THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS S PLUMMER**
MS D OLULODE

BETWEEN:

Ms A Sulieman

Claimant

AND

Boots Management Services Ltd

Respondent

ON: **26, 27, 28 and 29 October 2020**
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms D Gilbert, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. By a claim form presented on 14 May 2018 the claimant Ms Aysha Sulieman brings a claim for disability discrimination.

2. The claimant worked for the respondent as a customer assistant at the Hammersmith Store. She had less than 2 years' service. She worked for the respondent from 20 June 2017 to 14 March 2018.

The issues

3. The issues were identified at a case management hearing on 30 January 2020 before Employment Judge T Lewis and confirmed with the parties at the outset of the hearing as follows:

Direct disability discrimination and disability related harassment

4. Disability was admitted. Knowledge of disability prior to 8 April 2018 was not.

5. Did the respondent do the following because the claimant said she had a mental illness?

    a. Nargus Asfar, Fatima Kamhouri, Ewelina Zurawska and Varsha Jagatia bullying her after she told Nargus Asfar that she had mental health issues, ie excessive searching and Nargus/Helayna Kielty telling the claimant that she was dismissed when Mr Chapman was away.
    b. Fatima Kamhouri falsely accusing the claimant of saying "*I am going to kill you*" on 15 October 2017.
    c. Fatima Kamhouri calling the claimant "*a psycho*" on 15 October 2017.
    d. Nargus Asfar suspending the claimant and not suspending Fatima Kamhouri
    e. Mr Chapman dismissing the claimant.

6. These matters are relied upon as direct disability discrimination and disability related harassment, save that for harassment this does not include the dismissal.

7. We also record that Judge Lewis made a very careful case management order including for adjustments to be made for the claimant in the conduct of the hearing which we followed, including taking a 10 minute break every 45 minutes.

Witnesses and documents

8. On the claimant's side the tribunal heard from three witnesses: (i) the claimant and her former colleagues, customer assistants (ii) Ms Hayat Ali and (iii) Mr Mohammed Jawad Raja.

9. Mr Raja did not appear until after the close of evidence on day 4 although we were told that he had arrived on day 3 after the proceedings had finished for the day. The respondent opposed the introduction of his evidence. We considered this a reasonable adjustment for the claimant who was finding managing the proceedings difficult. The respondent relied upon possible delay but we considered that there was time for us to conclude the hearing and reach a decision as we were not going to give an extempore decision. The respondent was professionally represented by counsel who has experience of having to go straight into submissions and may not have a written submission that fully covered all the points. This could be dealt with orally. The tribunal has the power to change the order of witnesses even though we accept that in a discrimination claim the claimant's evidence goes first.

10. For the respondent the tribunal heard from four witnesses: (i) Mr Dave Chapman, the dismissing officer, (ii) Mr Andrew Gordon the appeal officer,

(iii) Ms Varsha Jagatia who worked on the No7 counter and (iv) Ms Ewelina Zurawska a customer advisor.

11. We had an 8-paragraph witness statement from Ms Fatima Kamhouri, a Clinique consultant who worked in the Hammersmith store, who was not able to attend for health reasons. We explained to the claimant that we could only attached limited value to this statement because Ms Kamhouri was not cross-examined on it. She is no longer employed at the Hammersmith store having moved to House of Fraser in 2018.

12. There was a bundle of documents which was divided into two sections, the first had over 140 pages and the second section had just over 80 pages. In total we had a little over 220 pages.

13. We had a written submission from the respondent to which counsel spoke and oral submissions from the claimant.

This hearing

14. A detailed case management order was made by Employment Judge Lewis on 30 January 2020 including for adjustments for this hearing to assist the claimant (bundle page 36H). We ran through this with the claimant at the outset and she said she would like us to follow this, which we agreed to do.

Findings of fact

15. The claimant commenced work for the respondent on 27 June 2017 as a customer assistant in the Hammersmith store. She worked on Saturdays and Sundays only. This was the first job she ever worked in.

16. The claimant did well signing customers up to Boots Advantage cards and initially the store manager Mr Dave Chapman told her to keep going as she was doing well. He did not initially raise any performance issues with her.

