



EMPLOYMENT TRIBUNALS

Claimant: Jade Destro
Respondent: Tesco Stores Ltd

Heard at: Cardiff **On:** 14, 15, 16 and 17 October 2019

Before: Employment Judge Rhian Brace

Members: Mrs C Mangles
 Ms K George

Representation
Claimant: Miss Roxanne Manson (Solicitor)
Respondent: Mr Zovidakis (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that the claims of:

- Unfair dismissal is not well-founded and is dismissed.
- Direct sex discrimination (s.13 Equality Act 2010) is not well-founded and is dismissed.
- Harassment related to sex (s.26 Equality Act 2010) is not well-founded and is dismissed.

REASONS

Background

1. The claimant was employed as a Shift Leader at the Rogerstone store of the respondent until her dismissal on grounds of capability on 27 November 2017.
2. At a case management hearing on 24 June 2019 the claimant identified that she was claiming:
 - a. direct sex discrimination;
 - b. harassment related to sex; and
 - c. unfair dismissal.
3. At that preliminary hearing the claimant was ordered to file further particulars of her claim, specifying in relation to each act relied upon whether she relied upon s.13 Equality Act 2010 (direct discrimination) and/or s.26 EqA 2010 (harassment).

4. Further particulars were provided by the claimant on 22 July 2019 (“Further Particulars”,) but these did not indicate which form of discrimination was being relied upon in respect of each act complained of. Rather, the Further Particulars spoke generally of less favourable treatment and harassment and provided more factual detail. The Further Particulars named Matthew Walters, a colleague and a male Shift Leader at Rogerstone, as a comparator in less favourable treatment. The claimant also referred to ‘victimisation’.
5. We took the opportunity at the outset of the hearing to clarify and confirm that the claims before us. It was confirmed by the claimant that she was not seeking to argue that she had been victimised under s.27 EqA as a result of a protected act. In respect of each and all acts complained of, the claimant confirmed that she was claiming both:
 - a. direct sex discrimination (s.13 EqA), with the comparator being Mr Walters; and, in the alternative;
 - b. harassment related to sex (s.26 EqA).
6. The acts complained of, set out in her Further Particulars were, in brief, as follows:
 - a. Matthew Walters had been given progression opportunities. Examples were given that:
 - i. Matthew Walters had been given an opportunity to run a store,
 - ii. Matthew Walters had several discussions regarding his development to become a manager; and
 - iii. Matthew Walters had been taken out of the store to cafes for meetings about the running of the store;
 - b. If the Store Manager, Paul Mayer had an issue with the claimant he would speak to Matthew Walters before the her. Examples were given that:
 - i. Rota concerns discussed with Matthew Walters;
 - ii. The claimant approached by Matthew Walters to say that Paul Mayer needed to discuss fact that the claimant had booked holidays;
 - c. Matthew Walters had been given preferential treatment when rota completed and given a day off in accordance with his private life;
 - d. Paul Mayer used the claimant’s unwillingness to do Late to Early shifts to make her feel guilty about the effect on colleagues;
 - e. When the claimant had any suggestions regarding the store, she had to go to colleague Matthew Walters for Matthew Walters then to discuss them with Paul Mayer, whereas Paul Mayer would regularly make business decisions with Matthew Walters;
 - f. On 26 November 2017, Paul Mayer had used threatening, intimidating and hostile behaviour to bully the claimant and make her feel inferior as a female member of staff;
 - g. 26 February 2018 – Paul Mayer bullied, intimidated vulnerable, anxious, distressed and humiliated; the meeting was extremely hostile, degrading and offensive;

h. her dismissal.

7. With regard to the issue of whether the claims had been brought out of time it was agreed, following representations from both parties, that this would not be considered as a preliminary issue at the outset of the hearing, but would be dealt with as part and parcel of the hearing, and would be determined after considering all the evidence.
8. The parties were asked to confer regarding the issues following an adjournment on the morning of the first day when the tribunal took the opportunity to read the witness statements. On return confirmed it was confirmed that the issues to be determined were agreed to be those as set out in the order from the case management preliminary hearing of 24 June 2019 (with amendments to para 16 to refer to capability not conduct).

Preliminary Issues

9. We had before us a bundle of documents (the Bundle) spanning some 758 pages.
10. The claimant had made a number of applications for specific disclosure prior to the full hearing, which had not been granted. At the outset of the hearing a further application was made by the claimant for specific disclosure of documents relating to a grievance made by an employee who had worked at the Rogerstone store, a Jessica Appleby. The claimant contended these documents were relevant as they demonstrated the propensity of the Store Manager to discriminate against women.
11. The respondent objected to the disclosure of this documentation on the basis of relevance and our attention was drawn to documents in the Bundle, relating to an investigation meeting where Ms Appleby had been interviewed as part of the Claimant's Grievance appeal, which made no reference to a discrimination complaint having been made by her.
12. Having adjourned, we read the notes taken during the Grievance appeal investigation of the meeting with Ms Appleby and noted that whilst the employee had confirmed that she had brought a grievance against the Store Manager, she had not stated that she had brought a complaint of sex discrimination.
13. We were not satisfied that the claimant had demonstrated the relevance or necessity of the documents to this case. In addition, there was no suggestion of a pattern of behaviour from the Store Manager, beyond the one event, or a policy of discriminatory treatment and no claim had been brought by the claimant of such a pattern or policy. On the basis of lack of relevance and/or necessity, we declined to make an order for specific disclosure of the documentation requested.
14. The claimant also sought to adduce a further witness statement, from Roxanne Manson, the claimant's partner, which had been disclosed late. We were told that this had been prepared to respond to additional disclosure which had been made by the respondent on 3 October 2019 as well as the statement disclosed from the Store Manager which made reference to interaction with the some employees of the respondent and claimant's partner regarding the claimant.
15. On that basis, after consideration during the adjournment, we did allow the statement from Ms Manson to be adduced into evidence in relation to any matters which

responded to the additional documents at p.743A-C of the Bundle on the basis of potential relevance to the issues to be determined.

