Case No: 3322840/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Jade Morris	**v**	1. **Matalan Retail Limited** 2. **Ms Vivene Peart** 3. **Ms Mala Charles**

Heard at: Watford **On:** 20 to 23 March and 27 March 2017

Before: Employment Judge Bedeau
Members: Mrs N Duncan
Mr A Kapur

Appearances:

For the Claimant: Ms D McKenzie, Friend
For the Respondent: Ms A Smith, Counsel

JUDGMENT having been sent to the parties on 30 March 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented to the tribunal on 18 April 2016, the claimant brought complaints of discrimination on grounds of sexual orientation covering both direct discrimination because of sexual orientation and harassment related to sexual orientation. To these claims the respondents have denied liability.

2. The matter came before the employment tribunal on 27 September 2016 when Employment Judge Heal ruled that the claim form was presented in time, however, acts or omissions before 21 October 2015, remain potentially out of time. With the parties' agreement, the learned judge identified the legal and factual issues in the case. They are set out in paragraphs 4 to 6 below.

The issues

4. Section 13: Direct discrimination on grounds of sexual orientation.

   4.1 Have the respondents subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely,

      4.1.1 On 8 October 2015, Ms Julie Barnard, Support Store Manager, verbally intimidated the claimant in the Click and Collect area. Ms Barnard's manner was aggressive? She asked the claimant where she had been because the claimant was four minutes late back from her break. Ms Barnard said that the claimant did not like her because she was a manager. Her hands were moving close to the claimant's personal space.

      4.1.2 On 12 October 2015, the claimant told Ms Mala Charles, Assistant Store Manager, about the incident with Ms Barnard, saying that she would leave the matter with her.

      4.1.3 On 24 October 2015, the claimant's aunt and friend came into the store when Ms Charles accused the claimant of talking to her 'mate' which the claimant found rude. The claimant explained that she was talking to her aunt.

      4.1.4 On 4 November 2015, Ms Charles accused the claimant of being a liar while discussing a visit made by the claimant to the stockroom. Ms Charles said that she would write to head office about the claimant and asked the claimant to sign a piece of paper. The claimant said 'wow'. At that point Ms Charles told her that she sounded like her 10-year-old.

      4.1.5 On 14 November 2015, Ms Marina Baltova, General Sales Assistant, told the claimant that after the claimant had left the store she, Ms Baltova, was intimidated into making a statement against her.

      4.1.6 The claimant went to collect a rota from Ms Charles and was spoken to her in an aggressive and dominant manner by her who refused to give the claimant the rota.

      4.1.7 Ms Charles told the claimant that she would tell head office that the claimant walked out that day.

      4.1.8 Mr Kamil Worotnicki, Sales Manager, told the claimant to leave the store. Other members of staff who had left because of Ms Charles' treatment had been allowed back in to the store.

      4.1.9 Ms Charles came to tell the claimant to get her belongings and leave. She grabbed the claimant's arm and called security to get her out.

4.2 Have the respondents treated the claimant as alleged less favourably than it treated or would have treated the comparators?

4.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.4 If so, what is the respondents' explanation? Does it prove a non-discriminatory reason for any proven treatment?

5. Section 26: Harassment on grounds of sexual orientation.

5.1 Did the respondent engage in unwanted conduct as follows:

5.1.1 On 13 October 2015, the claimant bought two pairs of men's pyjamas when Ms Vivene Peart, General Sales Assistant, asked the claimant if they were for her boyfriend. The claimant replied, "I don't do boys, I do girls." Thereafter Ms Peart's attitude towards the claimant changed, in that she did not smile at the claimant anymore and showed she was not impressed with her.

5.1.2 Ms Peart, after 13 October, made comments to the claimant that the claimant needed to be "dipped in water" and that "Jesus was calling" the claimant but the claimant was "not answering". She said that she felt uncomfortable around the claimant and the claimant made her "miserable". She told colleagues that the claimant would either leave or be dismissed.

5.1.3 On a date after 13 October, which the claimant cannot now remember, Ms Peart said, "Jesus, Lord help me to get out of this store, I do not like these people". She was looking at the claimant as she said it. Ms Baltova told the claimant that Ms Peart was speaking to her.

5.1.4 On the same day, Ms Charles asked the claimant and Ms Peart their ages when they went to her about the above matter. The claimant told Ms Charles how Ms Peart had treated her but Ms Charles did not take her seriously and took the Peart's side and she ignored the claimant's complaint against Ms Peart.

5.2 Was the conduct related to the claimant's protected characteristic?

5.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of

the case and whether it is reasonable for the conduct to have that effect.

6. Time

6.1 Day A was 20 January 2016, in relation to the first respondent. Accordingly, any act or omission which took place before 21 October 2015, is potentially out of time, so that the tribunal may not have jurisdiction.