17. The claimant also had success in selling No7 mascaras, selling 10 on the first day she was asked to promote them. The employee who worked on the No7 counter was Ms Varsha Jagatia. She had asked the claimant to help promote a new mascara and had asked her to try to sell 5 to 10 of them. The claimant's evidence was that the next day she was asked to sell 15 but she thought this was too much as it had been hard for her to sell 10. Ms Jagatia said that on the second day, the claimant refused to promote the mascaras and we say more about this below.

18. On 18 July 2017 the assistant store manager Ms Nargus Asfar had an informal discussion with her and carried out a search of the claimant. It was put to the claimant that she had her own Boots card and her own credit card on her on the shop floor which was against security rules. The claimant agreed that she had "*done some mistakes".* She agreed that she signed the record of this meeting which was at page 43 of the first part of the bundle. She said if she signed it then it happened. The claimant agreed that having

her Boots card and her credit card on her on the shop floor was a security breach and she had done this.

19. The claimant also agreed that the respondent had a right to search her but she considered that she was searched "*too much*". It was the claimant's case that she was also searched by colleagues Ms Ewelina Zurawska and Ms Jagtatia in a room next door to the canteen. She could not remember when this was. Ms Zurawska and Ms Jagatia both said they did not have the right to search her as they were not managers. They said that only managers could carry out searches and they denied searching the claimant, although they were allowed to act as a witness to a manager carrying out a search. The claimant wanted the CCTV and said that she asked for this. The respondent said that the CCTV for the relevant dates had been deleted. It did not appear to be in dispute and we find that the CCTV records are only kept for 30 days. We find that Ms Zurawska and Ms Jagatia did not search the claimant as they were not authorised to do so. They were only acting as witnesses.

20. On 2 September 2017 Ms Asfar spoke to the claimant about leaving the till unattended. The claimant said she remembered the incident. She said she had a customer buying baby milk and the customer wanted a different type to that which she had brought to the till. The till had opened because the customer had presented her card. The claimant accepts that she went to find the baby milk that the customer wanted.

21. Ms Asfar's note of the meeting said that the claimant had gone to get a pen (page 44), but the claimant said she had gone to get the baby milk. The claimant said that her colleague closed the till for her. The claimant again said she had made lots of mistakes when she started. The claimant agreed that this was her fault and a breach of the security rules but said she was "*so new"* and she had promised not to do it again.

22. We saw the security rules at pages 77 and 78 of the bundle. This included the rules on searching and cash handling. The claimant agreed that she had seen and signed these rules when she started. She admitted in her witness statement and we find that she apologised to Ms Asfar for this. The claimant was also told that she left too much money in the tills.

23. On 10 September 2017 Ms Asfar had a discussion with the claimant about her appearing unhappy on the tills. The claimant agreed that she had been "*crying a lot on the tills".* She said that Ms Asfar told her that she could not work with that face and that she should go home and not finish the day at work.

24. Ms Asfar's note of their discussion was at page 45 and said: *"Aysha believes just because Varsha [Jagatia] is my friend and she doesn't get along with her I'm getting rid of her and firing her. I told her yes she is my friend but I like to keep it professional and it has got nothing to do with that. Also that the points discussed with you is not just because of Varsha or Fatima [Kamhouri]. It's to do with other concerns like lateness, complaints, attitude*

and not following correct process, Aysha did not wish to listen and left the room saying no matter what I'm going to get my job back you can't stop me".

25. We find that the claimant misunderstood and thought that Ms Asfar was dismissing her. We find it was a probationary discussion two days before her formal probation meeting and that she would not pass her probation if she did not improve. We find she was not dismissed during this meeting and we are supported in this view by our finding that she remained in her job and by the fact that her witness Mr Raja also took the view that she had misunderstood. He said that in his experience of 3 years at the respondent, only a store manager and not a line manager (such as Ms Asfar) could carry out a dismissal.

26. On 12 September 2017 the claimant was invited to a probation meeting to discuss her failure to comply with security rules, her lateness and what the respondent considered to be poor customer service. The invite letter was at page 46. The letter said it was to discuss failure to adhere to security rules, namely cash floats, cash security and positive searches; lateness on 3 dates and customer service. The claimant was sent copies of notes of previous informal discussions and her lateness record. The claimant was told that her probationary period could be extended as a result of this meeting. She was given the right to be accompanied. She was also pointed towards the Employee Assistance Programme (EAP) for support if she wished.

