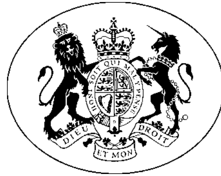
Case Number: 1301565/2022



EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs. J. Silva	v	**Foundever GB Limited (formerly known as Sitel UK Limited)**

Heard at: **Birmingham** **On:** **1,2,5 and 6 February 2024**

Before: **Employment Judge Wedderspoon**

Members : **Mr. J. Sharma (by CVP)**

Mr. K. Hutchinson

Representation:

Claimant: **In Person**

Respondents: **Mr. R. Milvenan, solicitor**

JUDGMENT

1. The claim for automatically unfair dismissal is not well founded and is dismissed.
2. The claim for direct race discrimination is not well founded and is dismissed.
3. The claim for indirect race discrimination is not well founded and is dismissed.
4. The claim for pregnancy and maternity discrimination is not well founded and is dismissed.
5. The claimant's claim for unlawful deductions of wages is not well founded and is dismissed.

REASONS

1. By claim form dated 21 March 2022 the claimant brought complaints of automatically unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 (pregnancy and maternity discrimination) and Regulation 20 of the 1999 Regulations; pregnancy/maternity discrimination pursuant to section 18 of the Equality Act 2010; a direct/indirect race discrimination complaint and an unauthorised deductions from wages and/or failure to pay compensation for accrued but untaken annual leave. Early conciliation commenced on 14 March 2022 and ended on 16 March 2022.

2. The Respondent stated at the beginning of the hearing that in respect of the indirect race discrimination claim it did not rely upon a justification defence.

Issues to be determined

3. The issues to be determined in the case are :-

3.1 Time Limits

3.2 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 15 December 2021 may not have been brought in time.

3.3 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

3.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
3.3.2 If not, was there conduct extending over a period?
3.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
3.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
3.3.4.1 Why were the complaints not made to the Tribunal in time?
3.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

4. Unfair dismissal

4.1 Was the reason or principal reason for dismissal that the claimant had fallen pregnant, had a baby or taken maternity leave; or was it redundancy but the respondent had not complied with regulation 10 of the 1999 Regulations?

4.2 If so, the claimant was unfairly dismissed. If not the unfair dismissal claim fails ?

5. Remedy for unfair dismissal

5.1 Does the claimant wish to be reinstated to their previous employment?

5.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

5.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5.5 What should the terms of the re-engagement order be?

5.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

5.6.1 What financial losses has the dismissal caused the claimant?
5.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
5.6.3 If not, for what period of loss should the claimant be compensated?
5.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
5.6.5 If so, should the claimant's compensation be reduced? By how much?
5.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
5.6.7 Did the respondent or the claimant unreasonably fail to comply with it ?
5.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
5.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
5.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
5.6.11 Does the statutory cap of fifty-two weeks' pay or [£105,707] apply?

5.7 What basic award is payable to the claimant, if any?

6. **Direct race discrimination (Equality Act 2010 section 13)**

6.1 For the purpose of her direct race discrimination claim the claimant relies on :
5.1.1. Her Brazilian and/or non-British national origins and/or her national origins being from a country where English is not the first language of most of the population;
5.1.2 on an allegation that because of those national origins her spoken English was perceived as difficult to understand;

6.2 Did the respondent do the following things:

6.2.1 Dismissed the claimant;
6.2.2 on 19 November 2020 the claimant's manager Leanne Dyer emailed the claimant telling her she should attend a hearing or meeting the following day to talk about the language barrier and at that meeting or hearing on 20 November 2020 telling her that because of her accent/English language skills meeting the company's criteria;
6.2.3 from late November 2020 (Robyn Booth) onwards setting targets that were impossible to achieve;
6.2.4 from late November 2020 onwards (Robyn Booth) criticising the claimant for not meeting targets including taking too long on calls;

6.2.5 from late November 2020 onwards, Leanne Dyer moving the claimant between different types of calls seemingly at random and more so than most other people were moved;

6.2.6 as an addition to the previous allegation Leanne Dyer deliberately moving the claimant around meaning she kept having to do more training with a view to making her working life more difficult intending to get her to resign;

6.2.7 Leanne Dyer deducting 2 hours from her time and pay;

6.2.8 Leanne Dyer accusing the claimant of being absent from work and knocking 2 hours off her pay.

6.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

6.4 If so, was it because of her race ?

7. **Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)**

7.1 Did the respondent treat the claimant unfavourably by doing the following things:

7.1.1 Dismissed the claimant;

7.1.2 Between April and August 2021 Richard Cave-Toye criticised the claimant for the length and number of comfort breaks she was having in circumstances where the claimant was going to the lavatory more often because she was pregnant. This included sending her a message on 26 of May 2021 complaining about having taken a particular comfort break that supposedly lasted 8 minutes;

7.1.3 In or around early July 2021 Richard Cave-Toye making difficulties connected with payment for days when the claimant had antenatal appointments and then after the claimant went to HR to get the issue sorted out on 13 July 2021 accusing her of avoiding work;

7.1.4 Richard Cave-Toye requiring her to take annual leave during her maternity leave in the run up to her dismissal without warning or consultation.

7.2 Was the unfavourable treatment because of the pregnancy?

7.3 Was the unfavourable treatment because the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

8. **Indirect discrimination (Equality Act 2010 section 19)**

8.1 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP:

8.1.1 A requirement or expectation that those doing the claimants job should speak English without a relatively strong Brazilian accent or other relatively strong accent of a country where English is not the first language of most of the population.

8.2 Did the respondent apply the PCP to the claimant?

8.3 Did the respondent apply the PCP to those with non Brazilian and/or British national origins and national origins from any country where English is the first language of most of the population or would it have done so?

8.4 Did the PCP put persons with Brazilian and or non British national origins and or national origins from a country where English is not the first language of most of the population at a particular disadvantage when compared with those with non Brazilian and or British national origins and or national origins from any country where English is the first language of most of the population ?

8.5 Did the PCP put the claimant at that disadvantage?

8.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

8.6.1 *The respondent does not rely upon a justification defence*

8.7 Remedy for discrimination

8.7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

8.7.2 What financial losses has the discrimination caused the claimant? Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.7.3 If not, for what period of loss should the claimant be compensated?

8.7.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

8.7.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

8.7.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.7.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.7.8. Did the respondent or the claimant unreasonably fail to comply with it?

8.7.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

8.7.10 By what proportion, up to 25%?

8.7.11 Should interest be awarded? How much?

8.8 Unauthorised deductions

8.8. 1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

The hearing

9 The respondent notified the Tribunal that the company had been renamed to Foundever G.B. Limited. The name of the respondent was therefore amended by consent to Foundever G.B. Limited formerly known as Sitel UK Limited.

10 The Tribunal was provided with a bundle of documents of 301 pages. The respondent added a confirmation of the claimant's contract (page 302) and an internal email (page 310) showing the leaving date of Ms. Robyn Booth in November 2022. In the course of evidence the claimant added the invitation to a meeting dated 19 November 2020 (page 303); a document taken from a linked in page of a colleague based in Glasgow which had previously been attached to her application to strike out the ET3 (page 304) and some documents querying her eligibility to work in the UK (pages 305-308) and a linked in page from another colleague based in Stirling (page 309). The parties did not object to the inclusion of these documents and Tribunal determined that because the documents were relevant to the issues it had to determine, that they should be included in the bundle.

11 The Tribunal determined to hear evidence on the issue of liability first. The Tribunal heard from the claimant; and the respondent's witnesses; Leanne Dyer,

(former team leader); Robyn Booth (former team leader); Richard Cave Toye (former team leader) and Karen Carswell (Senior Manager HR).

12 The evidence was completed within a short period of time. The claimant asked limited questions to the respondent's witnesses and in the circumstances the Judge put the allegations contained in the agreed list of issues to the respondent's witnesses insofar that they appeared in the claimant's evidence. Both parties requested time to consider and prepare their submissions and were given time. Following submissions, the Tribunal deliberated and provided an oral judgment on day 4.