6.2 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

6.3 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

7. Remedies

7.1 If the claimant succeeds either in whole or in part, the Tribunal will be concerned with issues of remedy.

7.2 There may fall to be considered a declaration in respect of any proven unlawful discrimination, compensation for loss of earnings, injury to feelings and/or the award of interest.

The evidence

8. The tribunal heard evidence from the claimant, who called as a witness, Mr Shamai Thomas, a friend. She invited the tribunal to have regard to the witness statements of Miss Antionette Parkinson; Ruth Pedro; and Hannah Cooper and to give whatever weight we considered appropriate as they did not attend to give evidence and be cross-examined.

9. On behalf of the respondents, evidence was given by Ms Vivene Peart, General Sales Assistant and the second respondent; Ms Mala Charles, Assistant Store Manager and the third respondent; and by Mr Keith Cunningham, Area Manager.

10. In addition to their oral evidence the tribunal were referred to the documents in the joint bundle comprising of over 268 pages.

Findings of fact

11. The first respondent is a major clothing retailer with stores throughout the United Kingdom. In 2015, it was due to open a new store in Edmonton, north London. Prior to the store's opening it engaged in a recruitment exercise during which the claimant applied for and was offered the position of General Sales Assistant. She commenced employment with the respondent on 21 September 2015, contractually, working eight hours a week. We find, however, that prior to the opening of the store and shortly thereafter, she worked in excess of her contractual hours.

12. From her curriculum vitae, the claimant has experience in working in retail as she worked in Superdrug between 2005 and 2006 and at River Island between 2007 and 2008. She also worked for a year as an Administrator in customer service for an organisation called Jesus in Ministry, in London.

13. Working at the Edmonton Store were Ms Vivene Peart, the second respondent; Ms Mala Charles, the third respondent and Store Manager; Ms Julie Barnard, Support Store Manager, based at Dalston, as well as a number of General Sales Assistants. Ms Barnard was there to assist Ms Charles as the store had newly opened and she had the greater experience. Ms Peart was employed as a General Sales Assistant prior to her being given the title of Till Champion. In that role, she was in charge of the tills and would supervise, train and organise the rota of the General Sales Assistants who worked on tills.

14. From the evidence, we find that an employee who work up to four hours a shift is not entitled to a break. Between four and six hours, the employee is given 20 minutes' break. Over six hours, the employee is given two half hour breaks.

15. In so far as the respondent's policies and procedures are concerned, it has an Equality and Diversity policy covering age, disability, gender, gender reassignment, marriage, civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It also has a grievance policy which provides that an employee can raise a matter of concern, informally, initially, and if not resolved at that stage, would then be dealt with formally by way of an investigation, followed by a grievance meeting with an outcome given. There is also the right of the aggrieved employee to appeal against the grievance outcome. As part of the policy there is also the option of mediation.

16. In relation to an employee's conduct, the respondent has a disciplinary policy. Outside of the policy it can issue what is described as a "Counselling note". This is an informal process whereby the employee affected will have his or her conduct monitored.

17. In relation to the duties of a General Sales Assistant, we adopt paragraph 3 of Ms Charles' witness statement. Their role is to undertake a variety of tasks including stocking of the store, serving customers at the tills as well as dealing with customer service tasks.

18. Ms Peart is a devout Christian who would have regular discussions with her work colleagues about her faith and about religion in general. When experiencing personal problems in their lives, she would tell them that she would pray for them.

19. The claimant left her employment on 14 November 2015, after two month's service. The case is about whether she had disclosed her sexuality, being gay, to Ms Peart, Ms Barnard and Ms Charles and in so doing, was she discriminated and harassed based on her sexual orientation? There were personal problems in her life during that time, particularly her turbulent relationship with her ex-girlfriend. Unfortunately, her witness statement

prepared for the purposes of these proceedings, do not address, in any significant detail, the allegations as set out at the preliminary. Much of her evidence relevant to the issues came out in cross-examination.

Out of time issue

20. We considered the time issue first. EJ Heal ruled that the claim form was presented in time but that the acts pre-dating 21 October 2015, were potentially out of time as against the first respondent. The issue is whether the alleged acts relied upon by the claimant, was "conduct extending over a period", section 123 Equality Act 2010? Having heard the evidence, we find that the individuals involved in the allegations of discrimination and harassment, namely Ms Barnard, Ms Peart and Ms Charles, were not acting in conformity with a policy of the first respondent to discriminate against the claimant. The allegations against Ms Peart covers the period before 21 October 2015 and are out of time. The alleged acts against Ms Charles covers from 12 October to 14 November 2015. Potentially they are in time. But could the claimant rely on the acts against Ms Peart as in time? They are distinct from the allegations against Ms Charles. There was no evidence that Ms Peart and Ms Charles were following some policy, rule, practice or provision.

21. We considered whether it is just and equitable to extend time in relation to the acts against Ms Peart? We are mindful that this is a discretion to be exercised exceptionally, Robertson v Bexley Community College [2003] IRLR 434, a judgment of the Court of Appeal. Exceptional circumstances were not canvassed before us by either the claimant or her representative nor were there any in this case. The claims against her are out of time.