27. The probation meeting took place on 17 September 2017 and was conducted by the store manager Mr Dave Chapman. The notes of that meeting were at page 47-49. He presented the claimant with her lateness record which showed her as arriving late on 18 July, 15 August and 19 August 2017. Although Mr Chapman thought that the claimant had also breached security rules and had given poor customer service, he decided to extend her probationary period for 2 weeks until 3 October 2017 rather than terminate her employment. He confirmed this in writing (letter page 50).

28. The claimant handed Mr Chapman a letter (page 41) about problems she was having with her colleagues. The claimant confirmed that this was her document and she confirmed that she gave it to Mr Chapman.

29. In his letter dated 17 September 2017 Mr Chapman said he would investigate matters raised by the claimant about how she felt she had been treated by colleagues in store. He also said he would not expect to see any more customer complaints or breaches of security rules during the extended probationary period. Mr Chapman gave the claimant a copy of the security rules. He asked her about the amount of cash that should be kept on the till and the claimant said she knew it was £50. Regarding her lateness, the claimant told the tribunal that due to her condition she sometimes had difficulty in the mornings. She could get to work on time but still needed time to get changed to be on the shop floor.

30. On 26 September 2017 there was a meeting between the claimant and Ms Asfar about her having too much cash in the till. The claimant recalled this

and said that Ms Asfar told her she had too much cash in the till, the claimant did not remember why she did this. She knew that she made a mistake. There was £110 cash in the till and the claimant knew she should only have up to £50 cash in the till to protect against theft.

31. The claimant was again late for work and she received a customer complaint.

32. On 2 October 2017 Mr Chapman further extended the claimant's probationary period to 17 October 2017 to allow him to complete his investigation into the complaint she handed to him at their meeting on 17 September 2017 (letter page 52).

Incident on 15 October 2017

33. On 15 October 2017 Mr Chapman was contacted by assistant store manager, Ms Halyna Kielty, who said that an incident had occurred between the claimant and Ms Fatima Kamhouri, a Clinique Consultant, in which it was alleged that each was bullying and threatening the other. Mr Chapman's evidence was that he was not there on that day so he did not deal with the situation immediately. He said that he found out about the incident he thought by Ms Kielty sending him a text but he could not find the text message so he was not completely sure that this was how he found out about it. The claimant's evidence was that he was there on 15 October 2017. Mr Chapman said he did not normally work on a Sunday, he usually did one a month. We make a finding below that he was not present on 15 October 2017.

34. He did not recall the incident between the claimant and Ms Kamhouri and he said he would not have conducted the investigation if he had been a witness to it, he would have involved another manager. He was also asked if there was any investigation into Ms Kamhouri's conduct. He said she was employed by Clinique and not the respondent so her employer was Estee Lauder who investigated the incident from their side and they found no evidence to take any action. The appeal officer Mr Gordon told us and we find that the process was that when they had staff from other "houses" such as a beauty company or a security company, it was necessary to involve the company that employed that person. We find that as she was the Clinique consultant Ms Kamhouri was not an employee of the respondent and therefore they did not have the responsibility for her disciplinary matters. We find that Ms Asfar did not have the power to suspend Ms Kamhouri. The appeal officer Mr Gordon's evidence (statement paragraph 13b) was that both individuals were suspended pending investigation and we find on a balance of probabilities that Ms Kamhouri was also suspended by her employer.

35. The claimant said she was "*always panicking"* and that on 15 October 2017 she opened a door not knowing that there was anyone on the other side of the door. She said in oral evidence "*maybe the door hit her, she said f*** off, nobody likes you you f***ing psycho".* In her witness statement the claimant said Ms Kamhouri said "*why are you barging the door you f***ing idiot"* and

that she (the claimant) replied "*I didn't see you I'm sorry"* and began to walk downstairs. The claimant accepted that when she opened the door it might have hit Ms Kamhouri. We find on a balance of probabilities, the claimant acknowledging that it might have hit her, that it did and this caused the confrontation. The claimant's evidence was that Ms Kamhouri called her "*a psycho"* three times. The claimant said that Mr Chapman heard the shouting but he denied this saying he was not present. The claimant accepted in evidence that she had not told Ms Kamhouri about her mental health condition, but she thought that Ms Kamhouri knew.

