

mf



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms F Akram  
**Respondent:** Next Retail Ltd  
**Heard at:** East London Hearing Centre  
**On:** 28-31 August & 4-7 September 2018  
**Before:** Employment Judge Hyde  
**Members:** Ms L Conwell-Tillotson  
Mrs S A Taylor

## Representation

Claimant: In person  
Respondent: Mr Wie-Men Ho (Solicitor)

## RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. The complaint of direct race discrimination under section 13 of the Equality Act 2010 was not well founded and was dismissed.
2. The complaints of victimisation under section 27 of the Equality Act 2010 were not well founded and were dismissed.
3. The complaint of unfair dismissal under section 98(4) of the Employment Rights Act 1996 was not well founded and was dismissed.

## REASONS

1 Written reasons are provided for the Judgment above as the Judgment was reserved. They are provided only to the extent that it is necessary to do so in order for

the parties to understand why they have won or lost. The reasons are also set out only to the extent that it is proportionate to do so.

***The claim***

2 The Claimant presented her first ET1 claim form on 25 May 2017 alleging age and race discrimination and victimisation. She made multiple allegations covering almost the whole period of her employment with the Respondent from 2013 onwards.

3 In the Grounds of Resistance dated 28 June 2017, the Respondent indicated among other matters that they intended to resist the claims. They set out some of the background detail.

***Interlocutory Matters***

4 A closed preliminary hearing took place on 7 August 2017 before Employment Judge Goodrich (“the Goodrich hearing”). He ordered that an open preliminary hearing should take place on 20 September 2017 in order to complete, if so required, the list of issues in the case and to determine, if considered appropriate by the Employment Judge, whether any of the Claimant’s allegations were out of time and, if so, whether the time limit should be extended or the allegations concerned be dismissed.

5 At the open preliminary hearing which took place on 20 September 2017 before Employment Judge Ferguson (“the Ferguson hearing”), she ordered that the complaints of age discrimination be dismissed because the Tribunal had no jurisdiction to hear them; and that with the exception of the complaint about changing the Store Manager in March 2017, the complaints of race discrimination were dismissed also because the Tribunal had no jurisdiction to hear them.

6 Finally, she ordered that the complaints of victimisation under the Equality Act 2010, insofar as they related to the grievance submitted in 2013, were dismissed because the Tribunal had no jurisdiction to hear them.

7 In the case management summary which she also sent to the parties following that hearing she set out the likely victimisation complaints. These had been identified earlier in the hearing before Employment Judge Goodrich (p.43).

8 By the date of the Ferguson hearing, the Claimant had been dismissed from her employment by the Respondent, this having taken place on 12 September 2017. It was therefore possible that the Claimant would be presenting a further claim form. This she did in due course by a claim form dated 11 December 2017. She complained of unfair dismissal under the Employment Rights Act 1996.

9 The Respondent presented a further Response with Grounds of Resistance (undated) in which they once again indicated that they intended to resist the claim.

10 A further Preliminary Hearing (Closed) took place on 23 January 2018 before Employment Judge Prichard (“the Prichard hearing”) to give directions in respect of the expanded case now including the unfair dismissal complaint.

11 At each of the three preliminary hearings, the Claimant acted in person. She was represented by a legal firm for the first four days (Tuesday to Friday) of the full merits hearing and then she conducted the remaining days in person.

12 The important point to arise from the Closed Preliminary Hearing in front of Employment Judge Prichard was that the list of issues was re-visited and the complaint in relation to unfair dismissal was added. This led to the list of issues which the Tribunal considered in the hearing. Further, there was a long discussion as Employment Judge Prichard recorded, about the recordings that the Claimant had made surreptitiously during her employment and the way in which these could or should be disclosed and/or brought into evidence. In this respect in particular, Judge Prichard ordered that the Claimant was to disclose extra recordings which she had already disclosed to Mr Blackwell, the Respondent's in-house solicitor, as they had not all found their way to Eversheds, so that they could cross-check the position.

#### The representation of the Claimant

13 At the start of the Hearing, the Claimant was represented by Mr Omope, Legal Executive, from a firm of solicitors. By an email sent to the Tribunal by her on just before midnight on 30 August 2018 (after the third day of the Hearing), the Claimant indicated that she believed that her representative had not conducted the case in accordance with her instructions and that she had dispensed with his services. She sought the opportunity to cross-examine Messrs Coatz, Bailey and Saunders, and Ms Matthu and Ms Akram, witnesses whose evidence had been dealt with the day before. The email had not been copied to the Respondent.

14 The Respondent was made aware of and given a copy of the email by the Tribunal at the start of the proceedings on 31 August 2018, and the parties were informed that correspondence must be transparent with the Tribunal and be copied to the other side. Mr Omope had attended and confirmed that his instructions had been withdrawn. He had sent email confirmation of this to the Tribunal and to the Respondent. He explained that he had attended out of courtesy to the Tribunal. The Tribunal released him from further attendance in the circumstances.

15 The Claimant had applied in the email for a postponement to Wednesday 5 September to postpone the hearing so she could find another solicitor to represent her. She then varied her application to a request for a postponement until Monday 3 September 2018 so she could prepare to represent herself. The Tribunal was not due to sit on 3 September, so we treated the primary application as a request to postpone until Tuesday 4 September 2018.

16 It was not in dispute that Ms Akram had only instructed the firm for which Mr Omope worked on 20 August 2018, despite having presented her claim in May 2017; having been informed at the Open Preliminary Hearing before Employment Judge Ferguson on 20 September 2017, that the Hearing was listed for 23 - 26 January 2018; and despite knowing from 23 January 2018 that the Hearing was listed to start on 28 August 2018 with an increased time allocation of eight days. She had also told the Tribunal that she had given up her employment with Debenhams recently so she could have three or four weeks to concentrate on preparing her case. The Tribunal considered that it was extremely unlikely in all the circumstances that the Claimant

would have been able to instruct fresh solicitors to resume even on 5 September 2018 as she initially requested in her email.

17 It was also not in dispute that the List of Issues had been substantially agreed at the Preliminary hearing before Employment Judge Ferguson in September 2017, and then finalised at the Open Preliminary Hearing.

18 Mr Ho on behalf of the Respondent also submitted that one of the Respondent's witnesses, Mr Bailey was due to be abroad from 4 September, the next day on which the Tribunal was due to sit on this case.

19 After considering the application with the Claimant and exploring with her the issues that she wanted to be revisited, and after hearing representations from the Respondent, the Tribunal decided that she had not demonstrated good grounds for recalling the witnesses whose evidence had been concluded. However, in the interests of justice, we were prepared to postpone the resumption of the case to 4 September 2018 to allow the Claimant to prepare for the remainder of the case, including the questioning of the two remaining witnesses on behalf of the Respondent (Ms Bryant and Ms Hamilton). These witnesses were relevant to the issue of the dismissal.

20 Before the Tribunal adjourned after announcing our decision about the postponement application, we took steps to ascertain whether the Claimant had all the necessary documents. The Respondent had brought a spare bundle of documents to the Tribunal and they had very helpfully given that to the Claimant. In addition, the Tribunal clerk made copies of all the witness statements produced. Finally, we went through with the Claimant the exhibits adduced to ensure that she had them all, including the updated list of issues. In those circumstances we granted the postponement to Tuesday 4 September 2018 at 10am to resume with the cross-examination of the remaining two witnesses and closing submissions.

### ***The issues***

21 The list of issues was agreed and presented at the beginning of the full merits Hearing. It was marked [R3]. It set out one allegation of direct race discrimination; five allegations of victimisation under the Equality Act 2010; and the complaint of ordinary unfair dismissal under section 98(4) of the Employment Rights Act 1996. The wording of each of the allegations of discrimination is set out at the beginning of the text in these reasons relating to them, because the Tribunal re-numbered the allegations in the reasons below. The Tribunal's numbering has been inserted into the List below in bold and square brackets.

#### **"Direct discrimination (s.13 Equality Act 2010)**

##### **[Allegation 5]**

1. Did the Respondent treat the Claimant less favourably than another person or a comparator?
2. If so, was the less favourable treatment because of a protected characteristic? The Claimant alleges race discrimination on the grounds that in March 2017, a Pakistani manager, Nush,

took over as store manager from Nick Bailey. The Claimant asserts that this was done because of the Claimant's ethnicity, in an attempt to prevent further allegations of race discrimination (see para 4.5 of the relevant orders at page 43 of the bundle).

**Victimisation**

1. Did the Claimant make an allegation (whether or not express) that the Respondent had contravened the Equality Act 2010? The Claimant relies upon her grievance complaint submitted in January 2017, which starts at page 152 of the bundle.
2. Did the Respondent subject the Claimant to a detriment because the Claimant made such an allegation?
3. The Claimant relies on following detrimental treatment:
  - Being removed from the position of Head Team Coach. She does not know who made the decision but believes it was made in the last week of January 2017. She states she was first aware of it in late February / early March 2017 (see para 5.1 of the orders at page 43 of the bundle); **[Allegation 2]**
  - Being removed from various till "permissions". The Claimant states she discovered this in march 2017 (see para 5.2 of the orders at page 43 of the bundle); **[Allegation 3]**
  - Being unfairly given two "Record Cards" (record of failure to follow a management instruction) by Nick Bailey, in March 2017 after Randeep Blaggan asked her to block a sale, and in April 2017, following a dispute with Farah Asghar about the timing of the Claimant's break (see para 5.3 of the orders at page 43 of the bundle); **[Allegation 4]**
  - Being obstructed from maintaining her record in the First Time Surfer campaign. From the second week of May to 3 June 2017 Veena Mathu, Farah Asghar and Riffat Ghazanffer denied the Claimant extra shifts and hid the First Time Surfer cards from her (see para 5.4 of the orders at page 43 of the bundle); **[Allegation 6]** and
  - She was removed from a "specialist" role dealing with new born and girls' clothes. From February 2017 onwards, she was stopped from carrying out her duties by Nick Bailey, Farah Asghar, Riffat and occasionally Laura. **[Allegation 1]**

**Unfair dismissal**

**[Allegation 7]**

1. What was the reason or principal reason for the dismissal?
2. If conduct (which the Respondent asserts), did the Respondent, by the standards of a reasonable employer:

- 2.1 have a genuine belief that the Claimant was guilty of the misconduct;
- 2.2 have reasonable grounds to sustain that belief; and
- 2.3 carry out as much investigation into the matter as was reasonable in the circumstances.
3. Was the decision within the band of reasonable responses to the Claimant's conduct which a reasonable employer could adopt?
4. Did the Respondent, having regard to the reason for dismissal and its size and administrative resources, act reasonably in treating the reason as a sufficient reason for dismissing the Claimant?
5. If the Respondent failed to follow a fair dismissal procedure, would the Claimant have been dismissed in any event? Would any failure to follow a fair procedure have made any difference to the Claimant's dismissal?
6. To what extent, if any, was the dismissal caused or contributed to by any action of the Claimant?
7. Did the Respondent comply with the ACAS Code of Practice on Discipline and Grievance? If not, was the failure was reasonable?