22. If we, however, are in error in relation to the time points, we, hereinafter, proceed on the basis that the acts relied on by the claimant are connected and amount to conduct extending over a period. We have focussed on the allegations made by the claimant in chronological order. In the course of doing so, we have made findings of fact.

23. The claimant is a single parent with a son of school age. She told us that she was in an abusive gay relationship with her now ex-girlfriend.

24. From the claims in the List of Issues, the first matter in time is alleged to have occurred on 8 October 2015. The claimant was a few minutes late arriving for work and was approached by Ms Barnard, Support Sore Manager, who invited her to the Click and Collect office. This is where customers place orders on the respondent's website which are later collected. The claimant alleged that Ms Barnard had verbally intimidated her in the Click and Collect area and that her manner was aggressive because Ms Barnard asked her where she had been as she was four minutes late from her break. The claimant asserted that as a manager, Ms Barnard did not like her. She further alleged that Ms Barnard's hands were moved close to her personal space.

25. Having heard the evidence, we find that Ms Barnard had concerns about the claimant's attendance as well as her attitude. At a briefing session in the morning, the claimant had yawned and appeared to Ms Barnard to be

disinterested in the matters being discussed. Later in the afternoon she was late from her break. Ms Barnard did speak to her about her behaviour and the fact that she was late. Her lateness was surprising as the claimant lived two minutes away from the store.

26. The claimant said in evidence that she was not happy at having been spoken to by Ms Barnard and relayed her concerns to Mr Kamil Worotnicki, Sales Manager, who advised her to speak to Ms Mala Charles, Store Manager. At this time, there was no evidence that Ms Barnard was aware of the claimant's sexuality. The claimant said that she had disclosed her personal problems to Ms Barnard, namely that her ex-girlfriend was not available for childcare and that she could not do the hours because she was not in a relationship anymore. She relied on these two matters to impute into the mind of Ms Barnard, knowledge of her sexual orientation. Even if Ms Barnard was aware of her sexual orientation, we find that she spoke to the claimant because of her attitude and whether the claimant had a problem with her being a manager. In or view, she would have behaved in exactly the same way had it been a General Sales Assistant who was not gay but was late in arriving for work and appeared disinterested in her work. Based on our findings and conclusions, even if this claim is in time, from our findings, it is not direct discrimination because of the claimant's sexual orientation.

27. On 12 October 2015, the claimant said that she spoke to Ms Charles about the discussion she had with Ms Barnard and said that she did not like the way Ms Barnard spoke to her on 8 October. Ms Charles asked her how she would like her to resolve the matter and whether she wanted it to be dealt with formally or informally. The claimant replied that she was content for it to be dealt with informally and left it up to Ms Charles to deal with it in her own way.

28. We are satisfied that Ms Charles then spoke to Ms Barnard who explained that the claimant was rolling her eyes and yawning at briefing sessions and was regularly late for work. She was considering issuing a strike out warning to her which is an informal discussion, the record for which would not to be placed on the claimant's file. In effect, it was a shot across the claimant's bow, warning her that any future conduct might not be dealt with leniently. Ms Charles was satisfied that Ms Barnard had dealt with concerns about the claimant's attitude and lateness appropriately, there was no need to refer to the claimant.

29. We find that as the claimant wanted Ms Charles to deal with the matter informally by speaking to Ms Barnard, she cannot complain once that had been done. Of importance is that the claimant did not mention during her meeting with Ms Charles, her sexual orientation. We were unable to make findings of fact from which we could decide that Ms Charles had discriminated against the claimant because of her sexual orientation.

30. As regards Ms Charles' knowledge of the claimant's sexual orientation, the claimant raised five grievances which were investigated by Mr Keith Cunningham, Area Manager. In Ms Charles' investigation meeting, in answer to questions put to her by Mr Cunningham about when she first found out that the claimant is gay, it is recorded that Mr Charles said that

the claimant came to her and said, "Vivene had been off with her and disclosed her sexuality with me which I didn't previously know". It is further recorded that Ms Charles continued by saying that the claimant said that Ms Peart was being "overly motherly" which she did not appreciate because her mum had passed away and that Ms Peart offered to pray with her. Ms Charles spoke to Ms Peart and told her what the claimant said and that she had issues in her personal life. Ms Charles advised Ms Peart not to mother the claimant. At which point Ms Peart became concerned as she felt that she might have offended the claimant.

31. From the account given, it reads as if Ms Charles knew about the claimant's sexuality when the claimant complained that Ms Peart was behaving in a motherly manner towards her. However, in Ms Charles' oral evidence she put the statement about knowledge in context and said that what is recorded did not follow from the same event. She could not recall when she became aware, for the first time, of the claimant's sexuality but it was not during the discussion with the claimant about Ms Peart mothering her.