36. Her witness Mr Raja was asked about this. He said in his witness statement (page 4 paragraph 3) "*I believe Nargus may have revealed this about Aysha to Fatima".* In oral evidence he said that at Boots they do not share employee information with other employees because "*confidentiality is a big thing at Boots".* We preferred his oral evidence as this seemed more consistent with the sorts of procedures that are in place in most workplaces about protecting employee confidentiality. We find on a balance of probabilities that as the claimant did not tell Ms Kamhouri about her condition and because of the confidentiality rules to which Mr Raja referred, Ms Kamhouri was not aware of the claimant's disability.

37. We find that the use of the term "*psycho*" was a derogatory term used within a heated argument as slang for someone displaying behaviour that the other person did not appreciate. Ms Kamhouri had been hit by a door opened too quickly by the claimant so was upset and was reacting angrily to what had just happened to her. We find that it was not a term related to the claimant's disability.

38. The claimant's case is that Ms Kamhouri falsely accused her of saying "*I am going to kill you*". We did not hear evidence from Ms Kamhouri and in evidence the claimant said she was told that she was suspended for "*threatening her colleague with death*". The suspension letter only referred to alleged threatening behaviour and not the details of that alleged behaviour. It was clear to us and we find that the claimant and Ms Kamhouri had a very heated argument. Even if Ms Kamhouri made a false allegation that the claimant said she would kill her, we find that this had nothing to do with the claimant's mental health condition about which we find Ms Kamhouri was unaware. Even if this false allegation was made, we find it was part of the acrimony between the two of them following the door incident and was not because of or related to any disability.

39. This incident on 15 October did not happen in front of customers, the shop was locked at the time.

40. The claimant thought she would be called into the office to speak to Mr Chapman about the incident that same day. She left work at the end of the day and went home. She was not back in work until the following Saturday, 21 October 2017. It was on that date at about 1pm that the claimant was suspended for alleged threatening behaviour towards another member of staff on 15 October 2017. The suspension letter was at page 54 and came

from Ms Keilty. The claimant was informed of her suspension by Ms Keilty. Mr Chapman initially said that he made the decision to suspend the claimant and subsequently said it was a joint decision with Ms Asfar. She consulted with him by phone and they agreed that the claimant should be suspended.

41. It was a significant issue for the claimant as to whether Mr Chapman was present at the store on Sunday 15 October 2017, although in terms of our determination of the issues, we did not consider that much turned on it. We had a document introduced on day 3 which showed his timesheet for October 2017. This was before the respondent introduced a fingerprint clocking in system. Managers receive a premium for working on a Sunday and this is shown in the time sheet record for payroll purposes. The time sheet did not show Mr Chapman as present on Sunday 15 October so we find on the documentary evidence, that on a balance of probabilities he was not present at the store on that day.

42. The claimant did not react well to the news of being suspended. She became very upset and refused to leave the store when asked to do so by Ms Asfar and Ms Keilty. She began shouting loudly in front of customers. She had to be escorted from the store by a security guard. She came back into the store more than once.

43. English is not the claimant's first language and the word "suspended" was not familiar to her until she was suspended. She said it was a "*new word in her dictionary*". We find that because of her lack of understanding of the word, she thought she had been dismissed – but she had not.

44. Outside the store, the claimant met with another customer assistant Mr Jawad Raja who was arriving a little later than usual for work and she told him what had happened. She told him that she had come into work and had been informed by Ms Asfar and Ms Kielty that she must leave the store because of what had happened the previous Sunday (15 October). Mr Raja told the claimant to get hold of Mr Chapman's number to ask him what was going on. Mr Raja encouraged the claimant to come back into the store to ask for Mr Chapman's number.

45. Mr Raja's evidence was that he did not see the claimant shout at anyone or do anything alarming. He accepted both in his witness statement page 3, third paragraph and in oral evidence that he did not know what happened between the claimant, Ms Kamhouri and Mr Chapman on 15 October. We also find he was not present in the store on 21 October prior to the claimant being asked to leave so he was not a witness to what happened prior to meeting her outside the store.

46. Once she left the store the claimant tried a number of times to return to continue working despite being told by the assistant managers to leave. The claimant very sadly collapsed outside the store and had to be taken to hospital by ambulance.

47. The claimant's called as a witness Ms Hayat Ali who had also worked as a

customer advisor in the store. Ms Ali was not present and did not witness what happened on either 15 or 21 October 2017. The claimant and Ms Ali got on well. Ms Ali described herself as a good listener, she spent time listening to the claimant, they ate lunch together and they were friendly with one another.

