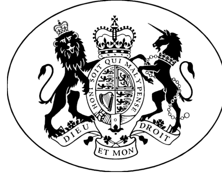

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Oladipo	**v**	Lush Retail Limited

Heard at: London Central Employment Tribunal **On: 28-30 March 2017**

Before: Employment Judge Norris **Members: Ms N Foster**
Mr R Lucking

Appearances
For the Claimant: In Person/Mr L Ogilvy, Consultant
For the Respondent: Mr G Self, Counsel

JUDGMENT

The Claimant's claims of direct race discrimination and victimisation are not well founded and accordingly fail.

WRITTEN REASONS

The Issues

1.1 On 20 December 2016, Employment Judge Snelson conducted a Preliminary Hearing (Case Management) into this matter, and set out the complaints and issues, which were as follows:

a) Victimisation; and
b) Direct racial discrimination.

1.2 For the purposes of the victimisation claim the Claimant relied on the following "protected acts":

a) Her text message of 14 August 2016;
b) Her email of 25 August 2016; and
c) Her remarks in a telephone conversation of 30 August 2016.

The detriment alleged to have been suffered is dismissal, which the Claimant says is because she had done one or more of those acts. The Respondent agrees that the Claimant was dismissed but denies that the dismissal was because of (or in any way influenced by) any protected act.

1.3 For the purposes of the direct discrimination claim, the Claimant, who describes herself as black and relies on her racial characteristic of colour, says that the Respondent treated her less favourably than her white colleagues on a training course in Poole by subjecting her to the following detriments:

a) Providing more “hands-on” training and support to the white colleagues; and
b) Reserving “talking trainer treatments” for the white colleagues; and
c) Removing her from the course.

The Respondent denied applying any different treatment or standard to the Claimant as against her white colleagues on the course. It agreed that she was removed from the course, but sought to justify the decision to that effect and denied that it was because of, or in any way influenced by, her race or the race of any other person(s).

1.4 At the outset of the Hearing, we established that these were still the grounds relied on by the Claimant. The Respondent conceded that the text message of 14 August 2016 and the remarks in the phone conversation on 29 August 2016 (not in fact 30th, both parties agreed), i.e. 1.2a) and c) above, were protected acts. Further concessions were made subsequently to which we return below.

The Hearing

2.1 On day one, the Claimant called a former colleague, Mercedez Gonzalez and gave evidence herself. Both were cross examined by Mr Self. We also had a statement from a former colleague Olivia Lee, who did not give live evidence; we placed limited weight on her statement, which did not address the issues in any event. On day two, the Respondent called Alanda Colegate, Spa Trainer, Nikki Camm, Spa Training Manager, Sonya Fanson, Customer Care Manager (at the relevant time Spa Support) and Elise McKenna, Spa Trainer. On day three, the Respondent called Nick Back, People Support Manager. Each of the Respondent’s witnesses was cross examined.

2.2 Initially, the Claimant was representing herself in this matter, as she had done in December before Employment Judge Snelson; he had extended time for the Hearing from two to three days, to include remedy if appropriate. After the timetable for the completion of the matter had been agreed on day one, the parties were sent away while the panel read the witness statements and pages of the bundle referred to therein. When the parties returned, the Claimant was represented by Mr Ogilvy, who said that he was acting without charge for the Claimant, to whom he said he had been referred by a mutual friend.

2.3 It was explained to Mr Ogilvy that the matter had been timetabled and that he would have to ensure that he was up to speed with the issues and facts because there was no opportunity for any slippage. Mr Ogilvy agreed. However, on numerous occasions during the Hearing, he had to be reminded not to lead the Claimant or Ms Gonzalez, and of the importance of focusing on the issues, particularly during his cross examination of the Respondent’s witnesses. Mr Ogilvy appeared aggrieved to be so reminded, and seemed similarly frustrated when he was asked not to interrupt Mr Self’s cross-examination of the Claimant. In particular, he sought to object when Mr Self put

to the Claimant that a reference to her being "older" than her colleagues had been a reference to age and not to race. The Employment Judge asked Mr Ogilvy to make a note of such points as he wished to make and to address them either in re-examination or submissions, but noted also that this had been a perfectly proper question to put to the Claimant.

2.4 The Employment Judge further reminded Mr Ogilvy that it was not proper for the Claimant to take her own paperwork to the witness table and that she would have to use the bundle provided for that purpose, in common with all the other witnesses; and at one point the Employment Judge (and on another occasion Mr Self) drew to Mr Ogilvy's attention that he was advancing a case that appeared contrary to that being put forward by the Claimant.