**Quantum**

8. In respect of the Claimant's claim of unfair dismissal, subject to the application of any deduction for Polkey / Contributory Fault, what compensation (if any) is the Claimant entitled to? The Claimant confirmed that around 6 weeks after her dismissal, she secured a job as a supervisor at Debenhams in Clapham.
9. If the Claimant is successful, what award if any should be made for injury to feelings?"

***Evidence adduced***

22 The parties had agreed that the evidence should be contained in two lever arch files which formed a core bundle [R1]; and a further lever arch file of background documents which was marked [R2]. In fact, neither party referred the Tribunal to any documents in the background bundle.

23 At the beginning of the hearing Mr Omope on behalf of the Claimant, presented a document marked "Claimant's Skeletal Argument" which was marked [C1].

24 The Respondent also presented an agreed chronology and cast list marked [R4]. This was subsequently updated during the Hearing at the Tribunal's request to reflect the nationality or apparent nationality of each of the relevant parties as this was a case involving race discrimination. That updated revised chronology and cast list was marked [R6].

25 The Respondent had prepared a bundle of witness statements from both the Claimant and Respondent's witnesses. As the bundle was paginated from beginning to end the Tribunal treated it as one exhibit and marked it [R5]. The Claimant had presented copies of her own witness statement as well but as it was included in the

bundle [R5] the Tribunal did not give that copy a separate exhibit number.

26 The Respondent's witness statements contained a number of page references from a previous bundle and therefore the Respondent presented a key setting out the updated page numbers to the page references in their witnesses' statements, marked [R7].

27 When the two managers who dealt with the disciplinary hearing and the appeal, Mrs Lisa Bryant and Ms Jennie Hamilton gave evidence, they also verified the contents of the disciplinary and appeal bundles respectively. They did this by annotating separate lists of contents of the hearing bundles. This was an exercise conducted before they completed their evidence and the result of this was agreed by the Claimant. The lists were marked [R8] and [R9] respectively.

28 Finally, Mr Ho presented written closing submissions which he supplemented orally in a document which the Tribunal marked [R10]. He attached a file of copies of all the authorities referred to in his closing submissions. These were a dozen cases.

29 Finally, the Tribunal was grateful to both parties for their assistance in dealing with this difficult and sensitive case. In particular the Tribunal wished also to express gratitude to the Respondent's trainee solicitor in attendance Ms Karan Kaur for her assistance in obtaining a spare copy of documents at short notice in order to assist with the smooth presentation of the evidence and to avoid a delay in the proceedings.

### ***Relevant Law***

30 Mr Ho set out the relevant law in his written submissions. He also provided a bundle of copies of 12 authorities. Having reviewed those submissions and the cases and statute law referred to, the Tribunal considered that Mr Ho had set the law out accurately between paragraphs 3 and 6.17 of his submissions. Although Mr Ho made various comments about the Respondent's position in relation to the evidence in those paragraphs, the Tribunal considers that it is still appropriate to adopt the statements of the law from Mr Ho's written submissions. He provided a copy of the document to the Claimant therefore it is not necessary or proportionate to repeat that statement of the law in these reasons, or to list the cases relied upon.

### ***Facts found, Issues and Conclusions***

31 The facts were found on the balance of probabilities.

32 It was agreed during the hearing that, although there was some inconsistency on this issue in the documents, the Claimant started working for Next in November 2011. She was then offered a permanent contract in March 2012.

33 At the material times, for the purposes of this case, the Claimant was employed in the Beckton store as a Sales Consultant which was the most junior position in the Respondent's structure. They recorded, and it was not disputed, that the Claimant moved to the Beckton store on 22 February 2015 following some difficulties she had encountered with management in the Stratford store and, as the Respondent described it, the inability to resolve the Claimant's "perceived" issues there.

34 It was not in dispute that the Claimant described herself as Asian Pakistani and contended that she had been treated less favourably because she was Pakistani or by reference to being Pakistani.

35 As was captured in the summary of the preliminary hearing which took place on 7 August 2017, between May and September 2014, the Claimant applied for four positions as sales coordinator but she was unsuccessful in respect of each of those. Between May and November 2015, she applied for a further three positions of sales coordinator in various stores in and around London and was similarly unsuccessful.

36 Prior to that, in April 2013 the Claimant raised a grievance about various matters which she complained about as detrimental treatment towards her in the Stratford store. Some of the complaints were similar to the complaints which we considered in the current case as victimisation detriments. Thus, she had complained of being removed from the specialist role, she complained about being removed from the title of Head Team Coach and she complained that she was not given the opportunity to deputise for the floor manager when the floor manager was absent. She also complained that instead of being given leadership roles within teams at Stratford these responsibilities had been removed and that she was isolated by three particular members of staff.

37 These were said to be acts of victimisation in the earlier proceedings. But as set out above Employment Judge Ferguson ruled that the Claimant could not proceed with them. This however formed the background which led to the Claimant being transferred to the Beckton store.

38 The first relevant event, which was agreed, was that the Claimant submitted a grievance addressed to Simon Wolfson, Chief Executive Officer of Next Retail Ltd in a letter which was undated but received by the Respondent on 20 January 2017. There was no dispute that the letter raised allegations of discrimination, bullying and victimisation under the Equality Act 2010 and that therefore it constituted a protected act. This was the protected act that the Claimant relied upon in support of her victimisation complaints.

39 In addition, in the grievance which ran to some 11 pages, the Claimant dedicated a section (pp.161-162) to Mr Nick Bailey who was at that point the Store Manager for the Beckton store. There was no documentary evidence before the Tribunal to suggest that Mr Bailey was actually informed about the fact that he was mentioned in this grievance. His evidence was that he knew nothing about it until much much later. In those circumstances therefore, the Tribunal considered that there was some difficulty in terms of the Claimant proving that the action that he had taken which she alleged was detrimental was as a result of the protected act.

40 The Tribunal therefore on the balance of probabilities accepted that Mr Bailey was not informed about the grievance or the protected act. The same applied in respect of the three other people named by the Claimant, namely Farah Asghar, Riffat and Laura. Mr Bailey, who gave evidence (and who appeared to be white British), was the store manager at the time but the other three people referred to did not give evidence. It was not in dispute however that Ms Asghar and Riffat Ghazafar were both



Pakistani. Laura Saruseviene was a part-time Sales Co-ordinator on Childrenswear and was believed to be white Polish. The latter three did not give evidence to the Tribunal. There was no evidence in the documents to that effect, and the Claimant did not assert that they had knowledge of the grievance. There was therefore on the balance of probabilities no likelihood that anything that was done in relation to the Claimant's "specialist" role was because of the grievance that she had presented.

41 The grievance was referred to Mr Darren Coatz, Area Manager for the City of London store until March 2017, to investigate by the Human Resources ("HR") department. At the time he had no prior knowledge of the Claimant in any great detail. He held a position at the appropriate level and had the capacity to deal with the grievance. He had handled many grievances previously. There was no suggestion that he did not deal with this matter in accordance with the Respondent's policies and procedures.

42 A grievance hearing took place with the Claimant on 9 February 2017 attended by Lena Sharp who was a union representative. Mr Coatz was supported by Andrew Jurd, to provide HR support.

43 With breaks, the meeting lasted from just after 1pm to just after 7.30pm. The notes which were taken were before the Tribunal (pp.258-306). At the end of the meeting which was intended to reconvene, it was agreed that the Claimant would provide further evidence to support her accusations and that the matter would resume after five weeks (p.257). It was apparent that a very wide-ranging discussion had taken place with the Claimant about the numerous matters raised in her grievance document. The reason for the adjournment and the evidence that was referred to, was the collection of covert recordings which the Claimant had referred to having made and which she asserted would substantiate the allegations which she made. These allegations included very serious allegations of sexual harassment of herself and at least one other colleague by another employee in a more senior position to herself (Mr Islam). The period of five weeks for the adjournment reflected what the Claimant asked for.

44 The grievance hearing thus reconvened on 13 March 2017 with the same people in attendance. The Claimant indeed produced some further evidence but they were only very limited audio recordings. They did not support the Claimant's claim.

45 Another theme raised by the Claimant during this grievance hearing was that her then first line manager Ms Farah Asghar, who was Sales Manager of the women's and the children's wear sections, was preventing the Claimant from developing and was preventing her from becoming a manager.

46 Mr Coatz confirmed at the end of the meeting that he would investigate the points further and confirm his decision in writing to the Claimant. The notes of that meeting appeared at pp.313-343 of the bundle. The meeting lasted from 1pm until about 4:45pm.

47 By letter dated 10 April 2017, Mr Coatz wrote to the Claimant informing her of his decision in respect of her grievance. He did not uphold any of the grievances. He confirmed that he had asked the Claimant to focus the timeframe of the grievances that

she wished Mr Coatz to investigate, to issues which fell within the last six months. He also clarified that in the first meeting they had agreed to focus on five issues namely:-

- 47.1 A conversation on 28 February 2017 with Farah Asghar;
- 47.2 Interview feedback from the previous Store Manager Chris Rodrigues;
- 47.3 Conversation between the Claimant and Nick Bailey, Store Manager, with the Claimant on Christmas Eve;
- 47.4 The alleged sexual harassment conversation between the Claimant and Mr Islam in the stock room;
- 47.5 Conversations with Ms Ghazanfar, Sales Coordinator, Cansel Huseyin, Sales Consultant and Anjali Joshi, Sales Consultant regarding Mr Islam's behaviour.