16. Finally, further documents had also been disclosed by the claimant to the respondent on the morning of the first day, namely two WhatsApp screen shots, of a group Whatsapp conversation. The respondent had objected to such documents being included in the Bundle as they considered that the documents did not go to matters that were before us and were not a comparative act. After consideration, we accepted that these documents may be relevant in a discrimination case, as evidence of differential treatment, and that it would be incompatible with the overriding objective if we were to exclude otherwise relevant evidence. These documents were added into the Bundle at pages 743D and E.
17. The claimant is a litigant in person but after discussion with the claimant and her partner, the claimant decided that she wished her partner, Ms Manson, an Immigration lawyer, to represent her.
18. We heard evidence from the Claimant on her own behalf and from the claimant's partner, Miss Manson and both were cross-examined by the respondent's representative.
19. We also heard evidence on behalf of the Respondent:
 - a. from Mr Paul Psaila (Area Manager);
 - b. Hayley Young (Personnel manager);
 - c. Daryl Lewis (Store manager); and
 - d. Paul Mayer (Store Manager)
20. Miss Manson was provided with the opportunity to cross examine the respondents' witnesses and was reminded during the hearing to focus on the List of issues when presenting her case.

Findings

21. The claimant has worked for the respondent since 2007 and has been at the Rogerstone Store in Newport since December 2016 as Team or Shift Leader. Throughout that time, she reported to Paul Mayer, Store Manager. The claimant considered that Mr Mayer's management style was very different to what she had been used to at the other Tesco stores she had worked in.
22. Two other Shift Leaders were employed at Rogerstone at times relevant to this claim: Sarah Morris and Matthew Walters. During his time as Store Manager Paul Mayer also promoted another employee, Hayley Goodwin to part time Shift Leader and endorsed a female shift leader to progress as part of the Development programme for Deputy Managers.

November 2017

23. Little evidence was given by any respondent witness in relation to the events relating to the complaint made by the claimant about Paul Mayer in November 2017. This was unsurprising insofar as the events of November 2017 were not referred to in the claimant's original ET1.

24. In November 2017 a meeting was arranged between the claimant and Mr Mayer, organised and attended by personnel manager, Hayley Young, following a complaint from the claimant regarding Mr Mayer of bullying. This was referred to by the parties as a "Facilitation Meeting".
25. The Facilitation Meeting had been arranged as the claimant had objected to Mr Mayer annotating a shift handover note, contained in the Bundle that the claimant had left for management, which referred to her comments as '*negative*' and '*resistant*' and that in a later conversation with him, Mr Mayer had told the claimant that '*Tesco did not employ you, the shop didn't employ you; I employed you*' or words to that effect.
26. At the Facilitation Meeting Mr Mayer was asked by Hayley Young to change the terminology used in the meeting, in which he had accused the C of '*blagging*' her way through her job, terminology which Ms Young did not consider constructive. No suggestion was made by the claimant that at that point she held any concerns of discrimination based on her sex, and we have no evidence before us to find that she did at that point, although she now claims that Paul Mayer treated her less favourably and harassed her because of her sex at that meeting. The claimant accepted on cross examination that she did not raise discriminatory treatment as an allegation contemporaneously.
27. Agreed outcomes were set at that meeting, which the claimant referred to later in her Grievance letter as follows:
 - a. Communications would be done on a handover and not through messaging (Whatsapp);
 - b. Paul Mayer would think before he said things and not make comments in the heat of the moment;
 - c. Rotas would be done fairly, and late shifts would be shared evenly amongst the team leaders;
 - d. One to one meetings would be completed to improve skill sets for the claimant and others.
28. After the Facilitation Meeting the claimant continued to work at the Rogerstone store reporting to Mr Mayer and the claimant was removed from the Whatsapp group for the store. There was no suggestion that the claimant was unhappy with the outcome of that meeting, Mr Mayer was spoken to regarding his management style and tone, and no issues arose until February 2018.

Texts regarding rotas and set days off

29. In February 2018 the claimant and her partner went on holiday. Whilst on leave, by way of text message, the claimant asked Mr Mayer about the work rota on her return from holiday.
30. In text response, on 22 February 2018 Mr Mayer texted the claimant a photograph of the 4-week rota for management which included the claimant, Mr Mayer, Matthew Walters and Sarah Morris.
31. This showed that on her return from leave, the claimant would be working a late shift on the Monday (being a 23.30 finish time (a "Late")) followed by an early shift on the Tuesday (starting at 6.30am (an "Early",)). She had a second Late-Early back to back shift that first week, with a Late shift on the Saturday night followed by an Early on the Sunday.

32. The rota indicated that only the claimant had any Late-Early shifts in week 1, but that she had no other Late-Early in the remainder of the four-week rota. Matthew Walters was shown to have two Late – Early shifts in week 2 and week 3 of the same four-week rota.
33. Mr Mayer texted and apologised for the two Late-Early shifts in her first week back and told the claimant that it was the only way he could work the rota, but that the claimant could swap with Sarah Morris if she did not want to do the Late - Early.
34. The claimant objected as swapping meant;
 - a. more Late-Early shifts for her that week;
 - b. that it was contrary to policy; and
 - c. bad for her health.
35. She also raised a separate issue within the text exchange, that Sarah Morris, Matthew Walters and Mr Mayer had a set day off and requested, from the next rota, every Saturday off.
36. Paul Mayer responded the same day, telling the claimant that she could not have her request for every Saturday off and they would need to discuss this on her return from leave. He also suggested that on a review of past rotas, they had been '*more than kind*' to her and that perhaps they could look at another store for the claimant that could accommodate her needs and work life balance.
37. The claimant replied that day denying that she said that the rota had been unkind to her, and that all she had done was ask for a certain day off in the week like everyone else to accommodate her personal life. She stated that Saturday was not a busy day. She also told him that she thought it completely inappropriate for him to text her messages telling her to look for a new store.