2.5 It became apparent that the Claimant would have to conclude her evidence on day two and the Employment Judge explained how the Claimant would, in terms, be able to "re-examine" herself following panel questions, by elaborating on her answers given in cross examination at any stage where she felt she had not made her point clear. Mr Ogilvy had said that he would not be present for the first part of the following day and so asked for the Claimant instead to be re-examined on his return, by him. The Employment Judge refused, given the tightness of the timetabling, the fact that the Hearing was already running slightly late and the fact that it was not appropriate to wait for Mr Ogilvy's return when he should not have taken the case on if he lacked the time to attend.

2.6 Mr Ogilvy then asked for the Employment Judge to re-examine the Claimant if he provided in writing the questions that he would have asked. Again, the Employment Judge refused on the basis that this would require her to "enter the arena" which is clearly inappropriate. The Claimant was assured that the overriding objective requires the Tribunal to manage proceedings so that the parties are on an equal footing.

2.7 On the morning of day two, the Employment Judge explained to the Claimant that she was free to instruct the representative of her choice, and that while there had been differences of opinion between Mr Ogilvy and the panel the previous day, this would have no impact on the outcome of the hearing. This was to address the suggestion, made in an undertone at one stage by Mr Ogilvy, that the panel had already made up its mind, when he was reminded of the importance of adhering to the issues and was prevented from cross examining on details that did not impact thereon. It was re-confirmed that Mr Ogilvy is not registered with the Claims Management Regulator, and in the circumstances, no money should change hands between the Claimant and Mr Ogilvy in any way. The Claimant acknowledged this and continued to be represented by Mr Ogilvy.

2.8 However, Mr Ogilvy then excused himself and left, he said to attend to another matter in the Employment Appeal Tribunal. He returned after lunch on day two, when the Claimant, who had represented herself in his absence, had just concluded her cross-examination of Ms Camm. However, as the panel started to ask its questions, the Claimant had asked whether she could ask some further questions of her own, and this had been permitted. Mr Ogilvy then said that he also had questions for Ms Camm. These were not allowed, on the basis

that the Claimant had already finished cross-examining that witness and because Mr Ogilvy had not heard any of the cross-examination so that there was a distinct possibility that he would go over ground which had already been covered.

2.9 All the witness evidence was concluded and submissions, to which we return below, presented by midday on day three, leaving the panel to deliberate in Chambers until around 15.45, when judgment was given. At the end of the Hearing, Mr Ogilvy requested written reasons and request this was followed up in writing by the Claimant.

The Law

Direct discrimination

3.1 Section 13 Equality Act 2010 (EqA) defines direct discrimination as being circumstances where *"because of a protected characteristic, A treats B less favourably than A treats or would treat others".* Race is one of the protected characteristics, and specifically includes colour.

3.2 The comparison between the treatment that A affords to B and that which A affords (or would afford) to others is designed to shed light on the reason for the treatment. Section 23 says that there must be no material difference between the circumstances relating to each, or, in other words, in considering whether any proposed comparator is an appropriate one, like must be compared with like. If there is no actual comparator, a hypothetical comparator may be used.

3.3 Section 39 EqA makes it unlawful for A to discriminate against B in the terms of his employment, or in the way that A affords B access to opportunities for promotion, training etc, or by subjecting B to any other detriment.

Victimisation

3.4 Section 27 EqA defines victimisation as circumstances where A subjects B to a detriment because B does a protected act, or where A believes that B has done or may do a protected act. Under section 27(2), a "protected act" includes (for present purposes) making an allegation, whether or not express, that A or another person has contravened the EqA, or doing any other thing for the purposes of or in connection with, the EqA.

3.5 Accordingly, a claimant seeking to show that they have been victimised must show that they have been subject to a detriment (which can clearly include dismissal) and that they were so subjected because they had done a protected act. While such a claimant does not have to compare themselves to someone else, they must establish that the alleged perpetrator knew or believed they had done a protected act.

Burden of proof

3.5 Section 136 EqA deals with the burden of proof and, at (2), states:

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

However, it goes on:

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

3.6 In other words, a *prima facie* case must be proved, and it is for the Claimant to discharge that burden. The burden of proof provisions have a role to play when there is room for doubt as to the facts necessary to establish discrimination, but in a case where a tribunal is in a position to make positive findings on the evidence one way or the other, they have no role to play (see *Hewage v Grampian Health Board*[1] and *Chief Constable of Kent Constabulary v Bowler*[2]).