48 There was no dispute that the Claimant was unhappy with the outcome of this investigation. The letter setting out Mr Coatz's findings addressed the points outlined above in some detail and was set out over some five pages. The main issue which is relevant to the rest of the case that we had to decide was the issue of the allegation of inappropriate sexual behaviour towards her by Mr Islam. The Claimant complained about both the manager's response to it and about the alleged inappropriate behaviour.

49 The Tribunal considered that it was indicative of a proper and genuine investigation having been conducted by Mr Coatz that he recorded that he had ascertained from the previous store manager that although he had investigated the allegations that the Claimant reported to him and that Mr Islam denied any inappropriate behaviour towards the Claimant, Mr Rodrigues also accepted that when the Claimant raised the concern with him, he had covered his ears and said that he did not want to listen. He explained that this was because of the graphic nature of the conversation not that he did not want to listen to the Claimant's concerns.

50 The Tribunal does not condone the response of Mr Rodrigues to that allegation. It is difficult to investigate a matter properly if the full details of the complaint have not been ascertained.

51 Mr Coatz further told the Claimant that he accepted that Mr Rodrigues should have handled the situation more appropriately and that covering his ears was not acceptable and that the meeting to investigate the Claimant's complaint should have been recorded. However, he did not accept that Mr Rodrigues had ignored the Claimant's complaint. Mr Rodrigues had apparently liaised with HR and had been instructed by them to speak directly to Mr Islam about the concerns.

52 In relation to the Claimant's allegation that there had been similar complaints about Mr Islam's inappropriate sexual behaviour/sexual harassment of other female members of the team, he informed the Claimant that these allegations were being fully investigated with members of the team who still worked for the Respondent along with the management team (p.347). He indicated that this was because the Respondent took such allegations seriously and that any action taken as a result of these

investigations would be appropriate and in line with the company's policies and procedures regarding such matters.

53 It was not contained in this letter but there was no dispute that these matters were then taken forward by Ms Catherine Kearney to conduct the investigation into the concerns highlighted by the Claimant at the meeting with Mr Coatz on 26 April 2017 (p.417).

54 As part of the outcome of the appeal Mr Coatz reminded the Claimant that if she needed to raise a complaint, such complaints were best dealt with at the time they occurred and should be raised with the appropriate manager. He reiterated and stated in the letter that the order of seniority was Coordinators, then Sales Managers, then Assistant Store Manager and then Store Manager (p.349).

55 In addition, Mr Coatz counselled the Claimant about the importance of accepting management decisions and instructions and implementing them as opposed to challenging them. Part of her sense of grievance arose from her perception that she was being asked to carry out tasks which were demeaning and beneath her. She clarified in the Hearing that she meant that she was being asked to do this more often than her colleagues. The perception of Mr Coatz however was that this was an important part of the Claimant fulfilling her role. In this he also urged her if she had concern about a line manager's decision to speak to the manager above them and that it was not appropriate to criticise that manager's direction with other staff (p.346). He advised her that progression within the company was based on many things and was not just about being involved in key tasks. He stated:

“Having the right attitude is important for progression and I am concerned that you feel you should only be undertaking tasks that you feel are important rather than day to day tasks such as sale recovery.”

56 He referred in this context to a visit he had made to the Beckton store on 23 March when he had been informed by yet another manager Randip Blaggan, Sales Coordinator that the Claimant was refusing to follow his direction about completing the task of recovering the sale items. Mr Blaggan told Mr Coatz that he had asked the Claimant to complete this task. Mr Coatz wrote in his letter:

“You confirmed to me that you are not here to tidy and should be given an appropriate task.”

He told her that he would expect all members of the team and managers to support with whatever tasks needed to be completed and that it was not acceptable that individuals refused to undertake reasonable tasks.

57 As set out earlier the Claimant had by now made numerous unsuccessful applications for promotion to Co-ordinator position. This was one of the matters that she raised in this grievance. Mr Coatz informed her that he was satisfied that interviews had been conducted fairly and that Mr Rodrigues had established that he would continue to support the Claimant in applications for Co-ordinator positions. He had apparently suggested to the Claimant that she should apply for a Co-ordinator position in the Ilford store. The Claimant had described this in her grievance as

something that she thought was “most amusing”. He advised her that it was common for applicants who were unsuccessful to apply again for the same or different positions when they became available. He told her that Mr Rodrigues felt that she had the potential to become a Co-ordinator but that he had discussed, on a number of occasions when she had complained to him about members of the team, that she may benefit from starting as a Co-ordinator in a new store where she did not know the team as it would be easier to gain the respect of the staff in that situation. Mr Coatz advised her that by Mr Rodrigues suggesting that she should apply for the position in Ilford he was indeed continuing to support her possible progression.

58 The Tribunal considered that it was also significant that the Claimant indicated that she wanted three outcomes from of the grievance, namely: -

58.1 a promotion to a management position at grade 3 or 4 level;

58.2 an unspecified amount of compensation;

58.3 compensation for a 16 year old female co-worker who she claimed had been the victim of inappropriate sexual conduct by Mr Islam (p348).

59 Mr Coatz informed the Claimant that promotion would not be an outcome of the grievance. These were awarded on merit to the best candidate. The Tribunal was not taken to any part of the grievance procedure which suggested that either a promotion or a compensation payment could be granted. Mr Coatz indicated that it was unusual for a grievance process to result in a compensation payment.

60 The Tribunal considered that Mr Coatz’s letter was well balanced indicating the negative outcome of the grievance but also seeking to encourage the Claimant where appropriate particularly in relation to her desire for promotion.

61 There was a lack of clarity about the date on which the Claimant received the letter of the grievance outcome. In his witness statement Mr Coatz said that he delivered it to the Claimant on 10 April 2017 but in the contemporaneous documentation and in particular the Claimant’s appeal letter, she referred to having read the ‘investigation letter’ of 10 April 2017 which was given to her by hand on 23 April 2017 by Mr Bailey. The Tribunal considered that on the evidence before us it was likely that the letter was not given to the Claimant until 23 April 2017 as she said at the time (p.355).

62 In any event it was not in dispute that a meeting then took place between the Claimant and Mr Coatz on 26 April 2017 (para 21 of witness statement of Mr Coatz). Mr Jurd from HR was present. The Claimant did not have a representative. The reason for this meeting was to discuss the Claimant’s accusations that Ms Asghar was not sharing responsibility amongst the team, as well as the Claimant’s allegations of sexual misconduct against Mr Islam. No notes were made of this meeting by either party.

63 Once again although Mr Coatz stated in his witness statement at paragraph 22 that this was the first time he had knowledge of the accusation against Mr Islam the Tribunal did not take this at face value and considered this must have been an

indication of him saying this was the first time he had knowledge of any detail of these allegations. He had addressed this issue in the earlier letter of 10 April 2017 where the Claimant complained that Mr Rodrigues had not investigated these similar allegations properly.

64 Mr Coatz confirmed in his letter of 10 April 2017 telling the Claimant what the outcome of the January 2017 grievance was that he would not be making any findings relating to issues that occurred prior to 6 February 2016 (p.345). He used this as a cut-off date because he considered that the Claimant had had the opportunity to raise any such matters with her previous grievance.

65 The Claimant submitted an appeal against the grievance findings by Mr Coatz by email dated 26 April 2017 sent in the very early hours of the morning (p.354). In her two page appeal she essentially complained that the grievance had not been properly investigated and that Mr Coatz had not reached appropriate findings of fact. She also listed some five matters which she had raised in her grievance which she believed had been ignored. Some of these were matters relating to her contract and pay; others were to do with her career progress. She also complained about a failure to stop constant harassment and victimisation by managers, including false disciplinary action by Veena and Riffat.

66 The Claimant wrote to Mr Coatz and Mr Jurd (p.358) by email dated 20 May 2017 complaining that matters had continued to get worse despite their assurances that their involvement would lead to matters improving. Specifically, she complained about the matters surrounding the 'First Time Surfer' campaign which were also the subject of a substantive victimisation complaint before us.

67 The grievance appeal hearing took place before Chris Downey, Area Manager assisted by Debbie Arnold, Senior HR Officer on 7 June 2017. The notes and record were at pp.359-406. The Respondent's record of the appeal outcome for 7 June 2017 was that further investigation was required.

68 Mr Downey, the Area Manager for the East of London, then wrote to the Claimant (pp.407-410) dated 12 June 2017 to confirm his decision following the appeal meeting on 7 June 2017. Before the Tribunal sets out what Mr Downey found, chronologically he referred to the Claimant's concerns about the sexual harassment allegations not having been dealt with, having subsequently been investigated thoroughly by "an independent manager" which led to the Respondent being unable to substantiate the Claimant's claim of sexual harassment and that this had been dealt with appropriately and in line with company policies and procedures. The Respondent here appeared to be referring to the Catherine Kearney investigation (p.417) which the Claimant had been told about on 26 April. This was referenced in the letter to the Claimant from Mr Coatz dated 29 June 2017 (pp.417-418).

69 The Tribunal was not asked to determine whether the handling of the grievance constituted an act of discrimination or victimisation. Further this was not a constructive dismissal complaint. However, the Tribunal has already expressed some concern about the way in which the initial grievance was dealt with, given that the Claimant dedicated a section to complaining about her manager Nick Bailey and yet we were satisfied that Mr Bailey knew nothing about this until after he had left that store in May

2017.

70 Mr Downey did not uphold the Claimant's appeal.

71 Among the many matters he investigated was the Claimant's involvement in stock takes in her department. He found that the Claimant had been included in every stock take between August 2015 and January 2017 except for when she was on annual leave. In this timeframe there had been at least three consecutive stock takes. This was an important finding because the Claimant had complained and indeed complained before us that she was regularly excluded from events like stock takes, 'face change' and launches. There was little evidence directly to support the Claimant's contention apart from some rota documents which were produced before us. However, they only give a very limited picture.