26 February 2018 Meeting

38. The claimant returned to work from her holiday on Monday 26 February 2018, commencing on a Late shift and was called into a meeting by Mr Mayer. It has been referred to as a 'Time Out' meeting by the respondent's witnesses. We found that the label put on the meeting was irrelevant as we found that the discussion or conversation had no special or formal status. Rather it was an informal meeting between the Store Manager and the claimant as the Shift Leader about a variety of issues. It was not a disciplinary meeting.
39. Unknown to Mr Mayer, the claimant covertly taped the meeting. The claimant had been advised by her partner, an immigration lawyer, that if she was concerned about the content of the meeting that she should record the meeting in order to protect herself.
40. A transcript of that discussion between the claimant and Paul Mayer has been provided and there has been no issue that the transcript is anything other than an accurate transcript [80]. The transcript commences 3 minutes 40 seconds into the meeting, but we were asked by the respondent to listen to the opening stages of the meeting which we did on the afternoon of the first day before the cross-examination of the claimant. We were also asked to listen to three extracts of the recording at the start of the claimant's cross-examination of Hayley Young.

41. The prospect of the pending annual formal review was flagged up to the claimant and Mr Mayer told the claimant that he wished to highlight some issues to the claimant in advance and provide her with some feedback, to '*draw a line in the sand and start all over again*'.
42. A full reproduction of the transcript is needed to do it justice but in brief the issues raised were as follows:
 - a. the claimant's management of an issue regarding a colleague 'Anna';
 - b. That Mr Mayer found the claimant quite difficult to work with, quite resistant and questioned most of the things Mr Mayer did;
 - c. That the other shift leaders did not feel she was collaborating as she should; that the claimant should show more commitment to the role and more collaboration;
 - d. That she should get a clear understanding of her role as Shift Leader before the annual review;
 - e. that a customer had commented to him that the atmosphere was different in the store when claimant was not on shift;
 - f. The days off and rota were also discussed.
43. In relation to days off, Mr Mayer offered the claimant a regular Monday, Wednesday, Friday or Sunday off each week. The claimant wanted a regular Saturday off work as her partner worked Monday to Friday.
44. Mr Mayer refused her a regular Saturday on the basis that Saturday was one of the busiest days in the store and that he needed to be fair to all staff around a Saturday because it was a day regularly requested as annual leave. The claimant did not accept that this was correct and maintained that Sunday was the busiest day. The claimant did not want a regular Sunday off because she needed the money that a Sunday premium provided.
45. We heard and accepted the evidence from other Store Managers, who confirmed that Saturday was the busiest day of the week, save for city centre stores where weekdays would invariably be busier than weekends as a result of office workers' use. We found that Saturday was the busiest day of the week for the Rogerstone store and that it would have been difficult and not reasonable to accommodate a request from a Team Leader for every Saturday off. No other Shift Leader had requested a Saturday as a regular day off. On cross-examination the claimant accepted that in offering a Sunday, Mr Mayer was giving her what she was essentially asking for.
46. The rotas, and in particular the Late – Early rota, were discussed at length at the meeting. The claimant explained the difficulty in her doing Late – Early shifts and Mr Mayer asked her for a solution to the difficult rotas and more commitment, commitment which he saw coming from both Matthew Walters and Sarah Morris. The claimant told him that it was illegal to have a Late – Early rota.
47. Mr Mayer offered to work the following Early shift for her that week, but that stopping the claimant working Late - Early would impact on the other managers. The claimant told Mr Mayer that she felt he was making her feel bad about raising that impact as an issue. Mr Mayer did not accept that, but acknowledged that the Late-Early shifts would have to stop generally and that this would include stopping for all including Matthew Walters who liked doing the Late to Early shift.
48. Having been asked to consider the tape recording, and having reviewed the transcript of the meeting, we found that whilst the claimant may very well have felt guilty about depriving colleagues of shifts that they preferred to work, there was no evidence

before us, and it was not reasonable for the claimant to conclude, that Paul Mayer used the claimant's unwillingness to do Late to Early shifts to make her feel guilty about the effect on colleagues.