13 These are the written reasons.

<u>Facts</u>

14 From May 2020 until 4 March 2022 the claimant was employed by the respondent as a telephone customer service employee (call handling agent) working from home during the pandemic, wholly on the pandemic related government contract namely track and trace. The claimant was required to read over the telephone a script to members of the public who had been in contact with someone with COVID or who had COVID and had to provide advice in terms of the individual's requirement to isolate.

15 The claimant's contract was short-term on an initial three months' basis (see page 302). The contracts were temporary in nature. The call agents were paid £10 per hour and worked 40 hours per week with a notice period of one week. Employees were aware of the temporary nature of the contract and that their employment would be terminated once the track and trace service requirement ended. Employees who stayed until the end of track and trace during February 2022 were aware that downsizing was ongoing as the requirement for the campaign reduced. Many call agents had left before the end of track and trace as the need for call agents had significantly reduced.

16 The claimant was remotely managed by team leaders who managed a group of up to 75 people each. The role of the team leader was to monitor calls for the call agents to make sure that they were actually making calls as was required and not avoiding calls. Further, a team leader would regularly carry out performance management processes and one to one meetings with employees as part of the normal working duties. The team leader was also responsible for arranging time off for call handlers. They also helped to cover other peoples' teams where required. The respondent employed employees from diverse backgrounds.

17 The respondent had an Equality & Diversity Policy (page 55 to 62) which provided for a complaints process. The claimant's evidence to the Tribunal was that she aware of the complaints process at page 60 but at no time during her employment did she raise a complaint of discrimination. The respondent also had a maternity policy see page 63 to 74.

18 From May 2020 to approximately June 2021, the claimant was line managed by Leanne Dyer. The claimant complained that members of the public made rude comments about her accent. On 15 November 2020 Leanne Dyer completed a

probation request form at page 76; she referred to the claimant's strong accent and that there had been multiple occasions where the contact the claimant was calling struggled to understand what the claimant was saying. Leanne described listening to multiple calls the claimant had made, and she too was struggling to understand the claimant.

19 The claimant accepted in evidence that if individuals raised concerns about understanding her, her manager was entitled to raise the concerns with her. Leanne told the Tribunal that her own manager had requested her to invite the claimant to a meeting about the "language barrier" but Leanne played no further part in the actual meeting. The claimant disputed under cross examination that when the respondent was raising the fact, she required to deliver a script in clear language they were raising an issue of her performance as opposed to an issue of racial origin. The claimant alleged that Leanne did not like her as she was an immigrant and did not like her accent and was intent on dismissing her. Leanne disputed this. The Tribunal rejected the claimant's contentions and found that in fact Leanne was trying to help the claimant.

20 On 19 November 2020, page 303, the claimant was invited to a probationary review hearing to discuss "the language barrier" with Luke Craig, Team Manager. At the meeting concerns were raised that members of the public were unable to understand the claimant's accent. The claimant stated that she was aware of this, and she was practising and working on her accent. In the circumstances, the claimant was simply counselled, and the matter was not raised again.

21 The claimant referred the Tribunal to a conversation in December 2020 page 207 to 210 between herself and Leanne Dyer about training. On 22 December 2020, page 150, the claimant requested assistance from Leanne in respect of finalising her tier 2 training. Leanne advised she would ask somebody. At page 151, the claimant enquired about the completion of a quiz as part of the training and Leanne passed the claimant the link to the quiz (page 152). The claimant raised her concern about an error on the quiz (page 153); Leanne said she would see if there was an error. On 3 January 2021 (page 157) Leanne confirmed to the claimant that the quiz was broken, and the claimant was not required to complete it. The claimant responded *"okay, I will prepare myself and start to do calls immediately thank you for this information."* (page 157). The claimant sought to suggest in evidence she was treated negatively by Ms. Dyer. The Tribunal rejected this; Leanne Dyer had attempted to assist the claimant so she could complete the training during the message conversation. At the time Leanne was unaware what training the claimant had carried out. Leanne was managing a large group of employees remotely. Leanne did not have the access to the online training course the claimant was to complete so she was trying to point the claimant in the right direction so that the training could be completed. The training at page 208 was normal training for all call agents.

22 The claimant also complained that she was treated less favourably because she was contacted by her manager Leanne via chat as opposed to formal e-mail (how some other colleagues were contacted). Leanne told the Tribunal (and the Tribunal accepted her evidence on the balance of probabilities) that everything was fairly chaotic at the respondent during this period; she was managing a large group of people remotely so she communicated with staff in lots of different ways,

including via chat or email. She did not single out the claimant to be messaged via chat. As part of her role, she had a responsibility to contact employees and ensure that they were working. She informed the Tribunal that some employees were not working when they should be including one member of staff who was messaging from the pub on one occasion. Most communications were via chat but could be by email. Leanne's evidence to the Tribunal which was accepted that she had so many agents and the company was in such a disorganised and shambled state on occasions there was a lack of consistency of communication between the teams. Most communications were via chat but could be by email. Leanne's evidence to the Tribunal which was accepted that she had so many agents and the company was in such a disorganised and shambled state on occasions there was a lack of consistency of communication between the teams. The claimant said she felt Leanne did not like her because of her accent and because she was an immigrant, referring to the fact that the United Kingdom voted for Brexit and the claimant said the UK did not like immigrants. Leanne stated this was wrong. It was not possible for her to form a relationship with 75 agents she was managing remotely. The Tribunal found that Leanne's evidence was more likely to be correct and did not find having heard the evidence of Leanne that she disliked the claimant at all.

23 The claimant complained that she was regularly transferred by Leanne to do other work but once she got to the other department to conduct the other work she would be told by another manager she was not required. The claimant referred the Tribunal to page 146 in January 2021 and page 164 on 18 February 2021. The claimant also complained that she was requested to move to isolation calls in April 2021 page 175. The claimant stated she had been changed a lot and she needed time to familarise herself with the script she had used before. The claimant was advised by Leanne that this is a permanent change; see page 176. The claimant was then advised to go back to Tier 2 see page 177.

24 Leanne's evidence to the Tribunal (which the Tribunal accepted) by reason of the disorganisation at the time, as a team leader she would receive an email that individuals were required to work in another team; she would communicate that to the claimant and others; by the time the notification was picked up; the need may well have changed; this affected a number of customer service employees and not just the claimant. Further, moving employees to different teams helped the agents' skills development. The evidence to the Tribunal from Ms. Dyer which the Tribunal accepted was that everybody was being moved to try and justify people staying on the contract as long as possible. The claimant described being moved to different jobs which created a barrier for her between November to February when she was changed five times and she did not have time to prepare to read the script. In the context that the role was communication with the general public, there was a genuine and reasonable expectation that a call handler could read a script.

25 The claimant was not available for two hours when she lost a connection on 26 January 2021 as her internet connection crashed (see page 146-8). The system operated by the respondent Sitel flagged up lack of activity amongst team members; it was monitored by the IT team and would be passed to a team leader. Leanne was entitled as a manager to raise the lack of activity with an employee. Leanne described to the Tribunal a great deal of work avoidance

amongst employees including one employee she discovered as mentioned above attended the pub when he was meant to be at work (see above). The claimant complained she was not paid for 2 hours. The Tribunal determined there could be no reasonable expectation for the claimant or any other employee who did not work to be paid for non-working time. The claimant had 2 hours of pay deducted from her salary.

26 Robyn Booth was the claimant's team leader from about April 2021. She informally introduced performance targets for all call agents as part of the campaign to try and have as many agents as possible working efficiently. Due to the difficulty with understanding the claimant, callers tended to hang up complaining that they could not understand what the claimant was saying. The respondent informally set a target for the claimant to have two to three successful calls per week. The Tribunal found this to be a very low target compared to the 60 calls per day (see page 106) which were being made by the lowest performing colleagues.

27 In April 2021, on the system this came up as AWOL(inactive for a 2 hour period) see page 169. The respondent requested the claimant to contact the "absence line" to discuss her whereabouts. The claimant was concerned and raised this with Leanne (page 171) who advised the claimant to call the line. The claimant described that she was noted as being away from her screen for 1 hour and 40 minutes and she was uncertain if there was a problem with the line. The claimant disputed this absence see page 173 and Leanne said she would check with her manager on her return to investigate the claimant's concerns.