32. The claimant said in evidence that she informed Ms Charles and Ms Barnard, shortly after the store's opening to the public, in a discussion about her hours being changed, that her ex-girlfriend was unavailable to do childcare but did not say that she is gay. She assumed by referring to her ex-girlfriend that they would form the view that she is gay. We find that a simple reference to ex-girlfriend, without any further statement about that person's sexual orientation, dos not imply that they are by reference to that word "ex-girlfriend" alone, is gay or is in or was, in a gay relationship. Girlfriends and ex-girlfriends, in common modern parlance, are used to refer to female friends.

33. On the balance of probabilities, we find that Ms Charles was not aware on 12 October 2015, of the claimant's sexuality and even if she was aware of it at the time, her conduct was not directly discriminatory because of the claimant's sexual orientation, as she was following the claimant's request to speak to Ms Barnard.

34. The claimant alleged that on 13 October 2015, a statement was made by Ms Peart and based on the claimant's response, Ms Peart became aware that she is gay. At the time Ms Peart was at the tills serving customers. The claimant had selected items she wanted to buy, one of which was a pair of men's pyjamas. Ms Peart, according to the claimant, asked, "Who are you buying these for, your boyfriend?" The claimant responded by saying, "I don't do men, I do women". She then said that Ms Peart appeared to be surprised by her statement so she, the claimant, asked, "Do you look at me differently now?" to which Ms Peart replied by saying, "No". The claimant alleged that thereafter Ms Peart's attitude towards her changed because she did not smile at her and showed that she was not "impressed" with her. The claimant's case is that incident itself and Ms Peart's subsequent alleged behaviours, amounted to harassment related to the claimant's sexual orientation.

35. We find that in her role as Till Champion, Ms Peart regularly interacted with her staff on the tills and they included the claimant. She discussed with the claimant their shared Jamaican heritage and their Christian beliefs. Staff,

including the claimant, did speak to Ms Peart about their personal problems. Ms Peart's relationship with the claimant continued as normal. There was no corroborative evidence produced that Ms Peart no longer smiled at the claimant and was not impressed with her. No specific examples were given of unwanted conduct on Ms Peart's part.

36. The claimant further alleged that about two days after the incident on 13 October 2015, Ms Peart came up to her and said that she, the claimant, needed to be "dipped in water" and that "Jesus was calling" but the claimant was not listening. The claimant said that she was, "a little bit offended" by the comments.

37. In the claimant's grievance dated 13 November 2015, she made reference to the alleged statement by Ms Peart and added that it was made from a Christian point of view.

38. If the claimant is right about what she wrote in her grievance, then it was with reference to their Christian faith and not to her sexual orientation. This is consistent, as we have already found that they were in the habit of discussing their Christian faith. A statement of that kind would not be unusual in the circumstances of their discussions, as they would discussed prayers, prayer meetings, baptism and the Bible. This was at the time the claimant was experiencing personal problems in her life and as a Christian, Ms Peart suggested baptism. The claimant said that she had been baptised at the age of 16 years and was of the view that the statement in respect of being dipped in water was to do with her sexuality.

39. We find that nothing of that kind was ever said nor can it be inferred from their discussions. The statement was made in the context of both of them discussing their faith and religious issues as well as personal problems in the claimant's daily life. Ms Peart made the statement in the context of being baptised, that is, it might be an appropriate time for the claimant to consider, having regard to her personal problems though not her sexual orientation, being baptised. We are unable to make findings that the discussions about baptisms or being dipped in water were related to the claimant's sexual orientation.

40. Although not in the List of Issues, the claimant alleged that Ms Peart told her colleagues that she, the claimant, would either leave or be dismissed. There was no direct evidence in support of this statement as the people with whom it is alleged Ms Peart had this conversation with were not called as witnesses. We, therefore, could not make any findings in relation to this allegation in support of the claimant's case.

41. The claimant also claimed that on unspecified dates, Ms Peart said she felt uncomfortable around her and that she made her miserable. Ms Peart said in evidence that the General Sales Assistants were the first point of contact with the public and that the claimant would turn up for work looking miserable. In paragraph 19 of her witness statement she stated that, "I asked the claimant to join me in the room as I wanted to discuss her attitude. I said to her that it was our role to present a pleasant and happy demeanour to customers and that we could not appear to them to be miserable or unhappy." Their conversation was in the Click and Collect

room.

42. Ms Charles also told the tribunal about the claimant turning up for work and that her mood would change depending on the day. On good days, she would behave as expected but there were days when she appeared not willing or wanting to be at work.

43. We accept the evidence given by Ms Peart and Ms Charles of the claimant's manner and behaviour while at work. The reference to Ms Peart being uncomfortable in the presence of the claimant and that she made her miserable, had to be taken in the context of Ms Peart's discussion with the claimant about demeanour and how she appeared to Ms Peart who was anxious to stress that those on the tills had contact with members of the public and that it would enhance the reputation of the respondent if they did not display what she described as a "miserable attitude". There was no evidence that Ms Peart's statement was related to the claimant's sexual orientation, as the claimant alleged, but was said in relation to the claimant's changes in mood and attitude to work.