49. Mr Mayer told the claimant that he considered that the Shift Leader, with the most capability, was Matthew Walters and that he felt confident when he was not in store. The claimant told Paul Mayer that she felt confident if she was given the opportunity and that when he had been off sick, she and Matthew Walters had run the store well. She accepted that Mr Walters had a little more experience but felt that this was because he had been given opportunity. Mr Mayer told the claimant that he considered that Matthew Walters was the shift leader who had the most capability, to get things done and that he felt confident in him when he was not in the store. The claimant accepted that Mr Walters had a little more experience.
50. The meeting ended with the claimant telling Paul Mayer that she was unhappy with the meeting and that she felt she had been treated unfairly, with Mr Mayer repeating to the claimant that the purpose of the meeting was to give the claimant feedback; that she had the ability but that he was concerned about collaboration and working with others.
51. Having listened to the tape-recording, we did not consider that there was anything in the tone, or level of the Mr Mayer's voice during the meeting that was in any way unreasonable, or that could be viewed as intimidating or unacceptable to an employee such as the claimant.
52. We did not accept that Mr Mayer had lectured the claimant as alleged and there was nothing in the tone or content of the conversation that could have reasonably led to any employee being scared for their mental safety, a matter which has been alleged on cross examination to the respondent's witnesses.
53. It was described by Ms Young (having listened to the recording herself as part of the claimant's Grievance investigation,) as a '*natural conversation*' between a manager and shift leader, a description which we found was a fair description of both the content and tone of the meeting.
54. We also found that:
 - a. at the time of the meeting Mr Mayer was not aware that there should be a minimum amount of daily rest break, and that he did not become aware until just after this meeting, at a group management meeting of some thirty stores, when the issue was addressed as being a wide scale issue for the respondent that needed to stop;
 - b. Mr Mayer had sought to be accommodating to the claimant regarding her weekly day off, but that regular Saturdays was not something that could be accommodated for anyone, taking into account the needs of the particular store.

Grievance

55. Later that day, the claimant emailed Hayley Young to confirm that she was putting in a complaint. She also obtained from a work colleague a handwritten statement expressing her views on the claimant's work manner and ethic and her ability as a Team Leader.
56. On 3 March 2018 the claimant submitted a formal grievance letter dated 28 February 2018 ("Grievance") [95]. The letter was detailed, running to over three pages, and

complained of bullying and harassment by Mr Mayer. Again in brief, the claimant stated it was an ongoing issue, but outlined the meeting on 26 February 2018 as a particular incident. In the Grievance letter the claimant summarised some of the issues discussed in the meeting but did not at that stage state or inform the respondent that the meeting had been taped by her.

57. The claimant did not state in her Grievance that she considered or believed that the treatment she complained of was based on her sex.
58. Hayley Young was appointed as the investigator to the Grievance and a Grievance meeting was held with the claimant on 13 March 2018. Lengthy handwritten notes from the meeting were provided in the Bundle [109]. Having reviewed those notes, at no time during that meeting did the claimant allege that she felt she had been discriminated against by Mr Mayer on the basis of her sex. She did not, at any point, raise that she felt she had been treated less favourably because of her sex.
59. At the investigation meeting she brought along a document containing additional matters which she felt had arisen since her Grievance which related to matters other than her concerns regarding Mr Mayer [120-124].
60. Further Grievance investigation meetings took place with Paul Mayer on 23 March [135], Sarah Morris on 28 March [154] and Matthew Walters on 3 April 2018 [165].
61. On 10 April 2018 a further meeting with claimant took place when the claimant was accompanied by her TU representative [195]. At that meeting the claimant indicated that the trigger for the Grievance was Paul Mayer telling her that she was, in her words, '*crap at her job*' and the outcome desired was that she wanted Paul Mayer to realise how she was feeling. At the meeting the claimant had the opportunity to again discuss rotas, request for day off on Saturday, WhatsApp communication and general managerial management of feedback
62. At the end of the meeting Hayley Young proposed mediation, which initially was rejected by the claimant on the basis that she did not consider that it would work. After a short adjournment the claimant agreed to engage in mediation.
63. Later that day Roxanne Manson, the claimant's partner, contacted Hayley Young to tell her that the claimant had a tape-recording of the meeting of 26 February 2018 [182]. Arrangements were made for a copy to be emailed to Ms Young.
64. A further meeting was arranged with the claimant to be held on 13 April 2018. Prior to the meeting, on 12 April 2018, the claimant sent in an email which attached the recording, and again highlighted issues which the claimant felt important which she felt had not been addressed. Further meetings took place with the claimant on 13 April 2018, when she was again accompanied by a TU representative, and further investigation meetings took place with Mr Mayer on 21 April 2018 [208] when he was told that the claimant had in fact covertly taped the meeting of 26 February 2018. He considered that it was an invasion of his privacy and was deeply upset that this had happened.
65. At some point after the submission of her Grievance the claimant transferred to work at one of the respondent's stores in Newport, some 12 minutes further away from the Rogerstone store, as she did not wish to work with Paul Mayer during her Grievance investigation. On 5 May 2018 the claimant told Hayley Young that it was no longer acceptable to her to work in Newport and asked to move back to Rogerstone. She

was reminded that when they had last met, she had requested not to work with Paul Mayer whilst the investigation was taking place.

66. On 8 May 2018 the claimant confirmed that she had been given medication for stress induced symptoms and decided that she needed time off work. The claimant commenced long term sickness absence from this point and did not return to work at any point up to the termination of her employment.
67. The Grievance investigation continued with Hayley Young. Detailed investigation notes including notes of all meetings were included in the Bundle. This documentation also included a synopsis of evidence which supported the allegations and matters which Ms Young considered did not, together with her conclusions as she progressed. We found that the investigation was thorough and dealt with the issues raised by the claimant.
68. On 15 May 2018 Paul Mayer met again with Hayley Young. He again expressed unhappiness that his meeting with the claimant had been covertly recorded by her and whilst at that point in time he did not consider that he could work with the claimant again as a result, he agreed to enter into mediation to address the breakdown in relationship between them [239].
69. On 18 May 2018 Hayley Young met with the claimant and her representative, having concluded her Grievance investigation, to confirm the outcome [289]. After an adjournment the claimant also agreed to mediation but expressed the view that she did not consider it would make a difference. She did not consider that her bullying allegations had been addressed
70. Again a full transcript of the meeting needs to do it justice, but in essence what was communicated to the claimant by Ms Young was confirmed by way of letter of the same date [298] and attached a copy of her Investigation Report [295] confirming that she had arranged mediation.
71. Whilst we found that the Grievance outcome did not specifically refer to the overarching allegation of bullying and harassment, Hayley Young had dealt with the individual allegations which had supported the claimant's allegations of bullying and harassment and her conclusion was:
 - a. that the claimant should not have been asked to work Late-Early; that this practice was being stopped and had been communicated;
 - b. That the respondent had failed to give her training for her role, hold regular 1;1 meetings and performance reviews;
 - c. That the text regarding transferring to a new store was not the best method of communication, but that there was no malice on Mr Mayer's part;
 - d. She did not consider that Paul Mayer had been malicious in his text messages but agreed that this was not the right method of communication;
 - e. She accepted that Store Manager feedback should be done differently and that this was being addressed across the organisation;
 - f. That communication by WhatsApp would need to stop;
72. The claimant appealed by way of letter dated 25 May 2018 [300].