28 The claimant said that her calls took approximately 10 minutes depending on the type of call she made, and she was reading from a script and for individuals that they actually had COVID or that being in contact with somebody with COVID.

29 In April 2021, Robyn Booth (page 139-143) asked the claimant whether she had any ticket numbers or evidence of IT issues yesterday. The claimant responded that she had no ticket but the system stopped yesterday about 4.30 p.m. She sought to reload on three occasions. Robyn asked the claimant about 4.30 p.m. onwards because the claimant had the lowest call outs out of a very large amount of people and she was able to work for the majority of yesterday. Robyn stated that it was unacceptable but that no one was in trouble this week but she was going to keep a closer eye on the claimant. The claimant's explanation was that she worked the best way she could but the system crashed. Robyn noted that the claimant was being defensive and Robyn did not want any conflict. She noted that agents were doing over double of the calls on the low call list alone. She also asked why the claimant appeared to be on one call for 40 minutes and if everything was all right. The Tribunal did not accept that the claimant was being put under pressure but Robyn Booth was giving her a chance and trying to help (page 139). The claimant disputed the number of calls and stated she made 34. Robyn commented that this was still low; 50 -55 calls was regarded as a low performer.

30 The Tribunal found that Robyn as a manager was making a legitimate enquiry. Robyn Booth was merely doing her job as a team leader and raising an issue of potential poor performance with the claimant and checking whether she needed

any support (page 143). In evidence the claimant suggested that Robyn Booth had a big problem with her and was rude and was not trying to help the claimant. The claimant accepted that her performance was not monitored by Robyn Booth. At the relevant time the claimant did not contend that her performance was impacted by her accent; her complaint was that the system crashed. The claimant described that she suffered most discrimination at the time when she was managed by Robin Booth; she clarified this under cross examination as discrimination from members of the public when she was explaining to them that she they had to stay in hotels there was increased dissatisfaction. The claimant accepted it was important that people understood in a track and trace context what she was saying, and she read from a script and it was important to speak clearly.

31 On 29 April 2021, page 81, the claimant informed the respondent's HR department that she was 20 weeks pregnant. On 6 May 2021, p.82, the claimant had an examination by her GP in respect of her pregnancy MAT B1. By letter dated 26 May 2021 p.84 HR informed the claimant about her rights during her maternity period.

32 On or about 26 May 2021 Mr. Cave-Toye asked the claimant about an 8 minute break over the claimant's allocated time of breaks (see page 145 and 191). Everyone had a 10 minute allocation break. If it was over 10 minutes a manager was obliged to check while the individual had not been working. The claimant explained that it was personal time. The claimant informed the Tribunal she required more breaks because she was pregnant. Mr. Cave-Toye said he just wanted to say Hi and if the claimant needed anything she should ask. There was no disciplinary action that followed. The Tribunal found that Mr. Cave-Toye as a manager was entitled to ask the claimant about excessive breaks so to monitor performance; he was simply carrying out his supervisory role as a manager.

33 At page 38 the claimant described that she had to take more comfort breaks by reason of the fact that she was pregnant and Richard Cave-Toye raised the fact that she was taking a break. She accepted that he was entitled as a manager to ask for what reason she was on a break. The claimant said he was not rude but someone had asked him to do it and that person knew she was pregnant. Mr Richard Cave- Toye said simply that that the long break was flagged up on his system that there were more breaks taken therefore he was requested by his manager to check. No further action was taken; he just made an enquiry.

34 On 6 June 2021, page 86, Richard Cave Toye emailed the claimant stating he was concerned that she had not arrived for her scheduled shift today and she had not been in contact to discuss. The Tribunal found that this was a reasonable enquiry to make; as her manager he was entitled to enquire why she was not on line. Mr. Cave Toye at the time of making the enquiry had not been informed where the claimant was. The claimant was not disciplined.

35 By e-mail dated 14 June 2021, page 87, the claimant thanked the HR department for all her support since notice of her pregnancy and informed them about the maternity leave start of her maternity leave namely 15 August 2021. The claimant confirmed in her evidence to the Tribunal she felt supported by HR.

36 The respondent had a maternity policy (page 63). It permitted time off for antenatal care and at page 66 described the entitlement of being paid. On 23 June 2021 the claimant informed Richard Cave Toye that she had an ante natal appointment. She informed him she needed to take a paid day off. He responded that it was probably not paid. The claimant said she had a document that her days off were paid. He responded that he would find out and asked whether the claimant had an appointment card and if she could email it to him. He was unaware this detail of the policy. He said that a line manager had to sign it off and payroll manager determines whether the claimant is actually paid. He informed the claimant that she needed to raise it with a manager (see page 193). He told the Tribunal that it needed to be signed off by a manager above him and if the claimant was not paid she needed to contact payroll (see page 194). The Tribunal determined that Mr. Richard Cave Toye was genuine and was unaware of the detail of the maternity policy. There is no evidence that the claimant was not paid.

37 On 13 July 2021 (page 196-197) Mr Cave-Toye raised with the claimant that she was dealing with calls for longer than 10 minutes because the phone system showed how long the call had been ongoing; for one call showed that the call went to voicemail then remained active for 10 minutes; the system would generate an e-mail which would be sent to Mr Cave Toye. Mr Richard Cave Toye asked the claimant about 3 outlier calls on voicemails; one of them was 28 minutes. He wondered if the claimant had taken a lunch break. The claimant said she had forgotten to stop the tracing and she was just out to lunch. He said he had 10 cases of this now in the last three days and requested to see some improvement. The claimant said she would improve. Mr. Cave Toye said that voicemails over 10 minutes and no reason why this could be in the comments *"looks like work avoidance which I'm sure it isn't"*. The claimant accepted that she understood Mr. Cave Toye was doing his job. The Tribunal found as a team leader, he took necessary action namely to ensure the work was being carried out; all of the calls of team members were monitored in this way and he dealt with any issues that the system flagged up. His evidence, which the Tribunal accepted, was that he made inquiries to all agents in these circumstances, and all were treated the same. The claimant was not reprimanded.

38 On 16 August 2021 page 89 the respondent in error sent the claimant notice that she had not logged onto the systems for her shift that day. The claimant had already commenced her maternity leave. The Tribunal found that this was indicative of the disorganised state of the contract at that time.

39 The claimant and her colleagues were sent notices to take their holidays towards the end of the contract. The claimant received notices on 12,15,19,22 and 23 February 2022 (page 95-102). At this time the work was dwindling away and there was insufficient work for the team; the Tribunal was told (and accepted) on one day in this period there was one call to make. All individuals were assigned to take holiday leave. The pay slips provided by the respondent show that the claimant was paid for holidays.

40 On 24 February 2022, page 103, the claimant was informed that her temporary contract with the respondent would end. The claimant was given one weeks' notice. At the time there was a cessation of the COVID legal restrictions and the

track and trace contract ended. The letter invited the claimant to consider Sitel vacancies on the website. She thought the termination of her contract was a mistake when she received the e-mail dated 22 of February 2022 (page 103 to 105). The claimant said after three months she thought she may have become a permanent employee but accepted there was nothing to that effect in writing. The claimant described other colleagues that she used to chat to namely Karen and Elizabeth (page 201) who were both English had their contracts terminated at the same time as her. At the time of her dismissal the claimant had been on maternity leave since 15 August 2021.

41 The claimant did not accept that everybody was dismissed at this point and she relied upon a LinkedIn page with a male employee who got work from Virgin Active. The Virgin Media job referred to in the Linked in page was based in Scotland and required face to face and in person working. The claimant accepted that she would not find this to be suitable vacancy at that time because she had a baby and she could not have physically been located in Glasgow or present in the office at this material time. Although the claimant attached a document about a role performed by a colleague in Stirling, she did not raise an issue about this in her evidence or refer to it in her witness statement. The Tribunal accepted the evidence of Mr. Carswell that there were no other jobs similar to the remote working of the track and trace contract available at the time with the respondent.