72 He also talked about the till permissions or functions and PC functions that the Claimant had. He confirmed that the number of these which the Claimant was authorised to exercise had fluctuated throughout her career. There was no evidence before us to contradict this finding.

73 He also listed the seven till functions which she had carried out at some stage. In contrast, five of the Claimant's colleagues in a non-managerial role could exercise only four of these functions at the time. He had advised Ms Nush Akram, the new store manager, that two of these individuals should have greater levels of access due to their role within the store. He did not believe that the lower levels of access which the remaining three exercised had come about as a result of deliberate action but was an oversight by the manager, who, he believed, should have conducted a review of access levels. This finding was consistent with evidence presented to us that these matters fluctuated and were granted on the basis of what was needed for the business. The Tribunal understood the Claimant's argument that it was part of the matrix which could assist a promotion if she had such till permission.

74 The final correspondence in relation to the Claimant's January grievance was the letter from Mr Coatz, who was by now Area Manager of South London, to the Claimant dated 29 June 2017 (pp.417-418). He set out in that letter that it had not been intended that the meeting on 26 April should be formally documented but that the Claimant had requested written confirmation of the contents of the meeting. This letter therefore set out the points which had been discussed with the Claimant on 26 April 2017.

75 In the letter 29 June 2017, Mr Coatz set out points which the Tribunal has already captured in terms of the Claimant being asked to work better with her team and to raise concerns with managers including more senior managers like Farah and the Assistant Store Manager, Veena Mathu. Ms Mathu was described as Indian. It reflected some of the themes already referred to from Mr Coatz's outcome letter to the Claimant of 10 April 2017. It recorded that as of 26 April Mr Coatz had asked Ms Kearney to conduct a full investigation into the sexual harassment allegations and that Ms Kearney would contact the Claimant to investigate her own claims against Mr Islam as she suggested she had more recent examples of inappropriate behaviour towards her.

76 It was agreed that the Claimant could continue working on the men's wear department whilst this investigation took place. Mr Coatz confirmed to the Claimant in the letter of 29 June 2017 that the Respondent had been unable to substantiate a claim of sexual harassment against Mr Islam. Mr Islam had denied these claims and the Claimant was unable to provide any evidence to support them. He recorded that he met with the Claimant again on Thursday 11 May 2017 with her Store Manager Nush.

77 During the meeting on 11 May 2017, he recorded that it was agreed that the Claimant would move back to children's wear on the ground floor from Monday 15 May 2017 (p.418). He stated in the letter that the Claimant had accepted this but highlighted concerns regarding interacting with Mr Islam. Mr Coatz continued:

"I clarified that Mr Islam as a Co-ordinator on the ground floor would need to interact with you to give management direction. You understood this would be the case but were clear that he should not invade your personal space. I agree that this was acceptable and Nush agreed that we tried to ensure you were not put in a position where you were working alone with Mr T i.e. in a stockroom or office."

78 This was not a substantive matter of complaint but when a member of staff had made a complaint about sexual harassment, even if the allegation was not substantiated, the matter of managing future interaction between the accuser and the accused required some sensitivity and clarity, and should have been committed to writing promptly for the benefit of all involved.

79 The Tribunal addressed the allegations in chronological order broadly. We noted also and comment will be made as we deal with each allegation that there was considerable vagueness surrounding virtually all of them.

80 In her witness statement the Claimant gave very general evidence about having brought the grievance and of the Tribunal proceedings and also spent some time complaining about her allegations of sexual harassment – which were not within the scope of this Tribunal's consideration. She described the earlier disciplinary sanction which she faced in July 2017 and then dealt with the last event on 23 August 2017 which led to her suspension on 24 August and subsequent termination. She gave no detail whatsoever in her witness statement of the victimisation and direct discrimination detriments. Fortunately, these matters appear to have been anticipated to a certain extent by the Respondent and some detail was provided about them in their witness statements. This regrettably compounded the lack of clarity about the dates on which certain matters occurred.

#### Allegation 1 - Victimisation

81 The Claimant complained that she was removed from a "specialist" role dealing with new born and girls' clothes. She complained that from February 2017 onwards, she was stopped from carrying out her duties by Nick Bailey, Farah Asghar, Riffat and occasionally Laura. As set out above these were the Store Manager, Sales Manager in women's wear and children's wear, Sales Co-ordinator in women's wear and children's wear, and part-time children's wear Sales Co-ordinator respectively. Mr Bailey set out his evidence on this allegation at paragraphs 25 and 26 of his witness

statement. There was no evidence to contradict this evidence in paragraphs 25 and 26.

82 The Tribunal accepted Mr Bailey's evidence on this issue on the balance of probabilities. We found that the Respondent was previously able to run their departments within the store as separate departments. This allowed staff to stay in a particular department and have a more "specialist" role. Within the last couple of years however due to the general retail climate, the Respondent could no longer sustain and operate such a system and this had therefore now changed. Staff were known as 'sales consultants' and not 'specialists' and were required to cover all departments. This was consistent with the provisions of their contracts of employment and there was no contractual entitlement for a sales consultant to stay within a specific department. He indicated that what appeared to be four separate departments had been brought together organisationally under one umbrella and these were: children's wear, women's wear, men's wear and homeware.

83 Importantly, and the Tribunal considered that it was perfectly credible that this would be the position, this changed strategy was company wide and not restricted to the specific store at which the Claimant worked. Any complaints that the Claimant had about treatment in relation to her role being changed in some way and the tasks that she was asked to perform in relation to it could not have been related to the grievance in January 2017 therefore.

84 Ms Akram was questioned about this allegation during her evidence. She did not agree with the account given in paragraphs 25 and 26 of Mr Bailey's statement and she referred the Tribunal to pictures that she had taken of shifts and the allocation of work to certain people. However, these were not sufficiently specific because they did not cover a wide enough timeframe for the Tribunal to be able to draw proper conclusions from them. The Tribunal has already referred to the report of the grievance appeal outcome in which her manager identified the types of work that the Claimant had had the opportunity to do over the previous year or so. Further, for example, one of the shifts that the Claimant gave details about was a shift which she was not due to work on anyway i.e. on a Sunday. She argued that this was evidence that the Respondent had organised the task for a time when she was not normally due to work. The Tribunal could not reach that conclusion without having a much wider picture and some analysis of the shifts and the types of work and when these occurred.

85 In all the circumstances therefore, we concluded that the Claimant had not proven that she had been put to a detriment by the removal of her specialist role. This was a general matter affecting everyone and the Respondent's expectation was that a wider range of staff would cover duties in a number of areas.

#### Allegation 2 - Victimisation

86 The Claimant alleged as an act of victimisation that she had been removed from the position of Head Team Coach. She did not know who made the decision but believed it was made in the last week of January 2017. She stated that she was first aware of it in late February/early March 2017 (para 5.1 of the orders at page 43 of the bundle).



87 This was an allegation made about events during Mr Bailey's tenure as Store Manager.

88 It was agreed that there was no additional pay or an alteration to the Claimant's contract for performing the role of Head Team Coach. It was part of the Respondent's case that being removed from the position of Head Team Coach could not constitute a detriment. The Tribunal did not agree. If being Head Team Coach carried with it certain extra responsibilities no matter how minor, the removal of that position could constitute a detriment. The question would then be whether the removal of that position was done because of the earlier protected act.

89 In Mr Coatz's grievance outcome letter to the Claimant of 10 April 2017 at p.349 he explained to the Claimant that Next was an evolving business and over time would undertake changes and refocus on priorities to ensure that they continued to be successful. He indicated that managers clearly found it challenging to communicate with her as she often did not accept the direction they gave her as she felt she knew better:

“Responsibilities that once may have been important in the past have evolved and the company places less focus on these roles. An example of this is the role of Head Team Coach. The responsibility of this role, over time has reduced as the company expectation is that store managers, sales managers and coordinators take responsibility for recruitment and training. To support them these managers may delegate tasks to team coaches to ensure that the best recruitment and training is undertaken, however a staff member is not expected to take sole responsibility as Head Team Coach.”

90 Mr Coatz confirmed in his letter of 29 June 2017 that he had told the Claimant, amongst other matters, on 26 April 2017 that the role of Head Team Coach was no longer needed in the Beckton store. He confirmed that the Claimant would continue to be a Team Coach but just not have overall responsibility for the store's training.

91 In this case the Tribunal found that prior to 2017 Head Team Coaches existed in certain stores and not in others. In those stores in which they existed they had a responsibility for overseeing training and the work of the other Team Coaches. It was simply for each Store Manager to decide whether such a position was established in their store. Ms Nush Akram against whom this allegation was not made, had previously worked in a store in which there was no Head Team Coach and it was not a position she was familiar with. The Tribunal also found that when Mr Bailey first came to the Beckton store in around September 2016, he ensured that there was a photograph taken of the Claimant which was then mounted and placed in a sufficiently prominent position so that the other staff could see that she was Head Team Coach (p.782). The Tribunal considered that this was an indication that when Mr Bailey came to the store he confirmed and supported the Claimant in respect of those responsibilities.

92 Mr Bailey found when he arrived at the Beckton store that many members of staff had not been correctly trained and he therefore organised the Next Head Office trainers to deliver various training sessions. He described that the Claimant was upset about one of these occasions taking place at a time when she was not present. His

case was that he had in fact discussed this matter with the Claimant in advance.

93 The Tribunal accepted the account set out by Mr Coatz in his letter to the Claimant giving the outcome of the grievance dated 10 April 2017 (p.349) in the second paragraph where he talked about the changes to the role of Head Team Coach. This account was also consistent with the evidence the Respondent gave us about the fact that there were some deficiencies in the training at the Beckton store.

94 The Claimant complained about this having happened in late February/early March 2017 but there was no evidence about this at all in her witness statement.