73. In brief, within that letter of appeal, the claimant said that she felt that her version of events had not been adequately investigated and considered. She also felt that the reason behind the treatment she felt she had received was covered by the Equality Act in relation to gender and had concluded that she was treated differently to her male counterpart. The letter was detailed and ran to some three pages. A further letter to support her appeal was sent in dated 7 June 2018 [306] which also alleged that she had been discriminated against on the grounds of her disability.
74. Daryl Lewis, Store manager from Swansea and latterly Cardiff Metro, was appointed as Appeal Manager and met with the claimant on 15 June 2018. Prior to the meeting he reviewed the Grievance documentation. His appeal investigation involved Mr Lewis interviewing both the claimant and Paul Mayer, as well as a number of employees who had worked with the claimant and/or Paul Mayer. Notes of his investigation interviews were in the Bundle [323-421].
75. Mr Lewis also listened to the tape recording of the 26 February 2018 and concluded that Mr Mayer was not being intimidating or bullying in any way but was genuinely trying to resolve issues between them.
76. On 13 July 2018 Mr Lewis met with the claimant to conclude the grievance [422] and she was told that there was very little support for her allegations that Paul Mayer was a bully or that he intimidated her. He told her that there was no evidence to support gender discrimination.
77. He concluded that he upheld Ms Young's decision, provided her with a copy of his investigation report [435] and confirmed that as her original desired outcome was for Paul Mayer to understand how he made her feel, mediation would help address both parties to share how they felt and that any other action that had or needed to be taken against Paul Mayer was private and confidential and would be handled in accordance with the respondent's policies. This was confirmed by way of letter dated 13 July 2018 [434].
78. We found Mr Lewis's investigation to be very detailed and thorough. His findings were also supported by the evidence before us, that whilst Paul Mayer was sometimes unapproachable, the majority of staff considered that Paul Mayer was a fair and reasonable manager. Evidence taken in the Grievance investigation from Matthew Walters and Sarah Morris had indicated to him that he was a good manager. Both indicated that at times the claimant could be difficult.
79. Whilst there was evidence before Mr Lewis that Jessica Appleby had complained about Paul Mayer's management style, there was evidence before him that other male employees had too complained and left Rogerstone store due to Mr Mayer.
80. We found that Paul Mayer was an experienced Store Manager with significant service with the respondent. He was well-respected by staff and the respondent alike. Having reviewed that evidence we found that this was the position. We also found that there was no pattern of behaviour by Mr Mayer to indicate or evidence in any way that he treated female employees in the store generally, in any way differently or less favourably to the way he treated male employees at the store.
81. We found that on balance that the evidence before us indicated that Paul Mayer's management style could be forthright, direct and blunt, and at times autocratic, a style which could and did upset some staff. Whilst we accepted that some of the language used by Paul Mayer, in the lead up to the November 2017 meeting and his text

communication with the claimant whilst she was on holiday regarding her finding work in an alternative store, were direct examples of this style of management, there was no evidence before us to make any finding that there was any differential in his treatment of men and women who worked in the store more generally. Rather, staff of both sexes seemed to find Paul Mayer's approach difficult.

82. He was spoken to regarding his style of management and steps have been taken to address his management style.
83. Whilst Mr Mayer had helped all shift leaders progress, including the claimant, Mr Mayer considered that Mr Walters was progressing better at that time taking into account his view on Mr Walters' day to day performance. He felt Mr Walters was akin to a Deputy and part of his development was to get Mr Walters to take some work off him. He did not consider the claimant to be at this point of capability and he had issues regarding the claimant's commitment and cooperation with other shift leaders.
84. With regard to Paul Mayer's attitude towards Matthew Walter, we did find that Mr Mayer considered that Mr Walter's ability and performance to be better than other Shift Leaders, and his high regard for Mr Walters, as communicated to the claimant in that meeting to the claimant, was evidenced again at the hearing by Mr Mayer, in the contents of his witness statement (paragraphs 15 and 19 in particular) and repeated on cross examination. On balance we found that as a result it was more likely than not Mr Mayer did foster Mr Walter's career more than the claimant's or indeed other shift leaders in the store.
85. We had no clear evidence from the claimant to support her allegations that rota concerns were discussed with Matthew Walters or that the claimant was approached by Mr Walters telling her that Paul Mayer needed to discuss leave arrangements and was not satisfied that on balance of probabilities that this had arisen.