42 In terms of allegations of race discrimination, the claimant accepted that she relied upon acts of race discrimination, excluding the allegation of dismissal, running from the 20 of November 2020 (the setting up of the probation review meeting) with Leanne to the 21 of April 2021 which was the last act in time. She accepted there was some period of 11 months between the last act on the 21 of April 2021 and when she actually contacted ACAS on 14 of March 2022. The claimant had gone on maternity leave on 15 of August 2021 and there were some eleven months between 21 of April and 21 of March 2022 when her claim was accepted by the Tribunal. Under cross examination the claimant accepted she could have contacted ACAS earlier and she did not do so, nor did she make any complaints pursuant to the respondent's Equality and Diversity policy at anytime. She did not offer an explanation as to why she failed to take these steps.,

<u>Submissions</u>

43 The respondent submitted the claimant had not established any discrimination allegation nor that any of her wages had been unlawfully deducted.

44 The respondent submitted that Robyn Booth made a mistake in her oral evidence as to her termination date. The respondent produced evidence of a screen shot dated 26 November 2021 (not 2022) before track and trace ended when Robyn Booth left the respondent. The respondent requested the Tribunal to reject the claimant's evidence that she was subject to race discrimination because of a vote by UK residents for Brexit.

45 In respect of automatic unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 (pregnancy and maternity discrimination) and Regulation 20 of the 1999 Regulations the respondent submitted that the reason for dismissal was not because the claimant was pregnant or for any reason connected to her

maternity leave. The claimant was employed on a temporary basis to work on the track and trace contract; it was clear from the outset it was a short term contract (see page 302) and the contract was terminated when the track and trace campaign ended. The claimant did not access the Sitel vacancies site at the time. The respondent relied upon the evidence of Karen Carswell that there were no suitable vacancies at that time. The claimant identified a role which required part time attendance in the Glasgow office which was unsuitable for her.

46 Further, it was submitted that the claimant was not subject to unfavourable treatment and the s.18 Equality Act 2010 claim should be rejected. It was submitted along with her colleagues, employees had their employment brought to an end following the termination of track and trace and the claimant's maternity leave was not a factor. In respect of the claimant's contention that she was criticised for the length of comfort breaks she was not treated unfavourably. Mr. Cave Toye made enquiries to which the claimant provided an explanation which was readily accepted and that was the end of the matter. In respect of the payment for ante-natal payments, Mr Cave Toye (p.192) referred to a system of approval which had to be complied with and the claimant was paid. In respect of holiday pay the claimant along with colleagues were required to take annual leave towards the end of the track and trace contract; there was simply very little work for employees to do and the claimant was not treated unfavourably and there was no relationship with the claimant's maternity leave. In any event the claims were out of time. There are no continuing acts and the claimant did not raise a grievance. The claimant accepted in her evidence that she could have taken action within the three month period but offered no explanation as to why she had not.

47 The respondent submitted that the race discrimination claim should fail. Accent is not race. Section 9 of 2010 Act defines race as including nationality/national origin; accent is a separate point. The respondent submitted that there are variations of accent across the UK. The claimant was not dismissed because of her race. Simply the temporary contract came to an end and race was not a factor. Further, there was no evidence that the claimant was treated less favourably due to her race. She was required to attendance a meeting because of her accent namely her English language skills. The claimant was difficult to understand. In her work making critical telephone calls she had to be properly understood so to avoid the risk of the health of callers. At the meeting she was provided with support. There was no PCP applied to the claimant or others as alleged. The respondent had a supportive approach to the claimant. Her claims are out of time; there is no continuing act; the allegations involve different managers.

48 There is no unlawful deduction of wages claim. All due untaken accrued leave has been paid; see the payslips; p.299.

49 The claimant submitted her allegations involve employment and human rights. At the meeting she explained she tried to give the best for her job. The claimant said she was discriminated against and relied upon the case of Unite the Union v Nailard 2018 EAT case. The claimant submitted that like this case, the respondent did not take steps to provide her with a safe environment. She was invited to a meeting by Leanne because of her accent. The claimant submitted

that if you take a bus/train when you are a pregnant woman someone should give you a seat. A man should know about her pregnancy affects a woman. There was an intention to dismiss her. The respondent did not ask her if she could take the Glasgow job; they just presumed she could not. I just trust God. During my period of working with company I suffered discrimination the most in my life. This situation hurt me too much. I wait for so long to have justice about my case. I decided to fight for justice. From 20 November 2022 I started at the university studying law. My objective in this case as there is violence in Brazil is peace but I did not have peace working for Sitel. Since the beginning made clear it was committed to discriminate against me.

50 The respondent commented that the Unite Union v Naillard case is not relevant. There was no exploration in the evidence about these points; the list of issues identified the clear parameters of the case.

Law

Direct Discrimination

51 Section 13 of the Equality Act 2010 states "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.

52 Pursuant to section 23 (1) of the Act, on a comparison for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

53 Section 136 (2) and (3) of the Equality Act 2010 states

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

54 If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

55 To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

> *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".*

(***Madarassy v Nomura International plc* [2007] ICR 867** at [56] *per* Mummery LJ)

56 Regulation 10 of the Paternity and Parental Leave Regulations 1999 provides that

1. This regulation applies where during an employees ordinary or additional maternity leave. It is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
2. Where there is a suitable available vacancy the employee is entitled to be offered before the end of her employment under her existing contract alternative employment with her employer or his successor or an associated employer under a new contract of employment which complies with paragraph and takes effect immediately on the ending of her employment under the previous contract
3. the new contract of employment must be such that
   (a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances and
   (b) its provisions as to the capacity and place in which she is to be employed and as to the other terms and conditions of her employment are not substantially less favourable to her than if she had continued to be employed under the previous contract.

57. Section 18 of the Equality Act 2010 provides
(2) A person discriminates against a woman if in the protected period in relation to a pregnancy of hers A treats her unfavourably (a)because of the pregnancy. Pursuant to (4) a person A discriminates a woman if A treats her unfavourably because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave.

58. Article 15 Equal Treatment Directive 2006 : A woman on maternity leave shall be entitled after the end of her period of maternity leave to return to her job or to an equivalent post on terms and conditions which are no less.

59. Section 123 of the Equality Act. The normal time limit is three months starting with the date of the act to which the complaint relates. It is provided (a)conduct extending over a period is to be treated as done at the end of the period; (b)failure to do something is to be treated as occurring when the person in question decided on it.

60. In the case of **Johal v the Commission for the Equality and Human Rights UKEAT/0541/09** it was held that a complainant does not have to show less favourable treatment simply unfavourable treatment because of pregnancy or maternity leave. The requirement was thus to ask the reason why the claimant was treated the way she was.

61. An adverse finding under Regulation 10 does not automatically mean there had been a breach of section 18 of the Equality Act; different tests apply. Regulations 10 requires more favourable treatment to be afforded to the woman within the protected period. Section 18 required that she was not treated unfavourably. (see **Sefton Brough Council v Wainwright (UKEAT/0168/14**).

Once an employee's position is thus redundant the obligation under Regulation 10 arises. In the case of **Evershed Legal Services v De Belin (2011) UKEAT/0352/10** the obligation is to do that which is reasonably necessary to afford the statutory protection to the woman who is pregnant or on maternity leave. Doing more than is reasonably necessary would be disproportionate and put the employer at risk of unlawfully discriminating against others. The protection is afforded to women on maternity leave because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain.

62. The word detriment as defined by Lord Hope in the case of **Shamoon v Chief Constable of the role Ulster Constabulary 2003 ICR 337** one must take all the circumstances into account; detriment is treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment. An unjustified sense of grievance cannot amount to detriment Lord Scott stated Lord hope's test must be applied by considering the issue and point of view of the victim.

Particular disadvantage/indirect discrimination

61. In a claim of indirect discrimination, the PCP must place the group with which the claimant shares the protected characteristic in question at a particular disadvantage compared to groups that do not share the protected characteristic will not in materially different circumstances or be it not every member of the group needs to be placed at a disadvantage in so far as the group is proportionately disadvantaged (**Essop v Home Office 2017 UKSC 27** paragraphs 25-7). Particular in this context is not intended to connote a disadvantage that is required to meet a certain level of seriousness but simply makes clear that it is a disadvantage for those with the relevant protected characteristic (**McNeil v Commissioners for HMRC (2019) EWCA Civ 1112**).