48. After the claimant had been taken to hospital she phoned Ms Ali. After this call Ms Ali said she went to see Mr Chapman and told him that the claimant had talked about [REDACTED]. This was not said in Ms Ali's witness statement and Mr Chapman had not had an opportunity to answer this. We therefore agreed to the respondent's request to recall Mr Chapman.

49. Mr Chapman agreed that about four days after the claimant was taken to hospital, so we find that this was on 25 October 2017, Ms Ali came to see him in his office to say that the claimant was still in hospital, that she needed help and did not have anywhere to go. Ms Ali was upset when she came to see Mr Chapman. Mr Chapman told Ms Ali that Boots have a confidential counselling help line that can be used for both emotional and financial matters and he gave Ms Ali the details, whether for Ms Ali or for the claimant to use. It is a service that is open to all the respondent's employees. Mr Chapman denied that he was told that the claimant had [REDACTED] or the claimant's mental health issues and denied that there had been any discussion of the medication the claimant was taking. He said that Ms Ali told him that the claimant needed help so he provided the details of the help line.

50. We find that Ms Ali did not disclose any detail to Mr Chapman about the claimant's mental health condition and we accepted Mr Chapman's evidence. Ms Ali had not included this in her witness statement. Mr Raja's evidence to the tribunal was emphatic that in his three years at Boots, as a pharmacy, that confidentiality was a "*big thing"* and they do not share confidential information about other employees.

51. Mr Chapman held an investigation meeting with the claimant on 27 October 2017. The notes of that meeting were at page 56-65. In the meeting the claimant told Mr Chapman that she was shocked when she was suspended and thought she was "*fired*".

52. Within the investigation, statements were taken from colleagues including the claimant, Ms Kamhouri and Ms Jagatia.

53. The claimant accepted in evidence that she prefers not to disclose her disability. She prefers that people do not know. The respondent introduced on day 3 a document showing that the claimant did not disclose a disability when she joined the respondent's employment and the claimant agreed that she did not do so.

<u>The disciplinary hearing</u>

54. The claimant was invited to a disciplinary hearing which took place on 1

December 2017. The disciplinary charges were "*alleged threatening behaviour towards another member of staff on Sunday 15 October and refusal to leave the store once suspended by Halyna Kielty and returning to the store on the same day causing a disturbance on the shop floor both of which brings the company's name into disrepute and breach of trust between you and the company".*

55. There were 2 disciplinary charges, the first relating to the incident of 15 October and the second relating to the day of the suspension, 21 October, for refusal to leave the store once suspended by Ms Kielty and for causing a disturbance bringing the company's name into disrepute. The claimant was told of her right to be accompanied at the disciplinary hearing and told that possible outcomes could be a final written warning or dismissal.

56. Mr Chapman heard the disciplinary hearing on 1 December 2017. The notes of the hearing started at page 68. The claimant was asked if she wished to be accompanied and she chose not to be. Mr Chapman's evidence was that the claimant admitted that she had "*acted silly*" in the way that she confronted her colleague and in response to her suspension. His evidence was that the claimant did not disclose any mental health issues. We find that she did not. On her own admission, she prefers not to disclose this.

57. The disciplinary hearing was adjourned and was reconvened on 16 January 2018. Mr Chapman decided to dismiss the claimant for her unacceptable conduct, this being the causing of the disturbance on the shop floor and for her refusal to leave the store on more than one occasion when asked to do so by assistant manager Ms Kielty on 21 October 2017. He considered this to be gross misconduct.

58. We find that the reason for dismissal was as found by Mr Chapman as being for gross misconduct on 21 October 2017 by causing a disturbance on the shop floor and refusing to follow managers instructions to leave the store after being suspended and creating a situation where the duty managers could not perform their normal duties.

59. The claimant accepted that she was not dismissed for the incident with Ms Kamhouri on 15 October 2017. In the dismissal letter (page 87) Mr Chapman said that he could not find any evidence to support any threatening behaviour and he took no action on this part of the disciplinary. This was later confirmed by the appeal officer Mr Gordon.

60. The claimant was asked if she told Mr Chapman about her disability. She said "*Dave knew very late that I had disability issues, I am not going to lie. I should have told him earlier".* Nevertheless she thought she had told him before he dismissed her.

61. Mr Chapman said at no point did the claimant tell him about any mental health issues or bipolar disorder and if she had that would have formed part of the investigation and he would have involved occupational health and their employee relations team called PeoplePoint. Our finding as we have said

above, is that he did not know about the claimant's disability and we find that had he done so he would have taken the steps he described.