3.7 Although a two-stage approach is envisaged by section 136, it is not obligatory and it may be more appropriate to consider the reason why the employer treated the claimant as it did. If the reason was one in which the protected characteristic played no part whatsoever, the claim fails. The Claimant correctly alluded to the fact, as held in numerous cases including *King v The Great Britain-China Centre*[3] and *Chattopadhyay v Headmaster of Holloway School*[4], that it is rare for claimants to be in possession of overt evidence of discrimination. There is considerable importance in the drawing of inferences from primary facts. Nonetheless, as we explained to the Claimant in this matter at the outset of the Hearing, there must be more than a difference in status and a difference in treatment to establish discrimination[5], even though it may be that such differences together may be sufficient to move the burden to a respondent to show that it did not act unlawfully[6].

Findings of fact

<u>Background to the claims</u>

4.1 The Claimant was employed by the Respondent, which is a retail company selling handmade cosmetics and operating in several countries. The Claimant first worked for the Respondent as a Christmas temporary worker and then as a sales assistant in Oxford Street. She wished to become a spa therapist, as the Respondent also operates what we gather are high-end spa facilities at some of its premises, and she applied for the training course. This was, at the time, an intensive seven-week residential course in Poole, Dorset, developed by Ms Camm and others, costing the Respondent up to £10,000 per trainee.

<u>The training in Poole, Dorset</u>

4.2 The Claimant's initial application was unsuccessful and she resourcefully found herself employment as a therapist in a five-star hotel which enabled her second application to succeed, and she was placed on the training course to start on 29 July and continue until 20 September 2016. Accommodation and food were to be provided. A phone line and email address were given for any questions arising; however, there was no indication of what might happen if the candidates were not deemed to meet the standards of training set. In addition, the Claimant who, it is common ground, had passed her probation period as a

[1] [2012] IRLR 870 SC
[2] UKEAT/2017/0214_16
[3] [1991] IRLR 513
[4] [1982] ICR 132
[5] See *Madarassy v Nomura International PLC* [2007] IRLR 246
[6] See *Hussain v Vision Security* UKEAT/0439/10

sales assistant, was not informed that she would enter a new probation period as a therapist.

4.3 There were eight candidates, including the Claimant, on the course at that venue at that time. These comprised seven women and one man. The Claimant was the only black trainee, Ms Gonzalez is Hispanic American and we gather that the other six on the course are white. We find that the heavily redacted document in the bundle which refers to the trainees by their sex, nationality and colour was compiled by Ms Camm for the purposes of this Hearing; it is clearly inaccurate and we attach no weight to it.

4.4 We find as a fact that the first three days of the course (Monday 1 to Wednesday 3 August 2016) were taught by a Ms Terri Bebb and on the fourth day two trainers, Ms Colegate and Ms White, took over from Ms Bebb. The Claimant was somewhat vague about dates, whereas we found Ms Colegate's recollection more convincing.

4.5 The layout of the premises was in dispute. The Claimant recalled that the training facility was completely open plan whereas Ms Colegate gave evidence that there was a large room with two smaller adjacent and self-contained rooms. She said there were five couches in the main room and one each in the smaller rooms, the aim being to simulate the spa experience as far as possible and for the trainees to practice what they had learnt in a realistic environment without distraction from others.

4.6 We tend, on balance, to accept Ms Colegate's evidence as to the dates and the layout of the training centre. The latter reflects what we understood from Ms Gonzalez, who said she did not see anyone other than one colleague performing her routines, and in part also confirms what the Claimant said, which is that she would ask colleagues when they came out of the room what their experience had been like. If it was all open plan and she could see what was going on, she would have had no need so to ask. It was however said of the Claimant that she needed to be told to position herself better within the main training room and pay careful attention, so that she did not need to ask questions about things which had already been covered.

4.7 Once Ms Colegate and Ms White arrived, all the trainees as a group were found to be behind the standard normally expected at that stage of the process, and therefore, the Respondent cancelled the appointments of external clients (who, we heard, come in for free treatment and give feedback), in favour of repeating some of the training with the trainers in private. However in particular it was considered that the Claimant, Ms Gonzalez, Ms Lee and a Ms Robins were falling further behind than the others.