The pool/indirect discrimination

62. If the claimant proves that a PCP has been applied it is then necessary to consider whether the claimant has proved that the PCP puts or would put persons who share the protected characteristic of the claimant at a particular disadvantage when compared with persons who do not share the protected characteristic (ie it is necessary to show group disadvantage caused by the PCP). In general, the pool is all those to whom the PCP is applied otherwise the pool does not test the allegation being made see **Dobson v The North Cumbria Integrated NHS Foundation Trust 2021 IRLR 729**. See also the EHRC code which states paragraph 4.18; in general the pool should consist of the group which the provision criterion or practise affects or would affect either positively or negatively while excluding workers who are not affected by it either positively or negatively. The starting point for identifying the pool is therefore to identify the PCP. Once the PCP is identified then the identification of the pool itself will not be a question of discretion or of fact finding but of logic; see **Allonby v Accrington and Rosendale College.**

63. Previous formulations had referred in terms to the proportions of people with the protected characteristic who could not comply with the PCP being

considerably smaller than those without the protected characteristic who could comply. This led to consideration of the correct pool for comparison and in error variably involved statistical evidence on disparate impact being produced. However under the current formulation neither a pool nor statistical evidence is required to prove group disadvantage all. Lady Hale identified one of the salient features of indirect discrimination claims as being that it is commonplace for disparate impact to be established on the basis of statistical evidence. Baroness Hale explained in **Chief Constable of West Yorkshire Police v Homer 2012 ICR 704** the change in the test for indirect discrimination brought about by the Equality Act. Baroness Hale held at paragraph 14 it was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages. Applying this approach the EAT in **Games v University of Kent UKEAT/O524/13** held at paragraph 41 it follows that it was not necessary for the claimant in order to establish particular disadvantage to himself and his group to be able to prove his case by the provision of relevant statistics. These if they exist would be important material. But the claimant 's own evidence or evidence of others in the group might suffice. In some cases particularly where the asserted group disadvantage is more obvious it is possible for a claimant to prove that there is group disadvantage without drawing up a pool or relying on the statistical evidence as was explained in **Dobson v Cumbria integrated NHS Foundation Trust 2021 IRLR 729** paragraph 35 particular disadvantage to the group can be established in a number of ways including by taking judicial notice of the matter that is asserted in this case which concerned whether women were put at a disadvantage by a requirement to work flexibly the claimant led no specific evidence on group disadvantage. The tribunal concluded the claimant had failed to prove group disadvantage. The EAT overturned the tribunal explained that it is clear from the case law that women bear the greater burden of childcare responsibilities that men and that this can limit their ability to work certain hours this is a matter in respect of which judicial notice has been taken without further inquiry on several occasions this was referred to as the childcare disparity and the EAT went on to hold that the tribunal erred in not taking judicial notice of the childcare disparity it is also well known in the context of indirect discrimination and so often the subject of judicial notice that it was incumbent on the tribunal to take notice of it here. In **Shackleton Garden Centre limited v Lowe UKEAT 80/0161/10** the EAT upheld the tribunal's conclusion that the requirement to work a roster which included weekend working put women to a particular disadvantage when compared with men because women have significantly more primary responsibility for childcare than men and accordingly the ability of women to work particular hours is restricted because of childcare commitments in contrast to men. No pool had been drawn up and no statistics reduced. It was also explained in **Dobson** that the claimant’s disadvantage might itself provide some support for group disadvantage. That is consistent with **Games** in which it was said that the claimant's own evidence as to the disadvantage to her might suffice see above whether the tribunal is able to infer group disadvantage from the

particular disadvantage to the claimant will depend not only on the quality and reliability of the evidence but also whether any meaningful conclusions about the group picture may be drawn from it that may not be the case where for example the individuals disadvantage arises in circumstances that are unusual or unique to the claimant and which do not exist in or not comparable to those of the wider group **Dobson.** It may also be the case that the disadvantages inherent in the PCP in question that was held to be the case in **Dobson** in which it was said that a requirement to work flexible hours was inherently more likely to produce a detrimental effect which would disproportionately affect women. There is no requirement that the PCP in question for every member of the group sharing the particular protected characteristic at a disadvantage. If it did it would be closer to a case of direct discrimination. Some in the group who shared the protected characteristic with the claimant will therefore not be disadvantaged **Naeem v the Secretary of State for Justice 2017 UKSC 27.** It is not necessary for a claimant to show that the PCP is impossible for the claimant and group to comply with it, merely it has to create a disadvantage; see for example **Rajarathan v Care UK Clinical Services Limited UKEAT/0435/14** in which the PCP was a requirement that GP's work one week of night shifts every four weeks. The claimant's case was that whilst it was open to her to use childcare this still created disadvantage. The EAT at paragraph 45 stated showing disadvantage does not mean showing that particular working arrangements are impossible for a particular individual merely that they put that individual at a disadvantage. This was also a point taken by the respondent in **Dobson** who sought to rely on the fact that the claimant 's difficulties in arranging childcare were not insurmountable as the respondent sought to give her as much notice of the changes to hours as possible and a husband was available to help weekends. The EAT rejected that argument explaining that the fact that compliance is possible with real difficulty or with additional arrangements having to be made or by shifting the childcare burden onto another can still mean that there is disadvantage. Whether a claimant and a person sharing his characteristic is placed at a particular disadvantage by a PCP must be assessed at the time when the PCP was applied. The question is whether at that time it places them at a particular disadvantage paragraph 44 **Games**. There is no express requirement for an explanation or the reason why a particular PCP puts one group at a just advantage when compared with others it is enough that the PCP does have this effect **Naeem 2017 UKSC 27.** It was explained that the reasons why one group may find it harder to comply with the PCP than others are many and various it could be social or other factors which in combination with the PCP cause the disadvantage. What there must be is a causal link between the PCP and the particular disadvantage suffered by the group and the individual.

<u>Burden of proof</u>

64. In the case of **Bethnal Green and Shoreditch Education Trust v Dippenaar UKEAT/064/15** the burden of proof only applies in indirect claims once the claimant has established facts from which a court could decide that there has been discrimination in the context of indirect discrimination this means that the claimant must establish on the facts of the application of a PCP and group and individual disadvantage.

65. There is initial burden on a claimant to establish that the relevant PCP caused substantial disadvantage following **Project Management Institute v Latif (2007) IRLR 579** paragraphs 44-5, Elias P Observed at paragraph 45 that establishing the PCP and demonstrating the substantial disadvantage

"are simply questions of fact for the tribunal to decide after hearing all the evidence with the onus of proof resting throughout on the claimant."

66. In the case of **Allonby v Accrington & Rossendale College (2001) ICR 1189** paragraph 12 Sedley LJ explained the initial burden on the complainant as follows

67. *it is for the applicant to identify the requirement or condition which she seeks to impugn. These words are not terms of art; they are overlapping concepts and are not to be narrowly construed Clarke v Eley IMI Kynoch (1982) IRLR 482. If the applicant can realistically identify a requirement or condition capable of supporting her case.. It is nothing to the point that her employer can with equal cogency drive from the facts a different and a new objectionable requirement or condition. The employment tribunals focus moves directly to the question of unequal impact."*

<u>Conclusions</u>

68. The Tribunal considers the issue of time in respect of the discrimination claims namely given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 15 December 2021 may not have been brought in time. The Tribunal will consider the following issues :-

68.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

68.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
68.1.2 If not, was there conduct extending over a period?
68.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
68.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
68.1.4.1 Why were the complaints not made to the Tribunal in time?
68.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

69. The Tribunal takes into account the Court of Appeal decision of **Adedeji v University Hospitals Birmingham NHS Foundation Trust (2021) EWCA Civ 21** that notes that strict adherence to the factors in section 33 of the Limitation Act 1980 (referred to in Keeble) is not required. The Tribunal should take into account all relevant factors including length and reasons for the delay and whether the respondent has been prejudiced by such a delay.

