of speed in her role, which was the main requirement for the job, and the fact that

at no point in her first four weeks had she managed to reach her daily target of 200 invoices.

70. The meeting at which she was dismissed on 8 October 2019, which was attended by Ms Johnson and Ms Ling, was particularly brief. There was no discussion about her dismissal. Although there was no legal obligation on the respondent to have a discussion with the claimant, we find that the lack of process added to the claimant's feelings of humiliation.

71. Each party disputed the other's version of what took place on 8 October 2019 after the claimant's dismissal meeting. The claimant's expectation appeared to be that she would be able to take her time leaving the building. Instead of collecting her belongings and leaving straight away, the claimant asked for permission from Ms Ling to send an email, which Ms Ling gave her. The claimant sat at her desk for approximately twenty minutes and composed an email to Dirk Kahl, who she had met on her first day at the respondent. She recalled that he had told her to let him know how she got on, and she wanted to let him know that she had been dismissed. The evidence was that she did not in fact email him that day, but sent him a grievance letter dated 18 October 2019 instead, which we have read.

72. Ms Ling's evidence was that she had to remind the claimant twice that she needed to leave. The claimant alleges that she was embarrassed by this and that other people were looking at her, but this is inconsistent with her decision to remain at her desk for so long after she had been told she was being dismissed. However, we accept that the claimant may have been in shock. Nevertheless, we find it was certainly unusual for a dismissed employee not to leave the building sooner than the claimant did, in the circumstances. We also find it surprising that Ms Ling agreed to let her send an email but that this reflects Ms Ling's inexperience in dealing with such situations.

73.

74. The claimant's evidence was that Ms Ling chased her out of the building, so quickly that she was running, and that she was forced to leave so quickly that she left some of her belongings behind. However, we do not accept that Ms Ling chased the claimant out quickly. We find that Ms Ling had understandable concerns about the time it was taking the claimant to leave, given that she no longer worked for the respondent, and that it was reasonable for her to insist that the claimant leave when she did.

75. Subsequently the claimant wrote, as described above, to Mr Kahl with her grievance about her treatment. This grievance was heard by Mr McGirr and the appeal against the grievance outcome was heard by Mr Newbon. However, the claimant does not complain about these processes and so no evidence was heard from these two witnesses, and we make no findings of fact in relation to the grievance process.

The Law

76. Direct discrimination: Did the respondent commit acts which treated the claimant less favourably that it treated or would treat a comparator, being a person not of the claimant's race in not materially different circumstances? Was that less favourable treatment because of the claimant's race? (s13 Equality Act 2010).

77. Harassment: Was any of the respondent's conduct of which the claimant complains unwanted and if so, did it relate to the claimant's race? Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? When assessing whether the conduct had that effect, the Tribunal is to consider the claimant's perception and the other circumstances of the case and whether it is reasonable for the conduct to have that effect. (s26 Equality Act 2010).

78. In relation to determining whether an act constitutes harassment, there is a subjective question and an objective question to be determined by the Tribunal. The subjective question is whether the claimant considers herself to have suffered the harassment and the objective question is whether it was reasonable for the conduct to be regarded as harassment, taking into account all the circumstances of the case. (*Pemberton v Inwood* [2018] EWCA Civ 564). The Tribunal was also referred to *Land Registry v Grant [2011] EWCA Civ 769* by the respondent on this issue.

79. Comparators: The comparator must not share the claimant's protected characteristic and there must be "*no material difference between the circumstances relating to each case*" when considering whether the claimant has been treated less favourably than a comparator, as per s23(1) Equality Act 2010. It is also possible for a claimant to construct a purely hypothetical comparison if no suitable actual comparator is available.

80. Burden of proof: Section 136(2) Equality Act 2010 states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. This means that once there are facts from which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof is then on the respondent to prove a non-discriminatory explanation for any less favourable treatment. Section 136(3) states that this does not apply if the person shows that he or she did not contravene the relevant provision.

Application of the Law to the Facts Found

81. Taking each of the claimant's allegations in turn, we conclude as follows.

Direct Race Discrimination s13 Equality Act 2010

82. **Ms Jadhav and Ms Ling allegedly denying the claimant the opportunity to read guidance notes in the workplace on 13 September 2019**. We find that the claimant was denied this opportunity when others were allowed to do so. She was therefore subjected to a detriment, even if she had only needed to read the first few pages of the notes.

83. Was the detriment because of her race or national origins? The claimant has indicated that Madara should be her comparator, but their circumstances are too different to be true comparators. Madara's first week at work was later in September 2019 and she had processed over 600 invoices that week, despite that not being a full week. A hypothetical white, British member of staff who was in her first week at the respondent but who was also a slow performer would, we find, have also been prevented from spending time in the office reading the guidance notes. The difference in treatment was not because of the claimant's race. Ms Ling's intention was, we find, to focus on the tasks given to the claimant and to discourage her from straying from these tasks, and Ms Jadhav was the same.