The appeal against dismissal

62. On 18 January 2018 the claimant appealed against her dismissal.

63. The appeal hearing took place on 26 February 2018. The was heard by Mr Andrew Gordon, an Area Manager for the North West London region. The claimant agreed that she did not tell Mr Gordon about her disability at that hearing. We find that he was unaware of her disability when he conducted the appeal process.

64. The appeal was a review of the disciplinary hearing; it was not a re-hearing. The claimant was accompanied by her colleague Mr Raja. Mr Gordon allowed Mr Raja to answer some questions on behalf of the claimant. Mr Gordon explained the process to the claimant and told her that this was her opportunity to tell him anything she wanted him to take into consideration in making his decision.

65. In his witness statement Mr Raja said that it was when he met her at the location of the appeal hearing she told him that she had bipolar disorder. He accepted in his witness statement that at the appeal hearing the claimant did not tell Mr Gordon about her condition. The notes of the appeal hearing were at pages 92-99.

66. Mr Gordon's view was that during the hearing the clamant did not always seem to understand what he had said to her during the meeting and that occasionally she did not want to answer questions. He allowed Mr Raja to assist her.

67. Mr Gordon adjourned for further investigation which he carried out between 7 – 14 March 2018. He met with Ms Asfar, Mr Chapman, Ms Ali, Ms Keilty and Mr Raja. Mr Raja acknowledged to Mr Gordon that he may have made the situation worse on 15 October because he became involved in the confrontation between the claimant and Ms Kielty regarding the suspension. It was Mr Raja who encouraged the claimant to come back into the store when she had been asked by Ms Keilty to leave.

68. The appeal outcome was sent to the claimant on 26 March 2019 – page 130 - 132. The appeal was not upheld.

69. The claimant replied on 8 April 2018 saying that she had been a victim of disability discrimination (page 133). During the time he dealt with the claimant's appeal Mr Gordon was not aware that she was disabled and he did not know about this until the email of 8 April 2018. As set out above, the claimant agreed that she did not tell Mr Gordon about her condition during the appeal process.

70. Mr Gordon replied to the claimant's email on 11 April 2018 (page 133) saying

that his outcome letter was the final outcome on the matter.

71. The claimant strongly believes that she was dismissed because of her disability and that this made her "*too much hassle"* for the respondent. She said at the end of her evidence: "*Maybe I couldn't do tills that much but there was lots of roles in Boots"*. In any event this was a conduct dismissal and not a performance dismissal.

Allegations of bullying

72. Both Ms Zurawska and Ms Jagatia denied bullying the claimant. Ms Zurawska said that she mainly worked on sales plans and worked upstairs from the shop floor in the storeroom so she did not come into contact with the claimant very much. Ms Zurawska denied searching the claimant. She said she did not have authority to carry out searches of staff. Searches had to be carried out with a witness present and Ms Zurawska agreed that she acted as a witness on an occasion when the claimant was searched by assistant manager Ms Kielty.

73. Ms Jagatia said that the only issue she and the claimant had was over the selling of mascara, as referred to above. The second time Ms Jagatia asked the claimant to promote the mascaras the claimant said she would not do so and Ms Jagatia reported this to one of the assistant managers. Ms Jagatia said that she told the claimant's witness Mr Raja that she and the claimant did not have the best relationship but they "*[kept] it civil*". Ms Jagatia and Ms Asfar are friends and have known each other for over 10 years. Ms Jagatia said that they do not discuss work outside work and that she receives no favouritism, if anything she felt she had to work harder.

74. We find that there was no excessive searching of the claimant. The claimant herself accepted that she "*made mistakes*" for example having her credit card and Boots card on her person on the sales floor in breach of security rules. She also said that at one point she was found to have €400 on her. We find that the claimant was legitimately searched by managers Ms Asfar and Ms Kielty because of their concerns that she had breached security rules; a matter upon which we find they were correct. This had nothing to do with the claimant's mental health condition. In any event, we find that they were unaware of this. We also find that Ms Zurawska and Ms Jagatia did not carry out searches of the claimant because they did not have authority to do so, they acted as witnesses on the instructions of their assistant store managers.