Automatic Unfair dismissal

71. The Tribunal considers, was the reason or principal reason for the dismissal that the claimant had fallen pregnant, had a baby or taken maternity leave; or was it redundancy but the respondent had not complied with regulation 10 of the 1999 Regulations? If so, the claimant was unfairly dismissed. If not, the unfair dismissal claim fails
72. The claimant was dismissed by notice on 23 February 2022 (page 102). Her employment terminated on 4 March 2022. This occurred when the government track and trace contract was terminated. There was a reduction in need for the claimant and her colleagues to perform the role of call agents for the respondent at this time because the track and trace contract was no longer in existence. The Tribunal finds that this fulfilled the definition of "redundancy" pursuant to section 139 of the ERA 1996 namely that the requirements of the respondent for employees to carry out work of a particular kind had ceased. It was clear from the outset of the claimant's employment that the track and trace role she was recruited to was, a temporary contract.
73. The claimant was on maternity leave at this time. She had commenced maternity leave on 15 August 2021. Pursuant to Regulation 10 of the 1999 Regulations the respondent was obliged to offer suitable alternative employment to the claimant. The vacancy the Tribunal heard about in evidence was an in person role in Glasgow working for Virgin Active. Although the claimant stated in submissions that the respondent must have assumed she did not want this role, she accepted in her evidence that an in-person role situated in Glasgow was not suitable alternative employment for her. No other available vacancy was identified in evidence.
74. In any event, the respondent's evidence (provided by Mrs. Carswell) accepted by the Tribunal is that there were no available remote vacancies at that time. In the circumstances, the Tribunal concluded that the Virgin Active job was not a suitable available vacancy for the claimant and there were no suitable vacancies for the claimant at this time.
75. The Tribunal found that the evidence of Ms. Booth that she remained with the respondent until November 2022 was wrong. She left the respondent in November 2021 and her statement recorded the incorrect year; this was corroborated by a document from the respondent's HR system which evidenced that she left the respondent's employment in 2021.
76. In the circumstances the Tribunal found there was no suitable alternative vacancy for the claimant to be offered by the respondent and accordingly there was no breach of Regulation 10 of the 1999 Regulations.
77. The principal reason for the claimant's dismissal was that the track and trace contract that she was employed to do ended. There was no suitable alternative employment.
78. The claim for automatic unfair dismissal fails.

Direct race discrimination (Equality Act 2010 section 13)

79. The Tribunal considers the following. For the purpose of her direct race discrimination claim the claimant relies on (a)Her Brazilian and/or non-British national origins and/or her national origins being from a country where English is not the first language of most of the population; (b)on an allegation that

because of those national origins her spoken English was perceived as difficult to understand.

80. Did the respondent do the following things:
    i. Dismissed the claimant;
    ii. on 19 November 2020 the claimant's manager Leanne Dyer emailed the claimant telling her she should attend a hearing or meeting the following day to talk about the language barrier and at that meeting or hearing on 20 November 2020 telling her that because of her accent/English language skills meeting the company's criteria;
    iii. from late November 2020 (Robyn Booth) onwards setting targets that were impossible to achieve;
    iv. from late November 2020 onwards (Robyn Booth) criticising the claimant for not meeting targets including taking too long on calls;
    v. from late November 2020 onwards, Leanne Dyer moving the claimant between different types of calls seemingly at random and more so than most other people were moved;
    vi. as an addition to the previous allegation Leanne Dyer deliberately moving the claimant around meaning she kept having to do more training with a view to making her working life more difficult intending to get her to resign;
    vii. Leanne Dyer deducting 2 hours from her time and pay;
    viii. Leanne Dyer accusing the claimant of being absent from work and knocking 2 hours off her pay.

81. Was that less favourable treatment?

    The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

    If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

    The claimant has not named anyone in particular who they say was treated better than they were. If so, was it because of her race ?

82. Accent itself is not a protected characteristic under the Equality Act. Race pursuant to section 9 of the Act, expressly includes nationality and ethnic or national origins and is protected under the Act. It is therefore unlawful to discriminate against or harass a person on the grounds of their "foreign" accent. The ACAS Code on race discrimination uses an example of a French worker being made fun of because of her accent to show how racial harassment might arise.

83. There are some first instance cases worth considering. In the case of **McCalam v Royal Mail Group Limited** a Scottish claimant alleged that his English manager had repeatedly said he could not understand him. On the facts the Tribunal found his manager could not understand the claimant because he

talked too fast and had a tendency to speak faster when he was irate. On these facts his race discrimination claim failed. In **Kelly v Hoo Hing Limited** an Irish employee was mocked for his accent and a colleague danced like a leprechaun. The tribunal concluded this conduct was direct discrimination and it would be difficult to argue that mocking somebody by adopting a stereotypical accent and gestures was anything other than inherently discriminatory.

84. The role performed by the claimant was providing accurate information to individuals who had tested positive for COVID or those who had been in contact with others infected with COVID. It was intrinsically important that the information was communicated clearly. A number of members of the public complained that they could not understand the claimant. For the purpose of the claimant's direct race discrimination claim she relied on (a)her Brazilian and/or non-British national origins and/or her national origins being from a country where English is not the first language of most of the population; and/or (b)because of those national origins her spoken English was perceived as difficult to understand. The Tribunal considers that section 9 of the Equality Act 2010 can be read to include accent by reason of the claimant's Brazilian and/or non British national origins or national origins from a country where English is not the first language.

Dismissal

85. The Tribunal has already dealt with the issue of dismissal. The respondent dismissed the claimant because the track and trace project terminated. The claimant was in contact with colleagues via messaging namely Elizabeth and Karen; they were both English and English speakers. The claimant informed the Tribunal that they carried out the same role as her and were dismissed at the same time. The Tribunal found that the claimant was dismissed by reason of the fact that there was no work for the claimant and her colleagues to do on the contract they were employed to work on; the track and trace system. The claimant was not less favourably treated to her comparators; they were all dismissed at the end of the track and trace contract. The termination of the claimant's contract had nothing whatsoever to do with the claimant's race.

Invitation to a meeting

86. On 19 November 2020 the claimant's manager Leanne Dyer emailed the claimant telling her she should attend a hearing or meeting the following day to talk about the language barrier and at that meeting or hearing on 20 November 2020 telling her that because of her accent/English language skills meeting the company's criteria. The claimant was invited to a meeting by Leanne Dyer. The evidence of Ms. Dyer accepted by the Tribunal is that Leanne was required by her manager to send the invitation to the claimant but that she was not involved in the meeting with the claimant. The claimant accepted in her evidence to the Tribunal and at the meeting that she was struggling with her language and that some members of the public had been rude to her because they said they did not understand what she was saying. Further the claimant acknowledged at the meeting that she had an issue and she was working hard to improve her language. In the context that information should be communicated in a clear way to members of the public, the respondent had noted that the claimant was struggling to do this and the claimant acknowledged this herself. The respondent determined that further training was required.

87. The claimant was invited to the meeting because of the language barrier; the claimant had a language barrier in part by reason of her strong Brazilian accent. This was related to race.
88. However, the Tribunal does not find by inviting and holding a meeting with the claimant to discuss a genuine performance issue was a detriment. A manager was entitled to raise a performance issue; the claimant's accent was negatively impacting on her performance of the role. In the course of the meeting the claimant accepted there was an issue and she was practising her language skills. A mere discussion with the claimant about a performance issue, which the claimant also acknowledged and agreed required some improvement, could not be deemed to be a disadvantage in the Shamoon sense.
89. In any event this allegation is out of time. The Tribunal did not find that it was part of a continuing state of affairs. The claimant took maternity leave in August 2021. It was a discrete matter and ended on 21 April 2021. The respondent invited the claimant to a meeting; discussed the language barrier and took no further action. The claimant raised no complaint about it at the time. The claimant accepted that she was aware of the complaints process at page 60 but did not complain and accepted under cross examination that she could have contacted ACAS much earlier than March 2021 (some 4 months before) and provided no explanation as to why she failed to take any steps to do so. The Tribunal takes into account the case of **Adedeji v University Hospitals Birmingham NHS Foundation Trust (2021) EWCA Civ 21** and notes that strict adherence to the factors in section 33 of the Limitation Act 1980 (referred to in Keeble) is not required but the Tribunal should take into account all relevant factors including length and reasons for the delay and whether the respondent has been prejudiced by such a delay. The Tribunal notes that this allegation is weak; the period of delay is significant in the context of the short period in which discrimination claims should be brought; there are no reasons at all put forward for the delay. It was not just and equitable to extend time.