4.8 We have seen and do not propose to rehearse in detail the lengthy feedback forms for the Claimant from the trainers. We accept the evidence of Ms Camm who explained that there are minor failings which can easily be put right but there are others which are harder to correct. In the Claimant's case, the failings were a combination of the two. While the feedback is detailed from the trainers, we acknowledge it is likely in these circumstances that it will have elements of subjectivity, because we are talking about a matter of personal preferences e.g.

in the firmness of touch. However, although we accept the Claimant's evidence that when a client came in from outside and enjoyed the Claimant's massage, that client had no complaints at all - indeed quite the reverse - we also accept the Respondent's evidence that this must be seen in the context of someone who is receiving a free treatment and is not trained to observe the technical aspects of the process. This can be contrasted with the trainers themselves.

4.9 It was August on the south coast, and it appears that there was a warm temperature in the room (we heard 24 degrees Celsius was the default) to keep the clients comfortable, and there was a perception that the Claimant should have paid more attention to her personal hygiene. However, the trainers chose to address this in the group in general feedback but not with the Claimant personally. In addition, there are references in the witness statements and contemporaneous notes to the Claimant wearing ill-fitting uniform, but it was the Respondent who had supplied the uniform. Neither of these issues was canvassed with the Claimant at the time and we afforded no weight to either aspect of this evidence, as it had no bearing on the issues.

4.10 We heard evidence that Ms Robins was given more "talking trainer treatments" (i.e. where the trainers give feedback during the spa treatment rather than waiting until the end to go over it) to perform than the other trainees and we accept this evidence, which the Respondent does not dispute. Ms Robins, it transpires, did not have even the background and experience of the Claimant, and while it may be surprising she was accepted on the course at all, it was not Ms Colegate or Ms White who accepted Ms Robins. At around that time however, we heard evidence and again accept that the Respondent was changing the focus from exclusively residential to a mixture of store-based and residential training, and in that light the requirement for experience was less prominent. In any event, Ms Robins did receive additional assistance, given that her starting point was below that of the rest of the group. We find she was the only one who received more talking trainer treatments and hands-on training than the rest of the group and we do not accept the Claimant's evidence, which conflicted with that of Ms Gonzalez as well as the Respondent's witnesses, that such treatment was reserved for all her white colleagues.

<u>The Claimant's return to London</u>

4.11 Despite the cancellation of external clients and additional training given, the Claimant and Ms Gonzalez were called in on Friday 12 August 2016 and informed that they were to return to the Oxford Street store (where they were due to be based once their training was "signed off") to continue their training in London. Ms Robins was to have been based at the Bath store if she qualified, and since that store was not geared up to on-site training, her employment was terminated instead. According to the letter in the bundle, she was deemed to have failed her probation. Ms Lee was what might be termed the best of the lowest-performing trainees, and therefore she was initially retained in Poole, but we accept the evidence of Ms Colegate that Ms Lee did not pass her "sign off" i.e. was not assessed as adequate, and once the Claimant had been dismissed from the Oxford Street store, Ms Lee was also sent back to London within a couple of days.

4.12 This return to London, we accept, put the Claimant in significant difficulties vis à vis accommodation because, not unnaturally, she had not been expecting to require somewhere to live in London before the end of September. The Respondent did not see this as its problem. The Claimant and Ms Gonzalez were given until the end of the weekend to return to London and were expected to go in to Oxford Street on Monday 15th August.

4.13 Additionally, the decision, we find, to return them had been taken in Poole by Ms Colegate and Ms White but required the ratification of the store manager at Oxford Street, Ms Constantine, who we gather is the daughter of the CEO, Mark Constantine. This meant that the Claimant's direct line manager Ms Gorman had no knowledge of the fact that the Claimant and Ms Gonzalez were returning. Steps had to be put in place to return Ms McKenna, who was also conducting training in a separate facility in Poole, to London to continue with the training for the Claimant and Ms Gonzalez. This could not happen immediately, so Ms Gorman herself took over temporarily, although we accept the Claimant's evidence that this was in conjunction with servicing her own spa clients and meant that although when training was given it was one-to-one or one-to-two, it was not exclusive and focused as it would have been on the training course in Poole.