95 Mr Coatz's description in the 10 April 2017 letter was also consistent with the matters the Claimant complained about. She described not being involved in induction any longer. Although she gave this example again we were not in a position to assess the detail of the occasion that she complained about. There was no specific evidence before us about this. She complained about not being present when the trainer from Head Office attended. A record card had been completed by Mr Bailey recording a discussion that he had with the Claimant on 27 January 2017 (pp.134-135). It appeared to the Tribunal to be the closest match to the allegation. He indicated in his evidence, and the Tribunal had no reason to reject it on the balance of probabilities, that Paul Phelan from Head Office was coming to carry out some training in the store on 31 January and it was proposed that he would meet with all the team and Head Coaches. His evidence was that this date had been fixed to suit the convenience of the Head Office trainer and because she had been booked on a holiday on the day the trainer could attend, he discussed with the Claimant the possibility of arranging for the Claimant to attend.

96 In short, the Tribunal considered that this was an example of Mr Bailey trying to include the Claimant in this meeting and not evidence of her being excluded or having her responsibilities taken away. We also accepted again because there was no contradiction to this evidence, that the training department in the Head Office was very small and their diaries were therefore very full. It was not in dispute that there were about eight or nine team coaches in the store.

97 In relation to the Head Team Coach allegation the Claimant also gave the specific example of her manager stopping her from carrying out a function in relation to the 10 shift programme in March 2017. She complained that she could not access the software because her pin was blocked.

98 The Claimant did not take the Tribunal to any specific documentary evidence and gave no detail of this incident in relation to her access being blocked because of a change to her pin number or her pin number being deactivated. The Respondent was therefore not in a position to respond to it. She also accepted in cross-examination that she had not raised this or that there was no evidence that she had told the Respondent about this difficulty at the time.

99 In respect of this matter also which was a complaint about Mr Bailey's management of her the Tribunal refers to our finding above about his state of knowledge about the grievance. In those circumstances the allegation could not succeed. In any event the Tribunal had accepted the explanation provided by the

Respondent for any change to the Claimant's previous responsibilities as a Head Team Coach.

100 The Claimant did not refer the Tribunal to any incident or explanation for attaching the timeframe of late February/early March to this allegation.

101 As before the Tribunal accepted Mr Bailey's evidence that he was not aware of the grievance that the Claimant had put in and his involvement in it and therefore the Claimant had not established that he had treated her unfavourably because of the protected act. In any event the Tribunal considered that the evidence that the Respondent produced about why it was the Claimant did not attend this particular meeting and also about why she may well have perceived a difference in terms of the duties that she had previously performed and those which the managers performed instead, was corroborated by Mr Coatz's account in the text set out above from his letter of 10 April 2017. In all the circumstances the Claimant had not established this allegation and it was dismissed.

### Allegation 3 - Victimisation

102 The Claimant alleged that she had been removed from various till "permissions". She stated that she discovered this in March 2017.

103 It did not seem to be in dispute that to assist with the smooth running of the store, additional till permissions would be assigned due to business needs to various members of staff. A simple example was the ability to void a sale which could obviously be most conveniently dealt with by a member of staff in the department rather than awaiting the attendance of a more senior manager.

104 The Tribunal accepted, as did the Claimant, that this was not a contractual matter but the Tribunal did not consider that there was any reason to suggest that it could not potentially be a detriment if it were removed from the Claimant. The issue was whether the reason for the removal of the till permission was connected to the grievance.

105 The Claimant's allegation was that this was discovered in March 2017 but once again she produced no contemporaneous documentary evidence to support her contention. However, the Respondent had anticipated this issue and Mr Bailey gave evidence about an occasion when the Claimant had not complied with the procedure in respect of a till permission. Having discussed the matter with the Claimant and the Claimant having continued to fail to comply, he had told her that he would have to remove the till permission from her and she had said that he should do what he had to do. Mr Bailey did not recollect the date of the occasion that he described in his witness statement (paras 13-16) but this was more detail than was provided by the Claimant. The Tribunal considered it was likely that this was the incident she was referring to but in any event as we set out above Mr Bailey did not know about the grievance and therefore his reasons for removing the till permission were unrelated to the grievance.

106 In this context it was also relevant to consider the evidence provided by Mr Downey by way of the grievance appeal outcome letter at p.408. He did not give evidence to the Tribunal. He described having investigated the Claimant's concern

about her access and permission levels and that his investigation showed that the Claimant had had numerous till permissions and PC permissions and compared to other people at the same level she had had more than they had. This was consistent the Tribunal considered with the finding that Mr Bailey was not treating the Claimant unfavourably because of the grievance in relation to till permissions.

107 It was also not in dispute that at all material times the Claimant had the till permissions which she needed in order to perform her job. The Respondent sought to emphasise, and the Tribunal considered that it was justified, that the till permissions were given to members of staff not for the purpose of increasing their experience but for the purpose of ensuring the smooth running of the business at a time when the manager in question may not be able to exercise that function promptly. The Tribunal agreed with the Claimant that the allocation of this responsibility to her could be a matter she could point to in for instance an interview for a promotion and that is why we found above that it could constitute a detriment if it was removed. In any event though, we found it was not an act of victimisation.

108 It was also consistent with the Respondent's position about the allocation of these till permissions that when the new manager, Ms Nush Akram came on board from May 2017 onwards there was evidence of her restoring certain till permissions to the Claimant once again on the grounds of business need.

#### Allegation 4 – Victimisation

109 The Claimant complained that she was unfairly given two "Record Cards" (record of failure to follow a management instruction) by Nick Bailey in March 2017 after Randip Blaggan asked her to block a sale, and in April 2017, following a dispute with Farah Asghar about the timing of the Claimant's break.

110 Prior to that there was a record card dated 21 March 2017 (p.137) which recorded that the Claimant had been spoken to. Mr Bailey recorded that the Claimant had come to speak to him about following management direction from Farah, Laura, Riffat and Mr Islam. These were all the managers on the floor on which she worked. The Claimant apparently had stated that she would no longer take direction from those named managers. Mr Bailey therefore agreed with the Claimant that she would move to the men's department on a temporary basis until a more suitable arrangement could be made.

111 There was contemporaneous documentation about the first incident involving Mr Blaggan (p.139) which indicated that his discussion with the Claimant had taken place on 23 March 2017 (p.139). The Claimant refused to sign the record card. It was not in dispute that she was not required to sign the record card. It was signed by Mr Bailey and countersigned by Veena Mathu the Assistant Store Manager at the time. Mr Blaggan recorded that he had had a formal discussion with the Claimant about her attitude in terms of following direction. He noted that the Claimant failed to follow direction and questioned the task at hand. He continued: "Certain tasks are required to be done given the current circumstances at the time. On this occasion it was to block the sale on the shop floor."

112 The Respondent's case was that merely recording or making an entry on a

record card was not detrimental in itself. The Tribunal agreed with that. It was apparent that for example the first record card completed by Mr Bailey about the Claimant involved a record of a compliment to the Claimant. However once again the Tribunal was satisfied that this could certainly amount to a detriment if it recorded something detrimental about the member of staff. That however did not mean to say that the manager was not entitled to do so, or that it constituted a breach of the law. In the circumstances which are relevant to this case, the law would only be engaged if the record was made for a prohibited reason under the Equality Act.

113 Finally, the Claimant disputed that the record card that the Tribunal has referred to above (p.139) was the relevant record card although she accepted that the handwriting appeared to be that of Mr Blaggan. The Tribunal considered that in the absence of any other evidence it was consistent with the allegation that she made that this was indeed the contemporaneous evidence about it. The Tribunal also took into account that the Claimant declined to sign the record card so it was perhaps less likely that she would have a recollection of it.

114 The complaint being made was that Mr Bailey had unfairly given the record cards. First of all it appears that it was Mr Blaggan who initiated the first record card complained of, and Mr Bailey simply signed the entry subsequently. But in any event even if the allegation was against Mr Blaggan once again the Tribunal had no evidence whatsoever that Mr Blaggan was aware of the grievance having been made. In those circumstances therefore that part of the fourth allegation was not made out and was dismissed.

115 As far as the next record card was concerned, once again the Claimant did not address this in her witness statement and did not refer the Tribunal to any specific documents. There was however a record card at p141 dated 11 April 2017 written by Mr Bailey. He recorded that he had spoken to the Claimant for the second time with reference to not following directions from management within the store. He recorded that if this was to continue he would have no choice but to follow a disciplinary route which could lead to dismissal.

116 The Claimant described that the record card she complained about in April 2017 was given by Mr Bailey after a dispute with Ms Asghar about the timing of her break. There was a contemporaneous document prepared by Ms Asghar and dated 11 April 2017 (pp.351-352) in which she described the incident which lay behind the record card referred to and which had occurred on 10 April 2017. The Claimant appeared to accept in cross-examination that this was a description of the incident which led to the second record card that she complained about.

117 The Tribunal considered that the account given by Ms Asghar of the Claimant refusing to comply with an instruction to vary her break time because of business need appear to justify the action that the Respondent took.

118 Whilst in isolation there may be something to be said for a member of staff feeling somewhat put out about an earlier instruction from a manager about when they should take their break being changed to a different time, the Tribunal considered that in the circumstances of this case the Claimant could not justify her continued objection. First, although the message to change her time came via a colleague, it was clear to

her that the instruction to change had come from the Sales Manager. Further when the Sales Manager Ms Asghar realised that the Claimant was refusing to alter her break time she went to speak to the Claimant herself. The Claimant continued to resist the change. The Tribunal was satisfied that the only reason for asking the Claimant to change her break time was because of the needs of the business. As the Respondent had no control whatsoever over demand on shop floor, the Tribunal accepted that they needed to juggle the positioning of staff and the timing of staff breaks at short notice.

119 When the Claimant gave evidence to the Tribunal about this issue she explained that she was in the middle of a particular task ('putting the rail away') at the time and that she wanted to complete it before she went on her break. The Tribunal considered that she could very easily have explained this to the manager so that those tasks could be dealt with by somebody else or at least the manager would know that the Claimant had not simply neglected her duties. Ultimately the responsibility for deciding which tasks were done when and by whom lay with the manager of the store or the manager in charge not with the individual sales consultants.

120 The Tribunal also took into account that the Claimant had only recently been transferred to men's wear which is where this incident took place as set out in our earlier findings by agreement with Mr Bailey the store manager because the Claimant had said that she did not want to follow the instructions of any of the managers on ladies' wear.