Targets

90. The claimant alleged that from late November 2020 (to April 2021) Robyn Booth set targets that were impossible to achieve and the claimant was criticised for not meeting targets including taking too long on calls. From the evidence targets were informal and used as a means of encouraging colleagues to work efficiently. The claimant was not disciplined at any time. The claimant was the worst performer; and the respondent's expectation for employees was to make 60 plus calls a day; its expectation for the claimant was to achieve 2-3 successful calls per week.
91. In evidence the claimant only cited one example where Robyn Booth raised the issue of the claimant's lack of calls see April 2021 page 139. The claimant's explanation at the time was that she was disadvantaged by reason of the system crashing. The claimant did not raise any concerns that her poor number of calls was by reason of any language barrier. The claimant was not disciplined but encouraged to improve. The Tribunal does not accept on these facts that the respondent set targets that were impossible to achieve; targets were informal; no disciplinary action followed and the expectation placed on the claimant was that she should achieve 2 to 3 successful calls a week. There was no less favourable treatment in these circumstances. Further on the claimant's own case her poor number of calls was related to IT issues and not her race.

92. Further this allegation is out of time. The claimant accepts that she could have contacted ACAS much earlier than March 2021 (some 4 months before) and provided no explanation as to why she failed to take any steps to do so. The Tribunal notes that this allegation is weak; it is a discrete allegation; the claimant took maternity leave in August 2021; the period of delay is significant in the context of the short period in which discrimination claims should be brought; there are no reasons at all put forward for the delay. The Tribunal do not consider in these circumstances that the claimant had established it was just and equitable to extend time.

<u>Moving the claimant</u>

93. The claimant alleged that from late November 2020 onwards Leanne Dyer moved the claimant between different types of calls seemingly at random and more so than most other people were moved and deliberately moved the claimant around meaning she kept having to do more training with a view to making her working life more difficult intending to get her to resign.
94. The Tribunal found that the situation as painted by Leanne Dyer was chaotic and disorganised at the time. The Tribunal accepted the evidence of Leanne that the movement of employees to different types of work was not a matter in her gift; she was told to move team members. Leanne as a team leader would receive an email that individuals were required to work in another team. She would communicate that to the claimant and others; by the time the notification was picked up; the need may well have changed; this affected a number of customer service employees and not just the claimant. Further, moving employees to different teams helped the agents' skills development. The evidence to the Tribunal from Ms. Dyer which the Tribunal accepted was that everybody was being moved to try and justify people staying on the contract as long as possible. The claimant was not moved anymore than others. Further the Tribunal rejected that the move meant that the claimant had to re-train. The claimant was conducting two types of work; requiring reading from a script; one for individuals who had been in contact with someone with COVID and a different script for those who had to isolate. The Tribunal rejected this required more training.
95. The claimant case is that she was deliberately moved around to make life difficult for her so that she would resign. The Tribunal rejected this allegation on the facts; Leanne was just doing her job in the context of a fairly chaotic and disorganised system and there was no intention at all to get the claimant to resign.
96. Further this allegation is out of time and does not form any part of a continuing state of affairs. The claimant took maternity leave in August 2021. The claimant accepts that she could have contacted ACAS much earlier than March 2021 (some 4 months before) and provided no explanation as to why she failed to take any steps to do so. The Tribunal notes that this allegation is weak; it is a discrete allegation; the claimant took maternity leave in August 2021; the period of delay is significant in the context of the short period in which discrimination claims should be brought; there are no reasons at all put forward for the delay. The Tribunal do not consider in these circumstances that the claimant had established it was just and equitable to extend time.

Deduction of 2 hours/accusing the claimant of not working

97. The claimant alleged that Leanne Dyer deducted 2 hours from her time and pay and accused the claimant of being absent from work and knocking 2 hours off her pay.
98. The respondent monitored the work of all employees to ensure they were working and making calls. In circumstances where an employee did no work because of a failure in the system or internet connection this would be flagged up by the system and the team leader had an obligation to raise this with the employee and a deduction was made to an employee's pay if no work was performed.
99. The claimant accepted that on 26 January 2021 the internet connection failed so that she was unable to work for 2 hours. Leanne Dyer asked the claimant why she was not working for 2 hours. This was a reasonable request to make of the claimant by her manager and had nothing whatsoever to do with race. The claimant responded that due to a loss of internet connection she was unable to log onto the system. The Tribunal determined that an employee who does not work for two hours for whatever reason can not expect to be paid for this non-working time. In the circumstances 2 hours of pay were deducted from her pay. This had nothing whatsoever to do with the claimant's race.
100. Further this allegation is out of time and does not form a continuing act namely part of a continuing state of affairs. This was a discrete management decision; the claimant failed to work for 2 hours to which she accepts and received nil pay for this period. The claimant took maternity leave from August 2021; accepts that she could have contacted ACAS much earlier than March 2021 (some 4 months before) and provided no explanation as to why she failed to take any steps to do so. The Tribunal notes that this allegation is weak; it is a discrete allegation; the period of delay is significant in the context of the short period in which discrimination claims should be brought; there are no reasons at all put forward for the delay. The Tribunal do not consider in these circumstances that the claimant had established it was just and equitable to extend time.

101. Further the Tribunal finds that there was no unlawful deduction of pay. An employee cannot reasonably be expected to be paid for time not worked.

Pregnancy and Maternity Discrimination : s.18 of the Equality Act 2010

102. The Tribunal considers the following matters. Did the respondent treat the claimant unfavourably by doing the following things:

(i)Dismissed the claimant

The Tribunal has already dealt with the issue of dismissal above. For completeness the Tribunal repeats its finding that the claimant was dismissed by reason of the fact that there was no work for the claimant and her colleagues to do on the contract they were employed to work on; the track and trace system. The termination of the claimant's contract had nothing whatsoever to do with the claimant's maternity leave. There were no suitable vacancies to offer the claimant at the material time as suitable alternative work.

(ii)Between April and August 2021 Richard Cave-Toye criticised the claimant for the length and number of comfort breaks she was having in circumstances where the claimant were going to the lavatory more often because she was pregnant; this included sending her a message on 26 of May 2021 complaining about having taken a particular comfort break that supposedly lasted 8 minutes.

The Tribunal has found that the claimant accepted that her manager was entitled to ask for what reason she was on a break. The claimant said he was not rude but someone had asked him to do it and that person knew she was pregnant. Mr Richard Cave- Toye said simply that that the long break was flagged up on his system that there were more breaks taken therefore he was requested by his manager to check. No further action was taken; he just made an enquiry. Mr. Cave-Toye said he may have known the claimant was pregnant at the time but was not clear on the timescales.

103. The Tribunal does not accept that simply making an enquiry as to whether an employee is working is actually unfavourable treatment or in fact related to pregnancy. The claimant was pregnant at the material time but she could have been taking a break for any reason; she suggests in her contemporaneous email it was for 'person reasons". She maintains the breaks were related to her pregnancy and the need to go to the lavatory more frequently. She does not dispute that she was over the 10 minutes she was entitled to by 8 minutes in terms of a break. Her manager simply made an enquiry which he was entitled to do which could not reasonably be considered to be any detriment; no disciplinary action was taken at all. In any event the treatment namely the enquiry itself had nothing whatsoever to do with the fact the claimant was pregnant. Mr. Cave-Toye was carrying out his role; he was obligated to enquire with an employee why they had taken more breaks than the norm.