Post Grievance period

86. The claimant had been on sick leave since 8 May 2018 and remained on sick leave after the outcome of the Grievance submitting Fit notes to cover her absence indicating stress and anxiety as the reason for her absence.
87. By way of letter dated 18 September 2018 [460], the claimant was invited to meet Hayley Young on 27 September 2018 at a formal absence meeting to discuss this absence. At this point, mediation had not taken place. The letter warned the claimant that the purpose of the meeting was to get the claimant back to work, and that one of the outcomes of the process could be that there would be a decision to dismiss her on grounds of her incapability to return in the foreseeable future.
88. Notes were provided of the meeting [463]. The claimant was assured that the purpose of the meeting was to get the claimant back to work, which was also a desire expressed by the claimant. The claimant stated that her ideal outcome was to return to Rogerstone and not to have to work with Paul Mayer or go to a larger neighbouring store.
89. She was offered a role back in Newport, but the claimant stated that she did not wish to work in there as it was too far for her to travel. Hayley Young told her that moving Paul Mayer was not an option, but that she would explore other vacancies for her as Shift Leader on full time hours as this was what was wanted and needed by the claimant. The claimant was asked if further support was required and reminded of the Employee Assistance Programme. The claimant confirmed that she had started

alternative temporary employment outside of the respondent organisation to pay her mortgage.

90. A brief letter was sent to the claimant on 1 October 2018, again highlighting that dismissal may be a possible outcome to the process and arrangements were made to meet again on 9 October 2018 [468].
91. On 3 October 2018 the claimant emailed and confirmed that she had looked at the respondent's vacancies website and that there were no positions available on a full-time permanent contract. She told Ms Young that she could not accept a cut in hours in pay and it was not possible for her to work with Paul Mayer again. In light of this, the claimant indicated that she would be willing to discuss an exit package.
92. On 9 October 2018, the claimant was invited to a further meeting and she was advised that failure to follow the process would result in the respondent conducting meetings in her absence and may result in the termination of her contract [472].
93. On 14 October 2018 the claimant emailed to Hayley Young a letter of further grievance which stated that mediation (which had recently taken place,) had been unsuccessful, and it had been decided at the mediation that the claimant and Paul Mayer would not be able to work again as the relationship was irreparable [476]. She felt that it was wrong that she had to explore options away from Rogerstone, whereas Paul Mayer did not. She considered that this was unjust, particularly when she felt she had done nothing wrong.
94. Hayley Young met with the claimant again on 16 October 2018 [notes at 477] and the claimant confirmed that she was happy to discuss the grievance she had emailed. Hayley Young confirmed that her information was that the outcome of the mediation was not that the claimant and Paul Mayer could not work together. The claimant conceded this point, and clarified that mediation concluded that it would be difficult for them to work together.
95. Whilst the detail of the mediation was confidential and none of the witnesses were asked about the content of the mediation, from the evidence we did have we found that mediation did not find that the claimant and Paul Mayer could not work together, rather that it would be difficult and that management did not know the detail of the mediation more generally.
96. At around this time Paul Mayer was asked if he wished to leave the Rogerstone store and he confirmed to management and Hayley Young that he wished to stay in that store and work with the claimant. This was communicated to the claimant.
97. The claimant was told that the respondent would work with her to get her back to work or continue the long-term absence process. A risk assessment was completed for her return and the claimant was referred to occupational health. The claimant was told that a return to work plan would be put in place to assist in the claimant's return.
98. On 16 October 2018 a letter was sent to the claimant confirming the discussion and the claimant was reminded that Paul Mayer had made the decision to work in Rogerstone and work together with the claimant but that the claimant did not wish to do this [487]. She was again reminded that an outcome of the process could be a decision to terminate her employment.
99. On 30 October 2018 the respondent received the report from Occupational Health [512] which stated that;

- a. the claimant had reported stress and frustration at not reaching a mutual resolution with management regarding her concerns;
 - b. was medically fit to return with a 'robust support plan';
 - c. there did not appear to be a medical solution to the situation and that resolution lay with further discussion between management and the claimant to address her perceived barriers to returning to work.
100. By way of letter dated 13 November 2018 the claimant was invited to a final long term absence meeting [503] and it was highlighted to the claimant that it was unclear to the respondent how long the claimant was likely to be absent from work and that neither the claimant's GP nor Occupational Health had been able to provide an estimated return date. The claimant was warned that an outcome of the meeting could be a decision to dismiss.
101. At that meeting [notes at 504] the claimant confirmed that returning to work with Paul Mayer was stressful. She felt unsafe in other city store options, and convenience stores around her would not work for her; that vacancies were not suitable as she needed permanent full time. She wanted to return to Rogerstone store without Paul Mayer being there, or in a full-time role close to home, but not the Newport store. She repeated that she felt she had been bullied and felt unsafe.
102. She was told that the formal process had concluded, and that Paul Mayer had chosen to work with the claimant. Ms Young told the claimant that there would be a return to work programme with regular reviews. Following an adjournment, the claimant confirmed that she felt no attempt had been made to resolve the issues between the claimant and Paul Mayer and she did not consider she should work with someone who made her feel unsafe. Ms Young confirmed that she was making a decision to dismiss the claimant and that she had a right of appeal. She was paid 11 weeks' notice. The dismissal was confirmed by way of letter dated 27 November 2018 [516].
103. The claimant appealed and repeated that she was fit to return to work, but that the barrier was working with Paul Mayer [517]. She considered that an appropriate option would be for Paul Mayer to be relocated.
104. Reno Psaila, Area Manager considered the appeal and met with the claimant at an appeal meeting held on 18 December 2018 [529]. In advance of that meeting, Mr Psaila had considered the documentation relating to the sickness absence review process that had been undertaken.
105. At the appeal the claimant raised that:
- a. she did not consider that she had been dismissed for capability reasons and that she could not return as she was afraid of Paul Mayer. She did accept that she was during the period of her absence under the care of her GP for stress and anxiety; and
 - b. she had been bullied by Paul Mayer. Mr Psaila took the view that matters relating to the claimant's Grievance had been resolved through the grievance process which had been exhausted and he was considering a situation where the claimant had been dismissed for capability reasons. He told the claimant that appropriate action had been taken and there were no grounds to remove Paul Mayer from Rogerstone store.