84. We note that when, in week three, a new element was introduced to the claimant's work, it did slow her down further, and we accept that Ms Ling was reasonable to limit the claimant's time to study the guidance notes. We find that the claimant found this lack of independence difficult to accept, but we find that this was Ms Ling's management style and the way she ran her team, by allowing the team little discretion in the early stages of their training. This was a style we find was applied to all of her team and the claimant was no different.

85. **The respondent allegedly failing to follow the claimant's training plan by failing to carry out periodical reviews, setting and reviewing relevant targets and having a job chat.** We find that on the balance of probabilities the claimant has not established that she has been subjected to a detriment in this regard. On her first day in work the claimant was set an initial target of 150 invoices a day, which was then increased to 200 per day by Ms Ling during her performance review on 13 September. The claimant did not follow the training plan as expected because she was not able to reach the initial targets. She had a performance review on 13 September and frequent chats with Ms Iacomi and Ms Ling, but found these intrusive and unhelpful.

86. **Ms Iacomi allegedly monitoring the claimant's work closely by moving her chair close to her without telling her and watching her screen from behind.** We accept on the balance of probabilities that this occurred. We also accept that the claimant perceived this to be less favourable treatment, in that she found the treatment embarrassing. We accept that this treatment did not happen to her colleagues at the time. However, there is no evidence whatsoever that this happened on the grounds of the claimant's race. This happened because of the differences in the claimant's performance when compared with other new starters in her team. A white, British employee with the same performance issues would, we find, have been treated in the same way.

87. We have found above that the department's working environment was very fast-paced. There was a very high value placed on speed and volume of processing and we have already noted that this culture and environment would have been very different to the claimant's previous workplaces. The claimant has listed several comparators such as Nicola and Madara who she says were not of the same national origins as her and did not suffer less favourable treatment. However, as we have set out above, the claimant's performance was markedly

worse than that of her colleagues and that of her comparators and it was this, we find, that explained the difference in treatment that the claimant received.

88. **Ms Ling deliberately giving the claimant duplicate or foreign invoices and Ms Ling deliberately giving the claimant papers to work with in unusually small fonts.** We do not accept that the claimant was sabotaged in either of the ways alleged by Ms Ling and as we found earlier, Ms Ling was far too focussed on the performance and efficiency of her team to wish to deliberately slow anyone down. There was no evidence whatsoever that the claimant was subjected to less favourable treatment in either of these regards.

89. **The respondent failing to follow company procedures by dismissing the claimant without extending her probation period and by Ms Ling escorting her from the premises (a reference to paragraph 15 of the Grounds of Complaint).** We accept that it was less favourable treatment for the claimant to be dismissed without allowing her to complete her probation period, or by failing to extend it beyond three months as had happened with other employees. We also accept that the claimant will have been highly embarrassed to be escorted from the premises, having been dismissed. We also accept that the dismissal itself is an act of less favourable treatment. However, there is no evidence whatsoever that this was done because of the claimant's race and a hypothetical white British employee in circumstances not materially different to those of the claimant would have been treated in the same way.

90. As set out above, Ms Ling's evidence was that the claimant was the worst performing new starter in her twelve years of management. We also found that the claimant had struggled to get on with her colleagues and had complained about Ms Iacomi, Ms Jadhav and Ms Ling herself in the short time that she had been in the team. Her performance had remained steadily poor throughout her period in the role, without any clear sign of improvement. She had to be escorted out of the premises because she showed no indication of being prepared to leave within a reasonable time. We find no evidence from which we could conclude that the reason for the difference in treatment was on the grounds of the claimant's race.

91. **Ms Ling inciting Ms Jadhav and Ms Iacomi to train the claimant badly.** This allegation was not made out on the evidence before us. Ms Ling gave tips to improve the claimant's efficiency to Ms Jadhav and Ms Iacomi, which the claimant did not appreciate or find helpful, but there was no evidence that Ms Ling purposefully incited them to train the claimant badly. Indeed, we accept Ms Ling's evidence that she encouraged the team to be nice because the claimant was, she felt, "*hyper sensitive*".

92. **Dismissal.** We have addressed this allegation above.

<u>Harassment: s.26 Equality Act 2010</u>

93. **Ms Ling responding spitefully in a meeting between 23 – 27 September 2019.** We found Ms Ling's communication style to be concise and considered. In providing answers to questions while under oath, she paused to think before

responding, even when the questioning was becoming very intense. Ms Ling was, we found, very focussed on efficiency. It is our finding that the claimant misinterpreted this measured approach as hostility, including in meetings with the claimant. Therefore although the claimant perceived Ms Ling's response as unwanted conduct (and indeed "*spiteful*") that created a hostile atmosphere for her, we do not consider that it related to her race or that it was reasonable for Ms Ling's comments to have had that effect. We find that Ms Ling was measured and professional with everyone, and was not concerned primarily with whether this made her popular.