104. Further this allegation is out of time. It does not form a continuing act namely part of a continuing state of affairs. This was a discrete matter. The claimant took maternity leave from August 2021. The claimant accepted in evidence that she could have contacted ACAS much earlier than March 2022 and provided no explanation as to why she failed to take any steps to do so. The Tribunal notes that this allegation is weak; it is a discrete allegation; the period of delay is significant in the context of the short period in which discrimination claims should be brought; there are no reasons at all put forward for the delay. The Tribunal do not consider in these circumstances that the claimant had established it was just and equitable to extend time.

(ii)In or around early July 2021 Richard Cave-Toye making difficulties connected with payment for days when the claimant had antenatal appointments and then after the claimant went to HR to get the issue sorted out on 13 July 2021 accusing her of avoiding work

The Tribunal has found that on 23 June 2021 the claimant informed Richard Cave Toye that she had an ante natal appointment. She informed him she needed to take a paid day off. He responded that it was probably not paid. The claimant said she had a document that her days off were paid. He responded that he would find out and asked whether the claimant had an appointment card and if she could email it to him. He was unaware about the detail of the maternity policy and the Tribunal finds that he was genuine when he said he had a lack of knowledge about this. He said that a line manager had to sign it

off and payroll manager determines whether the claimant is actually paid. He informed the claimant that she needed to raise it with a manager (see page 193). He told the Tribunal that it needed to be signed off by a manager above him and if the claimant was not paid she needed to contact payroll (see page 194). There is no evidence that the claimant was not paid. There was no deliberate attempt by Mr. Cave-Toye to make payment difficult for the claimant related to her ante natal appointments. He simply was unaware of the policy. His treatment of the claimant was not unfavourable treatment nor was it because of her pregnancy or because she was seeking to exercise her right to maternity leave. Further this allegation is out of time. It repeats its findings at paragraph 104 above.

105. In respect of 13 July 2021 (page 196-197) Mr Cave-Toye raised with the claimant that she was dealing with calls for longer than 10 minutes because the phone system showed how long the call had been ongoing; for one call showed that the call went to voicemail then remained active for 10 minutes; the system would generate an e-mail which would be sent to Mr Cave Toye. Mr Richard Cave Toye asked the claimant about 3 outlier calls on voicemails; one of them was 28 minutes. He wondered if the claimant had taken a lunch break. The claimant said she had forgotten to stop the tracing and she was just out to lunch. He said he had 10 cases of this now in the last three days and requested to see some improvement. The claimant said she would improve. Mr. Cave Toye said that voicemails over 10 minutes and no reason why this could be in the comments *"looks like work avoidance which I'm sure it isn't"*. Mr. Cave-Toye did not as the claimant contends accuse her of work avoidance. The claimant accepted that she understood Mr. Cave Toye was doing his job.

106. The Tribunal found as a team leader, Mr. Cave Toye took necessary action namely to ensure the work was being carried out; all of the calls of team members were monitored in this way and he dealt with any issues that the system flagged up. His evidence, which the Tribunal accepted, was that he made inquiries to all agents in these circumstances, and all were treated the same. The claimant was not reprimanded. Simply making an enquiry as to whether an employee is working can be reasonably considered to be any detriment. The treatment of the claimant was not unfavourable; nor related to her pregnancy or because she was seeking to exercise her right to maternity leave. Further this allegation is out of time. The Tribunal repeats its findings in paragraph 104 above.

<u>(iii)Richard Cavetoye requiring her to take annual leave during her maternity leave in the run up to her dismissal without warning or consultation.</u>

The evidence heard and accepted by the Tribunal was that towards the end of the contract work was significantly dropping off which affected every employee. There was simply nothing to do prior to the contract being formally terminated. Everybody including the claimant was requested to take holiday in that period. This treatment was nothing to do with the claimant's pregnancy or that she was seeking to exercise maternity leave.

107. Furthermore there was no evidence that the claimant was not paid her holiday pay entitlement.

108. **Indirect discrimination (Equality Act 2010 section 19)**

a. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

    i. A requirement or expectation that those doing the claimants job should speak English without a relatively strong Brazilian accent or other relatively strong accent of a country where English is not the first language of most of the population.

b. Did the respondent apply the PCP to the claimant?

c. Did the respondent apply the PCP to those with non Brazilian and/or British national origins and national origins from any country where English is the first language of most of the population or would it have done so?

d. Did the PCP put persons with Brazilian and or non British national origins and or national origins from a country where English is not the first language of most of the population at a particular disadvantage when compared with those with non Brazilian and or British national origins and or national origins from any country where English is the first language of most of the population ?

e. Did the PCP put the claimant at that disadvantage?

f. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

    i. *The respondent does not rely upon a justification defence*

109. The Tribunal considers the following issues.

(1)A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: A requirement or expectation that those doing the claimant's job should speak English without a relatively strong Brazilian accent or other relatively strong accent of a country where English is not the first language of most of the population

The Tribunal determined that the respondent did not apply the contended PCP. By the nature of the role performed by the claimant there was a general expectation that team members could speak articulately and speak intelligible English so to convey the crucial information to members of the public that they needed to isolate and/or had been exposed to COVID.

(2)Did the respondent apply the PCP to the claimant?

The respondent did not apply the contended for PCP to the claimant. The respondent had the general expectation that the claimant would speak articulately and intelligible English so to convey the crucial information to members of the public that they needed to isolate and/or had been exposed to COVID. This is significantly different from the contended PCP.

(3)Did the respondent apply the PCP to those with non Brazilian and/or British national origins and national origins from any country where English is the first language of most of the population or would it have done so?

The Tribunal heard no evidence about this at all. The respondent general expectation that all its employees speak articulately and intelligible English so to convey the crucial information to members of the public that they needed to isolate and/or had been exposed to COVID.

(4)Did the PCP put persons with Brazilian and or non British national origins and or national origins from a country where English is not the first language of most of the population at a particular disadvantage when compared with those with non Brazilian and or British national origins and or national origins from any country where English is the first language of most of the population ?

There is no evidence before the Tribunal to establish that the contended PCP put the alleged employees at a particular disadvantage. Further there is no evidence that the general expectation to speak articulately and intelligible English so to convey the crucial information to members of the public that they needed to isolate and/or had been exposed to COVID put persons with Brazilian and or non British national origins and or national origins from a country where English is not the first language of most of the population at a particular disadvantage when compared with those with non-Brazilian and or British national origins and or national origins from any country where English is the first language of most of the population. This was merely asserted by the claimant with no corroborative evidence.

(5)Did the PCP put the claimant at that disadvantage?

This was rejected by the Tribunal. The general expectation to speak articulately and intelligible English so to convey the crucial information to members of the public that they needed to isolate and/or had been exposed to COVID, the claimant indicated that she was at a disadvantage because she was invited to a meeting and attended a meeting in November 2020 to discuss the fact that a number of members of the public could not understand what she was saying nor could her manager. To be invited to a meeting to discuss the issue was a performance matter. The claimant in fact accepted that there was an issue and she was working on her language at the meeting. She was not disciplined. This could not be deemed to be any kind of disadvantage.
In so far as it can be suggested (although not clearly asserted by the claimant in this case) about any other alleged disadvantage, as expressed above the Tribunal is not satisfied on the evidence that the claimant was subject to a disadvantage. The times when the claimant was not working she blamed on IT issues. Being moved to another team at short notice and back again was applied to all and did not place the claimant at a particular disadvantage. The claimant was employed to read out two types of scripts; the Tribunal was not satisfied the reading of either script would require re-training on each occasion. There was no

formal monitoring of performance and no formal targets set. A manager enquiring about whether an employee had been working at particular times did not place the claimant at a particular disadvantage.

110. In respect of time, this allegation concerning the invite to the meeting in November 2020 is out of time. It does not form a continuing act namely part of a continuing state of affairs. This was a discrete matter. The claimant took maternity leave from August 2021. The claimant accepted in evidence that she could have contacted ACAS much earlier than March 2022 and provided no explanation as to why she failed to take any steps to do so. The Tribunal notes that this allegation fails; it is a discrete allegation; the period of delay is significant in the context of the short period in which discrimination claims should be brought; there are no reasons at all put forward for the delay. The Tribunal do not consider in these circumstances that the claimant had established it was just and equitable to extend time.

Employment Judge Wedderspoon

22 March 2024