121 The Tribunal also noted that although contemporaneous statements of what had occurred were prepared by Ms Asghar and Mr Riaz who was the colleague of the Claimant who first delivered the message, the Respondent did not take any formal action against the Claimant in relation to this matter other than the entry on the record card referred to. The Tribunal considered that this was a measured and proportionate response to her actions.

122 In all the circumstances therefore, the Tribunal rejected the allegation of victimisation in relation to the record card being written up in relation to the dispute with Farah Asghar about the timing of the Claimant's break.

#### Allegation 5 – Direct Race Discrimination

123 The Claimant alleged that the Respondent had treated her less favourably than a hypothetical comparator because of her race, namely that she was Pakistani. The treatment that she complained of was that in March 2017, the Respondent appointed Nush, a Pakistani manager, to take over as Store Manager from Nick Bailey. She asserts that this was done because of her ethnicity in an attempt to prevent further allegations of race discrimination.

124 The Tribunal confirmed during the evidence that Ms Nush Akram took over as Store Manager at the end of April/the beginning of May 2017. The Tribunal therefore considered this application chronologically in the context of the corrected date. Mr Bailey also confirmed in his evidence that he was Store Manager until Ms Akram took over. There were contemporaneous documents which bore his signature such as the record cards which confirmed that he was present in the store in April 2017.

125 The Claimant alleged that she had become something of a thorn in the side of the Respondent by now and that they had moved in a Pakistani manager to close off the possibility of the Claimant alleging direct race discrimination. The Tribunal did not consider that the Claimant had established that she was subjected to a detriment in relation to this allegation. The Claimant betrayed the weakness of this argument when she said to the Tribunal that she believed the Respondent had placed someone of the same ethnicity as herself as store manager so that when a low appraisal grading was given to her, she would not be able to allege that this was race discrimination. It was not in dispute that when Ms Akram appraised the Claimant for the first time shortly after she took over in May 2017, she gave the Claimant a low grading. That was the first time the Claimant had received that a grading that low.

126 The Tribunal considered that the most likely reason for the Claimant getting a lower assessment from Nush was that that was what her work warranted. She seemed to be arguing that if she had received a similarly low assessment from someone of a different ethnicity from herself then she would have alleged race discrimination. We considered that even if she made that allegation, she had no basis for suggesting that would have been a well-founded complaint.

127 It was more likely that in the circumstances the action taken by the manager was warranted.

128 Certainly, there was other documentary evidence of record cards being kept in relation to the themes which had been highlighted in the correspondence from Mr Coatz to the Claimant about her refusal or unwillingness to take management direction and being unwilling to 'muck in'.

#### Allegation 6 – Victimisation

129 The Claimant complained that she had been obstructed from maintaining her record in the First Time Surfer (“FTS”) campaign, in that from the second week of May to 3 June 2017, Ms Matthu, Ms Asghar and Ms Ghazanffer denied the Claimant extra shifts and hid the FTS cards from her.

130 In summary, the FTS campaign was a non-contractual campaign which ran at every store. Its purpose was to increase the number of customers using the Respondent’s online retail Directory. Thus, employees in the stores were to give coupons to customers who could then activate them on line. After a certain number of customers had signed up to the Next Directory, the Head Office would distribute Next vouchers to each store, to be given out to the members of staff at the discretion of the Respondent. The Tribunal accepted this description of the scheme from the Respondent’s witnesses, as they were in a position to give the most authoritative evidence about how it operated. In particular the Tribunal accepted that there was only a negligible connection between the receipt of a Next voucher by a particular member of staff and the number of coupons that member of staff distributed.

131 The Claimant relied on photographs of coupons in a store room, haphazardly found on the floor and shelves, as the evidence that they had been hidden from her. Ms Matthu’s evidence was that the coupons were often misplaced or left in areas like the stockroom, and would then get knocked onto the floor. Sometimes they were even

found in the staff toilets. This evidence was more consistent with the photographs that the Claimant produced, than was her assertion that they had been hidden from her.

132 We were further satisfied that when this complaint was made to Ms Matthu by the Claimant, she looked into it but was unable to find evidence to substantiate the concern. In the Tribunal also, the Claimant could not produce persuasive evidence to support her allegations. We found that the Claimant had not established the primary facts on which the allegation was based. It was therefore dismissed.

133 In relation to being refused shifts, there was no specific evidence about this. The Claimant relied on a conversation she had with a colleague whereby he was able to book himself for a particular shift, that he cancelled it for himself and told the Claimant about its availability, but when she logged on, the shift had gone.

134 We found that access to additional shifts or overtime was by way of the Respondent's online tool, called Marketplace. Individual members of staff could have access to this if they wished to book such shifts. In essence the Claimant alleged that it had been manually manipulated to thwart her attempt to book the extra shift referred to. Apart from Mr Bailey giving evidence that the tool could not be manually manipulated, the Tribunal struggled to understand how the Respondent would have known that the Claimant wanted to make this booking and then intervened. There was no evidence of the Respondent knowing this.

135 This was another allegation which lacked particularisation. Ms Nush Akram and Ms Mathu denied having refused the Claimant shifts. We had no good reason to reject that evidence on the balance of probabilities.

136 We considered therefore that the Claimant had failed to establish the primary facts on which her complaint was based, and the complaint was not well founded and was dismissed.

#### First written warning

137 The Claimant did not complain about this in the hearing before the Tribunal but it was part of the history. The Tribunal has already referred to the letter from Mr Coatz in which he confirmed to the Claimant what had been discussed at the meeting with her on 26 April 2017 (p.417).

138 The circumstances which led to the Claimant being issued with a first written warning were that on 12 July 2017 an incident of what is most succinctly described as insubordination took place. This was against the background that the Tribunal has already outlined of this being a continuing issue. This was insubordination in the sense of refusing to follow reasonable management instructions. It related to the manager trying to reallocate resources so that the Claimant was put to work on tills because of the needs of the business need. The Claimant was concerned because the person she had accused of sexual harassment but who she had now been told as a result of the internal grievance and the appeal had been found not to have sexually harassed her, was also working on the till (pp.420-446). The manager concerned was Jane Landon. The Tribunal noted that she had not featured in any of the earlier incidents involving the Claimant. The manager who investigated the matter was the Assistant



Store Manager Veena Mathu. She had an interview with the Claimant about it on 17 July 2017 (pp.422-426). The Tribunal compared the circumstances that the Claimant was being asked to work in alongside with Mr Islam with what she had been told by Mr Coatz and as was confirmed to her in the letter of 29 June 2017 about working with Mr Islam. The Tribunal also noted that it was only some two weeks after she had received that written confirmation about the circumstances in which she would be kept away from Mr Islam. The circumstances in which she was being asked to work on 12 July did not breach that assurance.

139 By a notice dated 21 July 2017 the Claimant was invited by Ms Mathu to a disciplinary hearing (p.427) to take place on 26 July 2017, to discuss inappropriate conduct in that she refused to carry out management instructions on 12 July 2017.

140 The Claimant's objection at the time as was recorded in the notes of the disciplinary meeting was that she was being forced to work alongside somebody who had sexually harassed her. She basically interpreted the arrangement in a much narrower way than had been indicated to her by the Respondent (p.433).

141 The disciplinary hearing was chaired by Ms Nush Akram. Having discussed the matter with the Claimant and having reviewed the statements that were prepared she concluded that the disciplinary allegation was made out (p.439) and she issued a first written warning to the Claimant because she believed that the conduct was inappropriate and that the Claimant had failed to follow a management direction. She also imposed a reduction in bonus for the next three months. The warning was to remain on the Claimant's file for 12 months. The Claimant was told that she had the right to appeal against the warning and that she should lodge that appeal within seven days.

142 The contemporaneous documents confirmed that the Respondent considered the terms of the agreement with management about working or the circumstances in which the Claimant would be working with Mr Islam (p.441) where it was noted that Mr Coatz explained that the Respondent had said that they would not allow the Claimant to "lone work" with Mr Islam.

143 The confirmation of the imposition of the first written warning was sent to the Claimant by letter dated 27 July 2017 signed by Ms Nush Akram, Store Manager. In the letter to the Claimant, Ms Nush Akram again set out the extent of the agreement that the Respondent had with the Claimant and that it was restricted to lone working with Mr Islam.

144 The Claimant registered an appeal by email sent on 2 August 2017 (p.444). She complained that Ms Landon's action in referring the matter for disciplinary action was unfair and unlawful and that the disciplinary was being forced on her based on lies "from a white British manager". In her appeal which ran to some three paragraphs, she asserted:

"I would like to make it clear that I have the right to feel safe and preserve my dignity at work. Therefore I am well within my rights to ignore any managerial decisions that involve [Mr Islam and I] having to work with or alongside each other as he has sexually harassed me and other women in the past and no

action has been taken against him.”

145 This quotation also reflected the essence of the Claimant’s case before us. This was yet another occasion on which she made this point clear to the Respondent. The Respondent had taken it into account as reflected in the letter above, but they held a different view about what the understanding was.

146 By letter dated 22 August 2017 Ms Brown who was due to deal with the appeal against the first written warning wrote to the Claimant to confirm that because the Claimant had not confirmed the rescheduled date for the appeal hearing, the arrangements for it would be cancelled and it would be assumed that she did not wish to pursue this matter further.

147 Thus, the appeal hearing did not take place before the incident on 23 August which led to her suspension on 24 August 2017 and then ultimately to the Claimant’s dismissal.

148 The Tribunal had a handwritten letter, which the Claimant referred to, from Mr Islam (p.447-448) dated 18 August 2017. It purported to inform Ms Nush Akram that Mr Islam intended to resign as a result of the effects of working with the Claimant. He made some very strong antipathetic statements about the Claimant which the Claimant relied on to argue that this resignation letter should have been before her disciplinary panel, and that by comparison Mr Islam should have been disciplined because his statements about her were hateful.

149 The Tribunal did not consider that it was relevant for this document to have been before the Claimant’s disciplinary panel. If anything, the letter tended to support the Respondent’s finding that Mr Islam was not guilty of having harassed the Claimant, but felt sufficiently harassed by what he saw as false allegations against himself by her, that he had decided to resign.