94. **Ms Ling placed the claimant under undue pressure, did not allow her to stop typing and did not allow her to complete an on-line Health and Safety course.** As we have found above, Ms Ling's focus was on productivity and efficiency and her team's working environment was fast-paced. The claimant felt, we accept, under pressure by this and perceived this as unwanted conduct that created a hostile atmosphere for her. However, we do not consider that it related to her race or that it was reasonable for the working environment to have had that effect. The claimant was told from the outset that the team worked under pressure and in a fast-paced environment, but that environment was one that she found overwhelming and unpleasant. This is not harassment on the grounds of her race.

95. We do not find that the allegation about the Health & Safety course is made out on the facts. We do not find that there was any unwanted conduct in this regard.

96. **Ms Iacomi "snuck up secretly" on the claimant and Ms Jadhav shouted at the claimant when training her.** We accept that the claimant found these actions to be unwanted conduct. The claimant, as we have already concluded, was unsuited to the working environment of the team and found it overwhelming. She found Ms Jadhav's voice to be too high pitched and harsh and asked her to lower her voice. She objected to Ms Iacomi observing her screen from behind. We accept that the claimant perceived this as unwanted conduct that created a hostile atmosphere for her, but we do not consider that it related in any way to her race or that it was reasonable for it to have had that effect.

97. **Ms Ling asked the claimant on 13 September 2019 where she came from originally**. We accept that Ms Ling asked the claimant this question, but we do not accept that the claimant at the time considered this to be unwanted conduct. The claimant volunteered her Nigerian national origin at her interview with Ms Ling and was recruited to the organisation and clearly recalled this because she refers to it in her grievance letter to Mr Kahl on 18 October 2019, in which she says "*she heard me speaking for almost 1 hour and I did tell her where I came from, I said I have not been able to change my accent*". We find that the claimant understood from this that the issue was one of communication. The team is very diverse in terms of its national origins and Ms Ling herself has a heavy accent. The claimant was a trained harassment officer and would have had, we find, a clear awareness of what constituted harassment at the time. She did not raise this as an issue at any time prior to her dismissal, despite being able to provide direct feedback to colleagues on other issues at the time.

98. The respondent's closing submissions helpfully reminded us of *Pemberton v Inwood* [2018] EWCA Civ 564 at paragraph 88, as per Underhill LJ: "*The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect."* In the circumstances of the case, we do not consider that the claimant found that her dignity was violated nor an adverse environment created at the time, but that this happened as a result of her dismissal and has caused her to revisit other events and perceive them differently after she was dismissed.

99. **Ms Ling moving the claimant's barcode printer.** The claimant's allegation in this regard was one of sabotage and also that this was done to embarrass her. We accept Ms Ling's evidence that she did this in an attempt to improve the claimant's speed and efficiency. We have found above that Ms Ling did this without first seeking the claimant's consent to do so and that the claimant found this to be a hostile act of interference and an unwanted act. We find that Ms Ling's management style was direct and focussed on efficiency and that this intervention was her attempt to assist the claimant. It was not done on the grounds of the claimant's race.

100. **Ms Ling wrongly labelled the claimant as having a vision problem and Ms Ling and Ms Jadhav discussing the claimant's eyesight in an open plan office**. As we found above, the claimant took great exception to being described as needing reading glasses. She considered this to be a humiliating allegation. During her cross-examination of Ms Ling, she repeatedly referred to this and accused Ms Ling of trying to make out that the claimant was "*half blind*." We accept that the claimant considered the suggestion that she needed reading glasses to be a hostile act and that Ms Ling and Ms Jadhav discussing this to be a further act of harassment. However, we do not find any evidence to conclude that this related to her race or that it was reasonable for the issue of her eyesight to have had that effect.

Conclusion

101. In conclusion, we find that none of the claimant's claims are made out. It is clear that the experience of working at the respondent was one that the claimant found extremely stressful and difficult, in particular found the act of being dismissed to be distressing and humiliating. We accept that she is still very upset about this. However, having considered her evidence and that of the respondent, we do not find that this experience was caused by or connected with her race or national origins, such that we do not find that the respondent's conduct constituted unlawful discrimination.

Employment Judge Barker

Date: 6 December 2021

JUDGMENT AND REASONS
SENT TO THE PARTIES ON
Date: 7 December 2021

FOR THE TRIBUNAL OFFICE