75. We have also found above that Ms Asfar and Ms Kielty did not tell the claimant that she was dismissed whilst Mr Chapman was away. Our finding above is that the assistant store managers spoke to the claimant about her performance two days prior to her probationary review with Mr Chapman on 12 September 2017. They told her that if she did not improve, she may not pass her probation. Consistent with our findings above, we find that claimant did not tell Ms Asfar or Ms Kielty about her mental health condition.

76. The matters set out above were the only issues of bullying particularised by the claimant and in issue for us to decide.

The relevant law

Direct discrimination

77. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

78. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Harassment

79. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

80. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

81. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The

EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

82. In ***Grant v HM Land Registry 2011 IRLR 748*** the Court of Appeal said that when assessing the effect of a remark, the context in which it is given is highly material. All relevant circumstances should be considered, including whether the claimant's own actions have caused her reaction and also the relationship between the claimant and the harasser – for example, a remark between friends is not the same as a remark made by someone who is not a friend (see Elias LJ). Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker.

83. In ***Hartley v Foreign and Commonwealth Office Services 2016 EAT/0033/15*** the EAT held that whilst the perception of the alleged harasser regarding whether the comment was related to the protected characteristic is relevant, it will not be determinative, and is it possible for an alleged harasser to engage in conduct related to a protected characteristic, even if they do not know that the victim possess the characteristic. The task of the tribunal is to look at the overall picture and determine whether objectively the comment was related to the protected characteristic.

<u>The burden of proof</u>

84. Section 136 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

85. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

86. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

87. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

88. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court

endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. *The judgment of Lord Hope in* ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

89. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

90. The approach to the burden of proof was confirmed by the Court of Appeal in ***Efobi v Royal Mail Group Ltd 2019 EWCA Civ 18.***

Conclusions

91. On allegation (a) that Ms Asfar, Ms Kamhouri, Ms Zurawska and Ms Jagatia bullied the claimant after she told Ms Asfar that she had mental health issues, with excessive searching and Ms Asfar and/or Ms Kielty telling the claimant that she was dismissed when Mr Chapman was away – this allegation fails on its facts. We have found that the claimant was legitimately searched by the assistant store managers with the others acting as witnesses on their instructions and that the claimant did not tell Ms Asfar or Ms Kielty that she had mental health issues. We have also found that the claimant was not dismissed by either Ms Asfar or Ms Kielty; they had a conversation with her on 10 September 2017 about her performance prior to her probationary meeting with Mr Chapman two days later. The claimant misunderstood the conversation. Our finding is that she was not told by either of them that she was dismissed.

92. On allegation (b) the claimant said Ms Kamhouri falsely accused her on 15 October 2017 of saying "*I am going to kill you*". We have found above that the claimant and Ms Kamhouri had a very heated argument and that even if Ms Kamhouri made such a false allegation, it was not because of or related to the claimant's disability about which Ms Kamhouri was unaware. It was part of the acrimony between them arising from the argument after the door incident.

93. On allegation (c) that on 15 October 2017 Ms Kamhouri called the claimant "*a psycho*" we have found that this was a derogatory term used within the heated argument as slang for someone displaying behaviour that the other person did not appreciate. We have found that it was not because of or related to the claimant's disability about which Ms Kamhouri was unaware.

94. On allegation (d) that the respondent suspended the claimant and not Ms Kamhouri, our finding above is that the respondent did not have the power to suspend Ms Kamhouri as she was not their employee; she was employed by

Clinique/Estee Lauder. In any event our finding above is that Ms Kamhouri was suspended by her employer. As the respondent did not have the power to suspend Ms Kamhouri, this allegation fails on its facts. The reason they did not suspend Ms Kamhouri was not because of or related to the claimant's disability but because they were not the employer with the power to suspend.

95. On allegation (e) Mr Chapman dismissing her, the claimant's case is that he dismissed her because of her disability. It was not relied upon as an act of disability related harassment. Our finding of fact above is that he did not have knowledge of her disability. Our finding is that the claimant did not make this known to the respondent until after her appeal outcome, in her email of 8 April 2018 (page 133). We have found above that the reason for the dismissal was the claimant's misconduct on 21 October 2017. It was not because of her disability.

96. Given our findings of fact and following ***Hewage*** we have not found it necessary to make much of the burden of proof provisions as we have been able to make positive findings on the evidence.

97. For the reasons set out, the claim fails and is dismissed.

Employment Judge Elliott
Date: 30 October 2020

Judgment sent to the parties and entered in the Register on: 30/10/2020

For the Tribunal