150 The Claimant only became aware of the existence and contents of this letter when disclosure in this litigation took place.

23 August 2017 – dismissal – unfair dismissal complaint

151 The incident which led to the termination of the Claimant’s employment by Mrs Lisa Bryant on 12 September 2017, took place on 23 August 2017. That was not in dispute. The Respondent argued that the reason or principal reason for the dismissal was that the Respondent believed that the Claimant was guilty of serious inappropriate conduct on the sales floor in front of customers (p.606).

152 The Tribunal assessed the procedure followed by the Respondent. The Claimant did not argue that there had been any breach of the ACAS Code nor indeed did she refer to the Respondent’s disciplinary policy and suggest there had been a breach of that. Her only reference to the disciplinary policy was to argue that her actions did not amount to conduct which could lead to dismissal.

153 On 23 August 2017, the Claimant was on her shift on the shop floor working on the tills at the Beckton store. Mr Islam was also on shift and at some point approached

the opposite end of the bank of about five or six tills at which the Claimant was working because he was waiting for a colleague who was working in the same area to finish serving a customer in order to provide some handover details to them. Whilst he was there at the bank of the tills Mr Islam also assisted a customer. The evidence which was obtained by the Respondent at the time showed that there was some “banter” between Mr Islam and Ms Rukshana Begum. Because the CCTV footage and the audio that the Tribunal heard and saw were not synchronised, it was difficult to be clear at what stage that banter had taken place (p.451 for example).

154 At any rate, it was not in dispute that at some point the Claimant challenged Mr Islam’s presence at the tills by asking him why he was there and what his problem was or words to that effect. She accepted that in talking to him she used a volume of her voice which was louder than usual although she denied that she shouted. It was clear however from the witness evidence obtained by the Respondent that a number of people heard the incident including members of the public who were shopping, some of whom were adults and some of whom were children.

155 The evidence obtained by the witnesses suggested that the Claimant had said during the incident:-

155.1 that Mr Islam was not allowed to be near her; and

155.2 that he had harassed her.

156 There was also some evidence from the witness statements that the Claimant had told a member of the public during the incident that Mr Islam had “touched her” (p.456).

157 In addition to this the Respondent had access to CCTV footage which did not have audio with it. However, this showed that the Claimant walked about 10 to 12 metres from the till at which she was working to confront Mr Islam who was at that point at the far end of the tills waiting for his colleague Lacri who he was planning to have the handover discussion with (p.454).

158 The CCTV which the Tribunal was shown did not show Mr Islam going anywhere near the Claimant.

159 A more senior manager Randip Blaggan intervened and sought to calm matters down and eventually order was restored. The Claimant continued with her shift and came to work also the following day. On 24 August 2017 the Respondent attempted to discuss the previous day’s incident with her but she refused to attend the meeting with Ms Mathu, the Assistant Store Manager. The Claimant ended up locking herself in the staff toilet. She was suspended by Ms Mathu that day.

160 On 25 August 2017, the Respondent wrote to the Claimant inviting her to attend an investigation meeting on 29 August 2017. On 26 August the Claimant responded to the invitation by stating that she would not co-operate with the investigation (p.463). She did not attend on 29 August but the Respondent rearranged the meeting for 31 August 2017.

161 The Claimant was asked to answer the disciplinary charge which fell under the category of “serious inappropriate conduct”. This was one of the examples given in the non-exhaustive list of conduct in the Respondent’s Disciplinary Policy which could fall within a category which could be considered as gross misconduct justifying summary dismissal (pp. 88 and 89).

162 The Tribunal found that the Respondent was reasonable in concluding that in principle the conduct that she was accused of could fall within this category.

163 The Respondent had taken some witness statements in the immediate aftermath of the incident as follows: -

- On 23 August 2017 from Rukshana Begum, part-time Sales Consultant working in the women’s and children’s wear department where the incident took place (p.451-453).
- On 24 August 2017 from Randip Blaggan, Sales Coordinator, men’s wear who was also in the vicinity (pp.454-457).
- On 25 August 2017 from Lacramioara Lutichevici (“Lacri”) (pp.458-459) who was also working on the tills.
- On 25 August 2017 from Viktoriya Savickaite (pp.460-461) who was also on the tills at the time.

164 By email sent on 25 August 2017 at 6.40pm, the Claimant was informed that Mr George Saunders would be conducting an investigation accompanied by Mr Bailey Bottero (Office Manager). Mr Saunders was a store manager at a different store.

165 Once Mr Saunders commenced his investigation he conducted the following interviews and made notes of them: -

- 165.1 With the Claimant on 31 August 2017 (pp.466-512).
- 165.2 On 5 September 2017 with Nush Akram (pp.513-514).
- 165.3 On 5 September 2017 with Ms Savickaite (pp.515-516).
- 165.4 On 5 September 2017 with Mr Islam (pp.517-519).
- 165.5 On 5 September 2017 with Randip Blaggan (pp.520-521).
- 165.6 On 5 September 2017 with Veena Mathu (pp.522-523).
- 165.7 On 5 September 2017 with Ms Begum (pp.524-525).
- 165.8 On 6 September 2017 meeting with Fatima Chowdhury (pp.526-527) who also attended the scene and worked in the area behind the tills.
- 165.9 On 6 September 2017 meeting Lacri (pp.528-529).

165.10 On 8 September 2017 second meeting with the Claimant (pp.532-558).

166 Having conducted these investigations and met with the Claimant both at the beginning and the end to cover further with her the points that he had gathered from that investigation, Mr Saunders informed her at the end of the meeting on 8 September 2017 that he recommended that the case should move to a disciplinary hearing (p.559). Among other matters he noted that the reason for this was that the Claimant had informed him that she believed her behaviour on the sales floor was acceptable given the circumstances that she felt she had been placed in for the last two years and that she did not accept the statements which had been obtained by the Respondent. He noted that she admitted to her conduct in front of the customers although she said all the witnesses were lying and that she would not do anything differently if the situation arose again. She referred to having tried to raise the matter with her Assistant Store Manager earlier in the day but that she was ignored. She told Mr Saunders that the agreement with Mr Coatz was that she would not be required to do any "lone working". She also said that there was a verbal agreement with Ms Nush Akram, the Store Manager that she would not be required to work on the same floor as Mr Islam.

167 The Claimant was given a set of copies of the witness statements by Mr Saunders at the end of his involvement in the investigation. The statements had also been read through with the Claimant during the investigatory meetings and her comments obtained on them by Mr Saunders.

168 The disciplinary hearing commenced on 12 September 2017 chaired by Ms Bryant who was a Store Manager at a different store (p.560). This meeting was also very extensive and lasted from 11.30am until just before 4.30pm. Contemporaneous notes were taken of the discussion (pp.561-605).

169 After an adjournment Ms Bryant reconvened the meeting to inform the Claimant that she had reached the conclusion that the Claimant was guilty of the conduct alleged and that the Claimant was going to be dismissed for gross misconduct (p.603). The Claimant was informed of her right to appeal against that outcome.

170 A letter dated 15 September 2017 was sent to the Claimant on Ms Bryant's behalf (pp.606-607) confirming the decision made at the disciplinary meeting on 12 September. It reiterated the outcome and also summarised the Claimant's response to the disciplinary charge, informed the Claimant of her right to appeal and dealt with various other matters.

171 The Claimant presented an appeal, which was essentially an argument that her behaviour on the day of the incident was the result of having to face constant harassment and 'mental torture' as she described it, throughout the entire duration of her shift. She also complained that she had not been provided with appropriate support and assistance and protection on the day of the incident and that she had in effect therefore had to protect her own dignity and her right to work in peace. She referred to relevant evidence being CCTV footage and any matching audio recordings of the day of the incident from 7am to 8pm; to a statement from the manager Ms Landon in relation to the incident on 12 July 2017 which had led to the first written warning; and finally, to CCTV footage and matching audio of Monday 21 August 2017

from 12 to 5pm. She did not describe the relevance of any of this evidence, or identify which parts of that evidence would be relevant. The relevance of the first request is perhaps obvious but she did not explain why she wanted the second two categories of documents.

172 Ms Arnold from the Respondent's HR department wrote to the Claimant on 20 September 2017 acknowledging receipt of the appeal which had been dated 17 September 2017 (p.609). She informed the Claimant that the Respondent was in the process of arranging for the appeal to take place.

173 In response to the request for information she told the Claimant that the CCTV system did not have audio recording. She also indicated that the Claimant had asked for 208 hours of footage and that unless she was able to explain what it was that she expected the footage to show, that request would be considered to be too wide. She asked for more specific detail about the cameras and time periods that the Claimant considered was relevant to her appeal and that she would then take steps to see if the footage could be obtained.

174 In respect of Jane Landon's statement regarding the incident on 12 July 2017, she informed the Claimant that this was not part of the information on which the decision to dismiss was based. Despite that, she attached a copy of the statement as requested.

175 Finally, in relation to the request for CCTV footage matching audio of 21 August 2017, her response was similar to the request for CCTV footage of 23 August. She noted that this was a request for 80 hours of footage. She had explained in the earlier paragraph that there were 16 cameras in the Beckton store so this is why there was so much footage. She repeated her request for more specificity.

176 The Claimant responded also on 20 September 2017 (p.610) by explaining why she had requested audio because she thought she had heard it said that new cameras and surround sound system had been installed. She commented though that she had her own recording of the day in question, she thought that using evidence that Next had generated would strengthen her case that the statement of Viktoriya was false. She repeated her request for the CCTV footage and explained that this would help her establish the fact that she had suffered constant harassment and intimidation from Mr Islam by showing his behaviour pattern in her presence. She did not however provide the specifics of times and camera angles that Ms Arnold had requested. She then commented that the statement of Ms Landon from the previous disciplinary action proved: "the ridiculous amount of support and favouritism towards [Mr Islam] from her".