44. A further allegation being made was that on or after 13 October 2015, Ms Peart said, "Jesus, Lord help me get out of this store. I do not like these people". Ms Marina Baltova, General Sales Assistant, allegedly told the claimant that at the time Ms Peart was speaking to her when that statement was made. The claimant and Ms Peart were working behind the tills. Another two General Sales Assistants were on the tills at the time when Ms Peart allegedly made the comment.

45. Ms Peart denied making that statement. If it was said it is singularly lacking in the claimant's five grievances and in her claim form before this tribunal. We find that that particular comment was not made by Ms Peart nor was it directed at the claimant, if it was made. We accept Ms Peart's evidence that on occasions, she would be in a low mood when at work and would say, "Oh Lord, let me get out of here. I cannot wait to leave Matalan" or words to that effect. They were not directed at the claimant but an expression of her state of mind at the time, namely that she was stressed at work. Those statements had nothing to do with the claimant's sexual orientation. Further, we bear in mind that Ms Baltova was not called by the claimant to give evidence in support of this alleged comment. We have come to the conclusion that this allegation of unwanted conduct has not been made out from the evidence.

46. On 24 October 2015, the claimant alleged that her aunt and her friend came to the store and while there, she, the claimant, was accused by Ms Charles, of talking to her "mate" which the claimant found rude. The claimant replied that she was talking to her aunt.

47. We looked at the staff rota for that day. The claimant was working a four hour shift and according to the respondent's policy, she was not entitled to a break. She was serving on the tills when her aunt arrived at the store with a friend. When the claimant had finished serving a customer, her aunt approached her and asked about a pair of jeans. The claimant then went to the stock room to check on the size. She said that Ms Peart knew that she was about to go on her break as Ms Peart had in her possession staff break

times.

48. Where the claimant was talking to her aunt and her friend was some distance away from where Ms Peart was working. Various distances have been given by different witnesses during the hearing but we are satisfied that if Ms Peart wanted to attract the claimant's attention she would have been able to do so by calling out her name.

49. Ms Peart was with a customer who was in a wheelchair. The claimant had served that customer the previous day but he came to the store because he had lost his till receipt and had asked to speak to the claimant for a copy. Ms Peart called out to the claimant a few times to inform her of the purpose of the customer's visit. Although the claimant turned her head in Ms Peart's direction, she did not respond. In evidence before us the claimant acknowledged that Ms Peart was calling her. We find that she decided to ignore Ms Peart, focussing her attention on her aunt. It was her aunt who replied to Ms Peart's calls by saying that the claimant was on her break.

50. Ms Charles saw what had taken place and spoke to Ms Peart and to the customer, after which she spoke to the claimant. She asked, "Are these your friends?" and not as alleged by the claimant, "Are these your mates?" She told us that it is unlikely she would have said "mate" or "mates" which are not words used by her in normal everyday speech. When the claimant's aunt said that the claimant was on her break, Ms Charles had no reason to disbelieve it at the time. She then said to the claimant that she should serve the customer who had asked to see her. The claimant went over to the tills and served that customer.

51. We do no find that Ms Charles' behaviour was accusatory as alleged by the claimant. She asked the claimant whether the people she was talking to were her friends, to which the claimant gave her an explanation that one was her aunt and the other a friend. It was perfectly reasonable to expect someone in the position of Ms Charles as Assistant Store Manager, to enquire of a General Sales Assistant who they are speaking to within working their hours. When she approached the claimant, she did not know that the claimant was on her break until she was informed of it by the aunt and did not seek to challenge the statement. We further find that a General Sales Assistant behaving the same way would have been treated in a similar way by Ms Charles. We have not made findings of fact from which we could decide that Ms Charles' behaviour was in any way related to the claimant's sexual orientation.

52. What the incident appeared to reveal to Ms Charles was a relationship issue between Ms Peart and the claimant, as Ms Peart's calls to her were ignored. Ms Charles invited them to her office to discuss what she had observed. She sat at her desk, the claimant and Ms Peart sat in front of her. Her role was to mediate between them. She said, "We are not in the playground" meaning that the claimant and Ms Peart should act their age, grow up and move on. The claimant responded by saying to Ms Charles that her mother had died and that she did not need anyone to mother her. At that point Ms Peart, we are satisfied, became aware that the claimant's mother had passed away and apologised for "mothering" her. The claimant's response was, however, not to accept Ms Peart's apology.

According to Ms Charles, whose evidence we accept, the claimant manner was such that she refused Ms Peart's apology. Ms Charles then said that Ms Peart was Till Champion and they needed to work together. She did not take sides as the claimant had alleged as her role was to mediate.