106. After two adjournments, Mr Psaila informed the claimant that he would not be upholding her appeal with the rationale for his finding being set out in the notes [541] that:
- a. the absence policy had been followed fully;
 - b. there were no grounds to be taken further with Paul Mayer;
 - c. it would as a result be unreasonable to move him from the Rogerstone;
 - d. options had been explored including vacancies and mediation;
 - e. payment of travel costs to another store would not be reasonable
107. On 18 February 2019, after early conciliation, the claimant issued her ET1 claim form.

Issues and Law

108. With unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal. The respondent asserts that it was a reason related to capability or, in the alternative, some other substantial reason of a kind justifying dismissal which are potentially fair reasons for dismissal within section 98 of the Employment Rights Act 1996.
109. If capability, we then have to consider whether the respondent held any belief in the claimant's lack of capability on reasonable grounds. After considering the reason for dismissal, we have to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances pursuant to section 98(4) of the Act
110. In relation to the direct sex discrimination, s.13 Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'
111. In relation to harassment s.26 Equality Act 2010 provides a person (A) harasses another (B) if:
- a. A engages in unwanted conduct related to a relevant protected characteristic (s.26(1)(a),) and
 - b. the conduct has the purpose or effect of
 - i. (i) violating B's dignity; or
 - ii. (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (s.26(1)(b)).
112. The burden of proof in any discrimination proceedings is set out in s.136(2) and (3) EqA 2010 i.e.
- (2) If there are facts from which the court could decide in the absence of any other explanation that a person (A) has contravened the provision concerned, the court must hold that contravention occurred
 - (3) Subsection (2) does not apply if A shows that A did not contravene the provision
113. The tribunal has reminded itself of the statutory reversal of the burden of proof in discrimination cases and considered the reasoning in **Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [20003] IRLR 332 and Madarassy v Nomura International PLC [2007] IRLR 246** where it was demonstrated that the employment tribunal should go through a two stage process, the first stage of which requires the claimant to prove facts which could establish that

the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The Madarassy case also makes it clear that in coming to the conclusion as to whether the claimant has established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Conclusions

Time Issues

114. We were invited by Mr Zovadikis, on behalf of the respondents, to find that the claimant had conceded on cross-examination that she did not consider that her actual dismissal was an act of discrimination; that as a result, all acts which relied upon pre-dated the last act i.e. the meeting on 26 February 2018 and were out of time and that even if we took 8 May 2018 (being the last date that the claimant was in work,) as the last act possible point, the claims were significantly out of time and that it would not be just and equitable to extend time if we accepted the time point.
115. The claimant has invited us to find that the claim is in time as had the respondents properly dealt with the claimant's claims of discrimination, she would not have been off work with and appropriate action would have been taken in relation to Paul Mayer and the claimant would not have been dismissed.
116. With regard to Hayley Young's decision to dismiss her, whilst on cross-examination the claimant had confirmed that she did not believe that Hayley Young had dismissed her because she was female and further confirmed that the acts of discrimination she relied on included the conduct of Paul Mayer at the meeting on 26 February 2018, and his previous conduct back in 2017 leading up to that meeting, she had qualified this response however by also confirming that it was the failure by the respondent to act and manage Paul Mayer in accordance with their policy that she also relied upon.
117. We therefore considered that the events of November 2017 leading up to and including the decision to dismiss the claimant were being relied upon by the claimant as a continuing act of discrimination, and that the claims were brought within the time limits in s.123 Equality Act 2010.

Unfair Dismissal

118. In applying our findings to the issues identified at the outset, we needed to initially consider the reason for dismissal, and whether it was potentially a fair reason for dismissal. We concluded that the principal reason for the claimant's dismissal was ill- health capability for her role, and that this was a potentially fair reason for dismissal.
119. In making this finding we considered that whilst her health more generally did not prevent her from working at all (as was evidenced by the fact that the claimant obtained temporary employment with a third party employer during her sick leave with the respondent,) her health did prevent her from returning to her role as Shift Leader at the Rogerstone store and in turning returning to work at the respondent.
120. Whilst the claimant had indicated that she was fit to attend work, and the Occupational Health Report had indicated that there was no medical reason for the claimant's inability to attend work, the claimant continued to provide FIT notes from her GP confirming that the claimant was not fit to attend as a result of stress and

anxiety. That stress and anxiety arose out of her concern regarding working with Paul Mayer and her unwillingness to work with him at Rogerstone.

121. With every indication that Paul Mayer was going to continue to work at Rogerstone (and no evidence to suggest that he would be leaving for any other reason,) and with every indication from the claimant that she would refuse to go back there to work with him as it was causing her stress and anxiety, in those very discreet circumstances, the claimant was not able to return to work at that store and that she would continue, if no suitable alternative work was available for her, to remain on sick leave in the foreseeable future.

122. We concluded that in this case, where the claimant had been absent from work since May 2018, it was essential to consider whether the respondent could be expected to wait longer for the claimant to return. In doing so we sought to balance the relevant factors in all the circumstances of this case which we considered included the following:

- a. the nature of the claimant's illness, which we concluded was stress and anxiety caused by working with Paul Mayer;
- b. the likely length of her absence, which we concluded would run to the foreseeable future on the basis that there was no realistic prospect of either:
 - i. the claimant's position on working with Paul Mayer changing and her returning to the Rogerstone store; or
 - ii. Paul Mayer leaving Rogerstone store;
- c. the size of the employing organisation, which we considered to be considerable and potentially having a number of alternative employment opportunities for the claimant; and
- d. the unsatisfactory situation of having an employee on very lengthy sick leave'.