177 The appeal hearing against the dismissal took place before Ms Jenny Hamilton, Area Manager. It lasted the better part of a working day from about 10 o'clock in the morning to 3.45pm in the afternoon. Contemporaneous notes were taken of this meeting as well (pp.612-662). She dismissed the appeal (p.611) on 3 October.

178 A further letter was sent to the Claimant confirming the outcome (pp.663-665) and setting out some reasons for it.

179 The Claimant made a number of points which she asserted had not been

adequately dealt with in the dismissal or disciplinary proceedings. The first was that the Respondent had not properly investigated her allegations that there had been inappropriate behaviour displayed to her by Mr Islam, Sales Coordinator.

180 The Tribunal noted that the Respondent specifically recorded this aspect of the Claimant's defence both in the documents that they considered for the decision to dismiss and in the letter dealing with her appeal. There was considerable investigation into these matters but from the witnesses and the CCTV that was reviewed, there was no evidence to corroborate the Claimant's contentions. The Tribunal has set out above the exchange between the Claimant and Ms Arnold about making CCTV footage available. The Claimant failed to identify any relevant CCTV footage.

181 The witness statements which were obtained from a fairly large number of people did not provide any corroboration of the Claimant's allegations. Nor did the CCTV provide any visual corroboration. The Tribunal considered that employer's failure to go through approximately 200 hours of CCTV footage was reasonable in the circumstances, not least because they had been given no specifics about how to focus such an exercise.

182 The other potential source of evidence was from audio recordings. The Claimant informed both Mr Saunders and Ms Arnold that she had such recordings. However, in considering this issue in the context of an unfair dismissal complaint, the Tribunal distinguished between evidence which the Claimant gave to the Tribunal and evidence and information which she provided to the Respondent at the time. The primary area for examination was the evidence or information which the Claimant gave to the Respondent at the time.

183 In summary by Ms Hamilton in her appeal outcome letter (p.663) she set out, and this is corroborated by the minutes of the meeting, that she gave the Claimant the opportunity to adjourn the meeting on two occasions and also offered to reconvene the meeting the following day to give the Claimant time to collect the audio recordings for her to consider. The Claimant indicated that she had forgotten the audio recordings at home which was in a hotel; she said it was on her laptop there. Despite Ms Hamilton's offers to give the Claimant an opportunity to return and pick up the laptop, the Claimant informed Ms Hamilton that she had no access to her accommodation and had prearranged meetings to attend therefore she could not attend a resumed disciplinary meeting the following day.

184 The Claimant did not tell Ms Hamilton that the prearranged meeting was a meeting at the Benefits office. This was her evidence to the Tribunal. Nor indeed did she ask for any flexibility from Ms Arnold in terms of a greater interval before she produced the recordings. The Tribunal also noted that this discussion was taking place on 3 October 2017, and the Claimant had been suspended from work since 24 August 2017. In those circumstances, the Respondent was reasonably entitled to think that she had had ample opportunity to have collated any relevant recordings. The Tribunal also took into account that in her investigatory meetings, Mr Saunders had also pressed her for any further information that she had and had made it clear to her that the Respondent could only proceed on the basis of evidence that they had.

185 Finally, the issue had also arisen during the meeting with Ms Bryant. For

example, the Claimant had asserted early on in the meeting with Ms Bryant (p.575) that the statements of Lacro and Mr Islam were “lies”. She continued: “My recordings for the tribunal are different to their statements”. The Tribunal considered that that was a very telling comment by the Claimant to Ms Bryant. There were various occasions on which she referred during the internal disciplinary procedure that she would produce the recordings to the “court” and not to Next (p.500) during the meeting on 31 August 2017 with Mr Saunders. There were comments to a similar effect elsewhere in the meeting (pp.501-502).

186 Then finally before the appeal hearing the Tribunal has already referred to the correspondence between the Claimant and Ms Arnold about audio and CCTV recordings that might have been in the Respondent’s possession. The Tribunal considered that against that background the Respondent acted perfectly reasonably in seeking to obtain from the Claimant any additional relevant evidence that she may have had.

187 The Tribunal did not consider that the Claimant put forward any good reason for not having provided those recordings during the internal proceedings, even at the Tribunal hearing. After the appeal and for the purposes of this hearing, some transcripts were provided.

188 In her grievance of January 2017 to the Chief Executive, the Claimant had referred to having at that point “1243 recordings (p.152) saved”.

189 The Claimant also argued in the Tribunal hearing that she had offered to email the evidence to Ms Hamilton but that this was declined. There was no evidence in the notes to that effect and this was the first time this claim was made in this case by the Claimant. In any event the Claimant made no attempt to email any further evidence to Ms Hamilton once the meeting had concluded.

190 The Tribunal considered it was likely that the Claimant may have been somewhat overwhelmed by the sheer volume of surreptitious recordings that she had made on a very large number of occasions.

191 The Claimant accepted that during the disciplinary process she was given an adequate opportunity to state her case and to respond to the allegations against her.

192 The Tribunal was satisfied on the basis of the information gathered from the investigation and the disciplinary hearing, and through to the appeal, that the Respondent had adequate grounds acting as a reasonable employer to conclude that the Claimant was guilty of the misconduct alleged. It was relevant as set out above that the Claimant accepted that she had conducted herself inappropriately in certain respects.

193 The next issue was whether it was reasonable to dismiss the Claimant. The Tribunal considered that this was the context in which the Claimant’s claim about having had a history of being harassed and tortured by Mr Islam was relevant. It was effectively an argument that the action was provoked and/or that the background circumstances were mitigation.



194 The difficulty with this was that the Respondent once again was not presented with any evidence which tended to corroborate what the Claimant maintained. They also had themselves conducted an investigation into the sexual harassment allegations (Catherine Kearney) fairly recently and that had not yielded any corroboration or substantiation of those allegations. Thus, for example during the course of the investigation by Mr Saunders, he was told by the Claimant about an alleged incident of inappropriate sexual conduct by Mr Islam (p.540) which was witnessed by a colleague of the Claimant's. The Claimant indicated that she was in the presence of her colleague Farah in the staff room when this incident occurred (p.543). Mr Saunders not only asked the Claimant for more details of this allegation when she raised it in the meeting but he then contacted Farah on the same day to check if she could corroborate this account (p.679). Farah expressly having witnessed the incident described by the Claimant. She indicated that she had been in the circumstances described by the Claimant, namely being in the staff room with the Claimant alone and then Mr Islam had come in but she said: "nothing has ever happened". Although the meeting notes were not dated it appears from the content that Mr Saunders spoke to Ms Asghar on the same day as the Claimant had informed him of this alleged incident.

195 Also during the course of the interview with Mr Saunders the Claimant confirmed that she had not reported this incident to anyone at the time. She estimated that the incident had taken place in November 2016.

196 In all those circumstances therefore, the Tribunal did not consider that the Respondent acted unreasonably in failing to attach weight to the background matters and the argument of provocation/mitigation as a result of Mr Islam's conduct because they did not have a proper basis for believing that Mr Islam was guilty of the conduct that the Claimant was alleging.

197 A further point was made during the course of the internal proceedings about the Claimant not having been taken sufficiently seriously or having been ignored on 23 August 2017. She referred in particular to having contacted the Assistant Store Manager Veena. This was another aspect of the Claimant's case which Mr Saunders followed up at the time it was raised (p.522). He put to Ms Mathu specifically that in the Claimant's interview with him she had said that she paged Ms Mathu a few times but that Ms Mathu had not responded and he asked her whether that was true. Ms Mathu denied this completely. She said that she spoke to the Claimant once after she paged her when Ms Mathu was on lunch and that she said she wanted to talk to Ms Mathu. Ms Mathu continued that she asked the Claimant whether it was ok to talk to her after her lunch and that the Claimant had said yes that was fine. She then said that she did not hear any other pages from the Claimant.

198 The Tribunal had to take into consideration that a manager can only go on the basis of what is said to them. The Respondent on that evidence could reasonably have concluded that Ms Mathu had not ignored the Claimant and had not been aware in any event of what the subject matter of the conversation was likely to be.

199 The Respondent's information was also to the effect that the terms on which it had been agreed that the Claimant and Mr Islam could work were different from the terms that the Claimant was asserting existed. The Claimant, as set out above,

asserted that she had been told verbally by Nush Akram that she and Mr Islam would not be required to work on the same floor. This was not consistent with the fact that Nush Akram was the manager who disciplined the Claimant for inappropriate conduct and failure to follow management direction on 12 July 2017 in relation to the Claimant refusing to work on the tills because Mr Islam was working at another till along that bank of tills. Indeed she confirmed in her letter to the Claimant (p.442) of 27 July 2017 as follows:

“During the meeting you explained you admit that you refused to assist on the tills to serve a queue of customers as [Mr Islam] was also serving at the till point. You said that there was an agreement in place with Darren Coatz whereby you would not be expected to work go on the till if [Mr Islam] was there. We do not agree that this is the case, the only agreement we have is that you would not be expected to work alone with [Mr Islam], it was made clear to you that you were expected to follow management directions at all times.”

200 The Tribunal took into account that this letter was not part of the disciplinary bundle but this issue was looked into by Mr Saunders who had confirmed with another manager that those were the terms of the agreement with the Claimant.

201 We were therefore satisfied that the employer had sufficient evidence of the misconduct; that their belief in the Claimant's guilt in it was genuine and reasonable; and that the procedure followed was fair. We also were satisfied that dismissal was a reasonable sanction for the alleged misconduct. The Tribunal took into account that the incident took place on the shop floor in the hearing and presence of the Respondent's customers. The Respondent was entitled to consider that this was an incident which was likely to have an adverse effect on their business and reputation. To all intents and purposes, the Claimant was making unsubstantiated accusations of sexual harassment against a fellow colleague in public and in front of colleagues and customers during opening hours. She also, as the Tribunal has recorded above, gave no reassurance to the Respondent that she would act any differently if a similar situation arose again.

202 The Tribunal therefore found that the Respondent acted within the band of reasonable responses in relation to the dismissal. The unfair dismissal complaint was therefore not well founded and was dismissed.

203 In those circumstances, it was unnecessary to consider any arguments about contributory conduct or *Polkey*.

Employment Judge Hyde

17<sup>th</sup> December 2018