53. The claimant's case is Ms Charles' treatment of her amounted to direct discrimination because of her sexual orientation. We find that a General Sales Assistant, "GSA" who is not gay, would have been treated in a similar manner. There was an apparent breakdown in the relationship between a GSA and the Till Champion and as a senior person in the store, it would be incumbent upon Ms Charles to deal with that relationship issue. In so doing, her conduct had nothing to do with the claimant's sexual orientation but trying to address a relationship issue.

54. On 4 November 2015 at 9:20am, the claimant asked Ms Charles for a toilet break as she felt sick which was granted. After a while Ms Charles thought that the claimant had gone for longer than normal toilet break but took no action. It was later in the morning when she noticed the claimant leave the staff room and was making her way downstairs. At the time, she was ahead of Ms Charles. Ms Charles had cause to check the CCTV footage of the claimant either going to or leaving the toilet. On one occasion the claimant was seen in the staffroom using a mobile phone. On the latter occasion, she was with Ms Tandra Leche, General Sales Assistant in the stock room. The claimant was then spoken to by Ms Charles about what she had observed from the CCTV footage. From the accounts given to Ms Charles by the claimant, they appeared to be inconsistent and, in Ms Charles' view, the claimant had told lies though she was not verbally accused by Ms Charles of being a liar. We can, however, understand why the claimant took that view that she was called a liar.

55. The claimant's conduct was causing Ms Charles some concern who issued her with a Counselling Note. This is an informal way of dealing with a particular issue. When the claimant received it, she uttered the word, "Wow". She alleged that Ms Charles accused her of acting like her Ms Charles' 10 year or 12 year old child. From Ms Charles' evidence, she told the tribunal that at the time, she neither had a 10 year old nor a 12 year old child and denied making that statement. The claimant alleged that Ms Charles' behaviour was an act of direct discrimination because of her sexual orientation.

56. We find that Ms Charles did not directly discriminate against the claimant. What Ms Charles observed of the claimant's behaviour on the day caused her to take the action she did. Had it been a GSA who is not gay, we are satisfied that she would have behaved in the same or similar way. It was the claimant's conduct in absenting herself from her work on the tills that caused Ms Charles to take the action she did.

57. The claimant alleged that on 14 November 2015, there were further acts of less favourable treatment. She arrived for work some 45 minutes early because the night before she was assaulted by her ex-girlfriend and was interviewed by police, leaving the police station in the morning. When she arrived at the store, she spoke to Ms Marina Baltova, after which she walked out of the store.

58. At 2:03 in the afternoon, she sent an email to human resources in which she wrote the following:

> "I went in to work and by a member of staff was made to feel bad for coming forward and standing up for myself in regards to a complaint I have made. I have been made to feel so out-casted and uncomfortable at this store because of my sexuality and have gone through hell because of another member of staff (I have sent you a full complaint in another email) called Vivene. I spoke to my manager a few weeks back about this and nothing was done. I walked out of the store today (14/11/15) because I cannot take it anymore. Mala saw me walk out as I did in fact walk past her. She gives me dirty looks continuously and is very cold towards myself and other staff members but I can only speak for myself. I have no choice but to walk out and I am now jobless because of this. I have a seven year old child to take care of and as a single mother it is hard enough, it is not right nor is it fair."

59. Ms Baltova was not called to give evidence in support of the conversation she had with the claimant. We find, having regard to the claimant's email, that she terminated her contract of employment with the respondent when she walked out of the store.

60. She later rang Ms Charles on 14 November who invited to come in to speak to her. When the claimant arrived at the store she spoke to Mr Worotnicki and together they went upstairs to see Ms Charles. The claimant asked Ms Charles for copies of her previous working rotas. We find that Ms Charles replied that the claimant had no need to see the rotas as she had left the company and was not willing to provide the rotas to her without first checking with Head Office. She suggested that the claimant should speak to Human Resources about the rotas. The claimant was then asked to leave the room. She made her way downstairs where she waited close to the tills for Ms Hannah Cooper, GSA, who was due, apparently, to go on her break. While the claimant was waiting, she conversed with those on the tills but was approached by Mr Worotnicki who asked her to leave as she was neither a customer nor an employee of the company. At the time, he was of the view that she was disturbing those working on the tills. We find that she refused to leave at that point whereupon Ms Charles was contacted by telephone and made her way to the till area.

61. When she arrived at the scene, she quickly formed the view that the claimant was causing a disturbance, in that she was interfering with the work some members of staff on the tills.

62. We pause here to remind ourselves of the conflict in the accounts given by the claimant and Ms Charles. Ms Charles said that when she returned to the shop floor, she noticed the claimant was talking loudly and was disrupting staff who were working on the tills as well as creating a disturbance. The sight was inappropriate and not pleasant for customers to watch. She asked the claimant to leave the store as she was creating a disturbance. She did not physically touch the claimant nor was she aggressive in her actions and at the time she was not aware of the claimant's sexual orientation. She was assisted by the store security guard. It was when the guard asked the claimant did she leave the store.

63. The claimant said that on being asked to leave the store, Ms Charles grabbed her arm which constituted a physical assault.