<u>The Claimant's complaint to Ms Rogers</u>

4.14 On Sunday 14 August, the Claimant texted Ms Rogers, an administrator for the training course, saying that she was intending to lodge a complaint and alleging for the first time that she had been the subject of discrimination being practiced and indeed outright white supremacy on the part of the trainers. She said that their treatment of her was due to her colour and weight. The treatment of which she complained was setting her and Ms Gonzalez up to fail and giving "talking trainer treatments" to their white colleagues and not to them. Ms Rogers did not respond to the complaints of discrimination but she did deal with the Claimant's expense form which was the other issue addressed in the Claimant's text. The Claimant did not, at least immediately, follow this up with a complaint as she had indicated she intended to do, nor did Ms Rogers refer the matter onwards.

<u>The Claimant's employment in London</u>

4.15 The Claimant and Ms Gonzalez continued to be trained, first by Ms Gorman and then by Ms McKenna, at Oxford Street. The Claimant confirmed in her evidence that she was not alleging that that element of the training had any element of race discrimination. We have seen some Facebook exchanges the exact date of which is unclear, between the Claimant and Ms Robins in which the Claimant suggests that she was receiving top quality training in Oxford Street and saw being sent back there as the best thing that happened. We do accept that the Claimant was endeavouring to put a brave face on what had been an unpleasant and stressful experience. However, it does also have to be said that she expressed herself in terms that were rude and nasty. For instance, the Claimant said of another trainee who was due to return to Oxford Street and with whom the Claimant had shared a house uneasily while in Poole that she was a "silly ass little girl" and on her return to Oxford Street had "better stay the fuck out of my way".

4.16 We find that this exchange did not come to the Respondent's attention until later, probably after the dismissal. However, we do find that this and other instances of the Claimant's behaviour tend to support the suggestion that she could be in some circumstances as aggressive and threating although she was unable before us to see any threat in the words she used.

4.17 The Claimant spoke to Ms Fansom on Bank Holiday Monday 29 August 2016. There is a conflict over whether the Claimant said she wanted her complaint dealt with informally by Ms Fansom as Ms Fansom says, or formally as the Claimant says. We can see that Ms Fansom had prepared questions in advance and that she kept a handwritten note from which it appears she stuck fairly closely to those questions and which she later typed up. The Claimant did not keep any notes of the discussion, and regrettably Ms Fansom did not send hers to the Claimant. However, we accept that it is accurate, because it is clear to us that Ms Fansom's actions were consistent with its contents; secondly because the Claimant appeared to want to return to Oxford Street and continue in her role; both then and before us the Claimant was very reluctant to make detailed or explicit allegations of race discrimination; and lastly because that is both the normal way of dealing with complaints across most industries and expressly so in the Respondent's grievance policy. We can see that the Claimant would have felt as though she had been dismissed when she was sent back to Oxford Street. In her eyes, and not surprisingly, this was a real setback. However, we find that she did believe she was back on track by the time of her actual dismissal.

<u>The Claimant's dismissal</u>

4.18 The dismissal itself arose following three complaints about the Claimant from different members of staff. The first was on 27 August and arose because the Claimant was said to have been rude to a receptionist colleague, Ailsa Scott, when there was a discussion about what was happening to the Claimant's treatments. Ms Scott complained that the Claimant had been abrupt, rude and condescending and left her speechless, giving exactly the opposite vibe from what one would expect in a spa centre. This was the first time Ms Scott and the Claimant had spoken. The email from Ms Scott in which she briefly details this incident was in the bundle. Both the second and third complaints arose from incidents on 1 September 2016 and involved Gemma Holt and Jasmin Mondata in the communication and co-ordinations team. Both complained that the Claimant was rude and aggressive.

4.19 We have found that the Claimant had passed her probation as a customer assistant and had not been told of, much less agreed to, the imposition of a further probation period as a therapist. In those circumstances, we gather that the Respondent's policy should have been to offer the Claimant a loan. When the Claimant was told she was not qualified for a loan, we can understand and greatly sympathise with her in that she was homeless and without funds through a situation completely unforeseen by her. However, while we can accept that she was, with reason, stressed, unhappy and worried, this appears to have manifested itself in rudeness and aggression to colleagues.

4.20 While neither of these conversations involved Mr Back in People Support we accept his evidence that he had a similar experience with the Claimant. He

said that they spoke on the phone and two things are of significance. First he said that at first the Claimant spoke loudly but not aggressively; however, she became increasingly aggressive so that he had to tell her twice to lower her voice and she continually interrupted him, and secondly, he did not know she was black until she told him.

4.21 On 1 September, Ms Constantine and Ms McKenna had a conversation in which they concluded that while the Claimant had improved as a therapist, she was still not at the standard required and, in light of her recent conduct issues, they would terminate her employment, the latter issues being pre-eminent in that decision. As a Lush representative, she was required to epitomise the brand, and she did not. Mr Back was called upon to draft a blueprint for the meeting, and the Claimant was dismissed with no right of appeal the following day.

4.22 We also note that there was a record of the Claimant having been spoken to about her attitude prior to being accepted onto the therapists' training course although we do have concerns that the record itself was not shared with her. Nonetheless, there is evidence before us that she may have been unaware of the significant negative impact her conduct had on others. We have seen the message sent subsequently to Ms Colegate in which the Claimant addresses her as the epitome of evil, claiming that darkness seeps through her veins and describes her as a racist and a bigot and says she hopes her children get treated "ten times as worse" as Ms Colegate has treated her. Without doubt this is unpleasant and grossly unprofessional, and yet the Claimant was unable to accept before us any concern as to the effect that this and other messages in similar vein would have on their recipients.

4.23 The Respondent has conceded, and we therefore find as a fact, that there was a signal failure to follow even a vestige of procedure on its part in dismissing the Claimant. She was called to a meeting at which she was presented with a *fait accompli* of her dismissal and no right of appeal because, the Respondent said, she had not completed her probation. As we have found, this is incorrect. There was a cursory investigation and then Ms McKenna and Ms Constantine decided that the Claimant's employment should end. They did not allow her to address them about the allegations against her before the decision was taken.

4.24 While the Respondent paid the Claimant in lieu of a month's notice that was, in reality, the only point in its favour. Had this concession not been made it would have had no prospect at all of defending its actions in this regard from a best, or even good, practice perspective. However, deplorable though those actions may be, and risky as they actually turned out to be - because they led the Claimant to think it was because of her protected acts – the issues before us do not include evaluating the Respondent's fairness, or lack thereof, in procedure. Mr Self says missing out a full process for employees who have been with the business for under two years is common practice up and down the country, but our experience as an industrial jury is that, increasingly, companies of this size and with aspirations to high ethical practice do not play fast and loose with basic disciplinary procedures.

Submissions

5.1 We had the benefit of submissions from both representatives on which they each expanded orally. We considered both the written and additional comments carefully in our deliberations.

Respondent's submissions

5.2 For the Respondent, Mr Self argued that such differences in treatment as there were, were dependent on the different needs of the different trainees; that the Claimant's removal from Poole to continue her training in Oxford Street was not a detriment nor less favourable treatment than the comparators; that while two acts were conceded as being "protected acts" within the EqA, it was denied that the decision makers who dismissed the Claimant knew of them.

5.3 It was permissible for the Respondent to have high standards within its training regime and high behavioural expectations within the spa; the Claimant's temper and aggression were evidenced in the bundle and provided a clear explanation for the Respondent's conduct in dismissing her; her failure to meet the standards set was, while in part subjective, documented. The Claimant failed to complain about any allegation of discrimination until after she had been told she was being sent back to London, and she had failed to provide sufficient evidence to shift the burden of proof. She was prepared to make untrue statements to achieve an end goal. It was not permissible to try to change the protected acts to match the evidence as it unfolded before the Tribunal.

Claimant's submissions

5.4 For the Claimant, Mr Ogilvy conceded that in all probability, it was the Claimant's alleged conduct and not her capability that prompted her dismissal. The Claimant had been treated less favourably than Ms Lee because the latter was given more chances to be kept on when she failed the assessments of her massage skills. He relied on the external client assessment of the Claimant's massage skills as "just fabulous".

5.5 In his "legal submissions" section, Mr Ogilvy noted that the Respondent had failed to call witnesses who might have been expected to give evidence and invited the Tribunal to draw inferences from that omission (specifically referring to Ms Constantine). He relied on case law that pre-dated the EqA to suggest that the "reverse burden of proof" provisions do not apply to victimisation cases in the context of race discrimination (though as noted above in *Bowler*, the EAT has recently held otherwise; in the end, nothing turned on it because on any analysis the Claimant did not either shift the burden of proof or prove on the balance of probabilities that victimisation had occurred). He said that there was sufficient evidence before the Tribunal to infer victimisation.