64. We again considered the claimant's five grievances and the content of her witness statement but such an allegation of being grabbed by the arm is singularly absent. Grabbing someone's arm is an assault and, if it did occur, we would have expected it to have been in the claimant's grievances and in her witness statement. We do not accept that Ms Charles touched the claimant.

65. Had it been a GSA, who is not gay but who had resigned and was creating a disturbance at the tills, we are satisfied that Ms Charles would have behaved in either the same or in a similar way by asking that person to leave the store and should that fail, then to seek the assistance of the security guard. In this particular case, it was not only Ms Charles who asked the claimant to leave, but before her, Mr Worotnicki, Sales Manager and the Security Guard. Three members of staff in responsible positions asked the claimant to leave, why? It was because of her conduct at the time. We have not made findings of fact upon which we could decide that there had been less favourable treatment because of her sexual orientation.

66. On the issue of credibility, we have taken into account and do accept the matters referred to us by Ms Smith, counsel on behalf of the respondent, in her submissions. The witnesses who made statements on behalf of the claimant were not present to be cross- examined, therefore, their evidence carried little weight. Mr Thomas' evidence on behalf of the claimant was, in our view, unreliable and was not directly relevant to the issues in the case.

67. The claimant's evidence had apparent inconsistencies which we have made references to in our findings of fact. Her witness statement made no reference to the allegations as set out at the preliminary hearing. She challenged the accuracy of the notes of the interview she had with Mr Cunningham but she signed each page except one as accurate and made corrections to them. We simply do not accept her assertion that the notes missed out important parts of her account. Mr Cunningham, we accept, contrary to the claimant's case, provided the claimant with the opportunity of reading the notes and to challenge their accuracy but the notes were challenged, for the first time, during the course of the claimant's evidence before us.

68. Ms Charles came across to us as committed in her work as Assistant Store Manager, competent and anxious to resolve disputes amongst staff. Her evidence was clear, concise, consistent, credible and contextualised. She gave an account of why she took the view that she was not told about the claimant's sexual orientation until much later than what is recorded in her grievance interview. She candidly acknowledged that she could not recall when that was but it was sometime after the 14 November incident.

69. Where the claimant's evidence came into conflict with the respondent's witnesses' evidence, we preferred the evidence by the respondent's witnesses.

70. In relation to other members of staff working at the Edmonton Store, we

bear in mind that Mr Robert Corbett, Sales Manager, is gay and no evidence has been adduced showing that the respondent or its managers, or Ms Peart, have any issues with his sexual orientation.

71. Ms Tandra Leche said in her grievance interview meeting, that she is gay though that fact, it appears, is not generally known in the store.

72. Although these facts are not in themselves determinative of the store's attitude to those who are gay, they do assist the store in its argument that the claimant was neither discriminated because of her sexual orientation nor harassed related to it.

73. From the evidence, we make this further finding that the store did make changes to the claimant's work patterns to take in to account her childcare commitments. We also find that she was reluctant to accept management decisions when she had been, in some way, in breach of management's rules and had to be told, such as, being late.

Submissions

74. We have taken into account the submissions by Ms McKenzie, on behalf of the claimant and by Ms Smith, counsel on behalf of the respondents. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended.

The law.

75. Under section 13, Equality Act 2010, direct discrimination is defined:

> "(1) 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."

76. Section 23, EqA provides for a comparison by reference to circumstances in relation to a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

77. Sexual orientation is a protected characteristic under the sections 4 and 12 EqA.

78. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the of any other
>
> (3) explanation, that a person (A) contravened the provisions 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."

79. The statutory burden of proof applies in cases of direct and indirect discrimination, victimisation and harassment. It also applies to breaches of an equality clause in an equal pay case.

80. Guidance in applying the statutory burden of proof was given under the old law in the case of Barton v Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 332, EAT. This was approved by the Court of Appeal in the case of Igen Ltd v Wong [2005] IRLR 258. It is applicable to other forms of discrimination where the new burden of proof applies. The Court amended the dicta in Barton. It held, Peter Gibson LJ giving the leading judgment., that:

> "1. Pursuant to Section 63A of the SDA, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of Section 41 or 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to as "such facts".
>
> 2. If the Claimant does not prove such facts he or she will fail.
>
> 3. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> 4. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
>
> 5. It is important to note the word "could" in s 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> 6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is adequate explanation for those facts.
>
> 7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)b of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
>
> 8. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take into account in determining, such facts pursuant to s.56(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> 9. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.
>
> 10. It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

> 11. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
>
> 12. That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> 13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

81. We have also considered the cases of: Laing v Manchester City Council [2005] IRLR 748, EAT; and Madarassy v Nomura International plc [2007IRLR 246, CA. The Court of Appeal in Madarassy approved the dicta in Igen.

82. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal was entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

83. As already stated, in direct discrimination cases involving less favourable treatment, the claimant will need to show that he or she was treated differently when compared with an actual or hypothetical person, the comparator. There must be no material differences in the circumstances of the claimant and the comparator.

84. In the House of Lords case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, it was held that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he or she was and postponing the less favourable treatment issue until they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable.

85. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her

appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

86. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts 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.

87. The Court then went on to give this helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

88. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

89. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, race, sex, religion or belief, sexual orientation, pregnancy and gender reassignment.

90. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable

hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal which accepted her argument that the tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory.

91. In the case of, B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not to lead to the legal conclusion that the dismissal occurred because she was a woman.

92. The tribunal could bypass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it is not necessary to consider whether the claimant has established a prima facie case particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This approached was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords and by Mr Justice Elias in Laing-v-Manchester City Council [2006] ICR 1519, EAT.

93. In relation to the justification defence, the Supreme Court judgment in the case of Homer v Chief Constable of West Yorkshire Police [2012] UKSC15. In that case, involving age discrimination, the court held that Mr Homer was indirectly discriminated against. The range of aims which could justify indirect discrimination on any ground was wider than for direct discrimination. Further, to be proportionate, a measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary to do so.

94. In relation to harassment related to disability, section 26 provides:

"26 Harassment

(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 and intimidating, hostile, degrading, humiliating or offensive environment for B"

95. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, setting out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race relations Act 1976. The EAT held that the claimant had to show that,

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating the claimant's dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

Conclusions

79. In relation to the direct discrimination because of sexual orientation claim, we have not made findings of fact from which we could decide that the claimant had been treated less favourably when compared with someone who is not gay. We had concerns about her credibility as a witness as her evidence was inconsistent in places and we preferred the respondents' where their evidence came into conflict with the claimant's. We, accordingly, have come to the conclusion that the claimant's direct discrimination claim because of sexual orientation is not well-founded and is dismissed.

80. With regard to the claim of harassment related to sexual orientation, again we repeat that from our findings we were unable to determine that there was unwanted conduct related to the claimant's sexual orientation. As previously stated, central to the case is the issue of credibility and we

preferred the respondents' evidence. The claimant has to show that there was unwanted conduct related to her sexual orientation and this she has failed to do on the evidence before us. Accordingly, even if she was successful in relation to the out of time issue, the claim would fail as it is not well-founded and is dismissed.

Costs

81. After the tribunal's judgment, Ms Smith asked for some time to take instructions in relation to a potential application for costs. Upon the parties return, she made a formal application based upon the claimant's claims having reasonable prospect of success, in other words, they were unmeritorious. The respondent's in-house solicitors emailed the claimant's representative at 17:17pm Wednesday 15 March 2017, stating, in summary, that the claims were weak and misconceived with no real prospect of success. The solicitor then gave the claimant notice that if she was unsuccessful before this tribunal then having regard to the Employment Tribunal's Rules of Procedure in relation to costs, that an application may be made. A figure of £6,500 was given based on legal costs incurred prior to counsel in this case representing the respondents from Monday of last week. The costs applied for covers Ms Smith's brief fee and refresher fess in the sum of £4,080 inclusive of VAT. She also has incurred expenses in terms of hotel and travel as her chambers are in Manchester. She estimated that the figure is around £1,000.

82. Ms McKenzie submitted that upon receipt of the email of 15 March 2017, she spoke to the claimant who was concerned about the way she had been treated and wanted the matter to be heard by a tribunal. She is on limited means, only receiving Employment Support Allowance and Child Benefit. Her rent is paid for and has a dependant son. There is no way she could pay any costs.

The law and conclusion on costs

83. For the reasons given by Ms Smith, and bearing in mind our judgment, this was, in our view, a very weak case against all three respondents. There was the lack of evidence in support of each of the claims made by the claimant, hence we were unable to make findings of fact in support of her claims.

84. We also make comment on the preparation of the claimant's case. Her witness statement did not address the allegations in any detail. Mr Thomas' evidence was unreliable and important witnesses in support of the claimant's case, were not called to give evidence and be cross-examined, such as Ms Marina Baltova.

85. Given the costs warning on 15 March 2017, the claimant did not withdraw her claims. She, therefore, was aware that a costs application was highly likely if she was unsuccessful.

86. We are satisfied that the first limb of a costs application has been met in this case, rule 76(1)b, namely that the claims had no reasonable prospect of succeeding. They were misconceived.

87. We have, however, taken the claimant's means into account but do bear in mind that the case was heard over five days with over 260 pages of documents and witnesses were called. The respondents had to prepare their case challenging the allegations, all of which took time and cost money. They, quite reasonably, limited their application to counsel's fees. We do not award in favour of the respondents, the sum asked for as we accept that the claimant is on benefits costs have been incurred in defending the claims. We, therefore, make an award of costs in favour of the respondents in the sum of £400.

_____
Employment Judge Bedeau

Date: 17 July 2017…….

Judgment sent to the parties on

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For the Tribunal office