5.6 Mr Ogilvy further submitted that while the Claimant was "very outspoken and of strong character" this did not make her rude and aggressive. He sought to cast doubt on the evidence of both Ms Fansom and Ms McKenna, the latter not least on the basis that the Claimant's line manager had been unaware that the Claimant was to be returned to London.

Conclusions

Direct discrimination

6.1 The Claimant's case is that being sent back from Poole was less favourable treatment in that those who remained had the advantage of being five trainees with, we understand, three trainers, reducing to four trainees when Ms Lee returned, whereas the Claimant and Ms Gonzalez had Ms Gorman, who was, as we have found, splitting her time with them and with her clients, and then Ms McKenna. Nonetheless their treatment was still better than Ms Robins for whom there was no second chance.

6.2 Mr Ogilvy says that Ms Robins was not an appropriate comparator. We disagree. In fact, we understand that it is Ms Robins to whom the Claimant was referring in the list of issues as one of the white colleagues who received more hands-on training than her. We have found that Ms Robins did receive more such training; this was accepted by the Respondent. However, this, we conclude, was because she was less experienced than the others and required more to get her up to speed. When that failed, she was not kept on. We have found that the others did not receive more of this type of training than the Claimant. Ms Robins is therefore a potential comparator who was treated both more and less favourably than the Claimant, but not because of race.

6.3 Ms Lee is also a suitable comparator, because she was initially assessed as someone who would go back to London once there was a vacancy and was indeed sent back to London on 4 September 2016, but was then dismissed in December 2016 when she also did not make the grade. In terms of being sent back to London from Poole, there is no need to find a hypothetical comparator, because the Claimant is in not materially different circumstances from Ms Gonzalez, Ms Robins and Ms Lee, in that they had all been found to be below the standard required after two weeks' training; none of these three comparators is black. Ms Gonzalez and the Claimant were sent back to London to continue their training, as was Ms Lee once the Claimant was dismissed; and Ms Robins was not sent back to her home store but was dismissed for failing her probation period. We conclude that the Claimant has therefore not shown less favourable treatment than her comparators on the question of being sent back to London.

6.4 The talking trainer treatment and the provision of more hands-on training were, it is admitted and so we have found, provided to Ms Robins. We conclude that this was not because of race, but because of her lack of experience, her consequent needs, and the aims of the Respondent in bringing her up to speed quickly; while for some of the time during the first two weeks of the training course, the Claimant was potentially treated less favourably than Ms Robins in that she was not given that additional assistance, race had no part in that treatment. Our findings lead us to conclude that on the evidence before us, the Claimant was not directly discriminated against because of her race in that or any other aspect of her employment.

Victimisation

6.5 We do not accept the Claimant's contention that her email of 25 August constitutes a protected act. It does not, either expressly or indirectly, make any allegation that someone has contravened the Equality Act 2010 in connection

with race. The highest it goes is to allege that Ms Colegate had an obvious preference for certain members of the group and that she and Ms Camm were just biased and were more “into how a person looks” than the content of their character. This could be a reference to height, weight, fashion sense etc, and is insufficiently precise to constitute any reference to the protected characteristic of race as such. However, we do still have the two conceded protected acts.

6.6 In light of our findings of fact, we conclude that the reason for the Claimant’s dismissal was not that she had done those protected acts; it was because of her conduct in her dealings with her colleagues and the fact that the Respondent decided that her behaviour was not conducive towards the spa environment, either in terms of the business’s image or her role. Her protected acts did not in any way influence that conclusion.

6.7 Although it is now said by Mr Ogilvy that the Respondent “raced” to dismiss the Claimant “because of her complaints”, in fact we find that the text sent to Ms Rogers went no further, the discussion on 29 August 2016 with Ms Fansom appeared, so far the Respondent was concerned, to have been dealt with and the complaint to Mr Constantine was not before the decision makers and actually postdated their decision (indeed, it was not listed as a protected act before us).

6.8 We draw no inference from the Respondent’s failure to call other witnesses to give evidence, because it did not appear to us that there were any witnesses from whom we did not hear and who had necessary and relevant evidence to give as to the issues before us.

6.9 The burden of proof, according to the law as we have set out above, is initially on the Claimant and we conclude that it does not shift. Even if we are wrong on that and it should have shifted, there is clear and cogent evidence from the Respondent that would have provided an explanation sufficient to discharge it.

7. Accordingly, the Claimant’s claims are not well-founded and fail.

Employment Judge Norris
17 May 2017