123. In the circumstances of the case we considered that the respondent had satisfied us that the respondent could not be expected to wait longer for the claimant to return.

124. We concluded that had the claimant indicated that she was willing to return to work at Rogerstone, an appropriate return to work plan would have been put in place to facilitate this. In the circumstances whereby the claimant was refusing to consider that as an option, it was not unreasonable for the respondent to have not put this in place.

125. Whereas we accepted that a number of factors were brought into play when determining the claimant's dismissal, including her refusal to work with Paul Mayer, it did not detract from our conclusion that her health, and lack of return to her role in Rogerstone in the foreseeable future as a result of that health, was the principal reason for the respondent's dismissal. Whilst the respondent may very well have chosen to take an SOSR route, or even potentially a conduct route for refusal to return, it considered her continued employment on a capability basis and the principal reason for her dismissal related to her capability.

126. In terms of process, we were satisfied that the respondent had followed a fair procedure before, and in making, its decision to dismiss, including the appeal process.

127. We concluded that there had been reasonable consultation with the claimant through the sickness absence meetings held with her, which had commenced after the conclusion of the outcome of the claimant's Grievance, which sought to establish the true medical position; meetings which were used to fully consult with the claimant. Through the correspondence with her and through communication in the sickness absence meetings, it was also made clear to the claimant what the respondent's position was on her employment, including the potential for dismissal if she did not return and/or alternative employment wasn't palatable to her.
128. This was not a case whereby the employee was too sick to work at all. That was clear from the fact that the claimant was in fact working with a third-party employer on a temporary basis and from the claimant's own admission. The Occupational Health Report also indicated as much. This was a case however where the claimant was presenting medical evidence to the claimant that she was too unwell to return to the respondent to the Rogerstone store.
129. Prior to this point the respondent had exhausted the Grievance procedure and had organised and arranged mediation with Paul Mayer which had resulted in Paul Mayer confirming that he was willing to move forward with the claimant and work with her. The claimant was given full opportunity at the sickness absence meetings to respond to the warnings regarding her failure to return to work. The claimant persisted in her refusal to return to work at Rogerstone with Paul Mayer and was also unwilling to consider the Newport store as an alternative. There were no other vacancies that the claimant considered suitable.
130. We concluded that in those circumstances, the respondent took sensible steps to consult the claimant and discuss the specific issues with regard to return to work at Rogerstone with Paul Mayer. It also took reasonable steps to consider what could be done to get the claimant back to work including offering alternative employment in the business, but the claimant did not consider that those alternatives were acceptable to her.
131. It was not reasonable for the claimant to expect the respondent to re-open her Grievance against Paul Mayer. There had been a detailed and thorough investigation and she had been provided with a right of appeal to Daryl Lewis who had told her that he had concluded that no bullying and no discrimination had taken place. In those circumstances, it would not have been reasonable to revisit those concerns.
132. We concluded that the dismissal for the Claimant in was fair and reasonable in the circumstances pursuant to section 98(4) of the Act and the dismissal fell within the band of reasonable responses.

Sex Discrimination

133. Having found that Matthew Walters was being fostered to progress by Paul Mayer and, that as a result, on balance of probabilities Mr Mayer may very well have had discussions with him (whether on or off site) regarding his development to become a manager, we concluded was not, without more, sufficient material from which we could conclude that on balance of probabilities, the respondent had committed an unlawful act of discrimination.
134. We considered our conclusions regarding the alleged conduct of Mr Mayer towards the claimant specifically, and more generally towards staff at the Rogerstone store.

135. Whilst we accepted that the claimant found him to be a difficult manager, and that he had been spoken to by HR regarding the tone and manner in which he had dealt with the claimant (both in relation to the matters leading up to the November 2017 meeting and in relation to his comments and communication by text whilst the claimant was on leave,) he was generally considered by a small number of staff, male and female to be a difficult manager, and they did not like working with him before his style. We also found that it was also fair to say that a number of staff, again both male and female, considered him to be a fair and reasonable manager.
136. We therefore concluded that there were no facts or no facts from which we could draw any inference of discrimination in relation to his general management style as a result.
137. We accepted that it was, as put by Mr Zovidakis, difficult to pin down what the claimant was saying in relation to other issues complained of regarding Mr Payer's engagement with her.
138. With regard to the allegation that when she had any suggestions regarding the store, she had to tell Matthew Walters, for him then to discuss them with Paul Mayers, we concluded that this was not an act of Mr Mayer/the respondent, rather conduct of claimant's borne out of her own feelings and not acts or omissions by Mr Mayer.
139. With regard to Mr Mayer's management of the claimant, and the specific complaints, there was no evidence that Mr Walters had been given preferential treatment when the rota was completed. Whilst Mr Walters had been a regular day off in accordance with his private life, so too had Sarah Morris. When the claimant requested a regular day off, the claimant was offered a regular day, including a regular Sunday off when she could be with her partner. This was not acceptable to the claimant who wanted/needed the additional pay that working a Sunday provided. She specifically wanted a Sunday, not a Saturday.
140. On the basis of these findings, we concluded that the claimant had not demonstrated that she had been treated less favourably in relation to days off or in relation to the rotas.
141. Having listened to the tape-recording of the 26 February 2018 meeting and having found that Paul Mayer had not;
- a. used hostile, degrading and/or offensive behaviour to the claimant; or
 - b. used the claimant's unwillingness to do Late to Early shifts to make her feel guilty about the effect on colleagues,
- we concluded that again that the claimant had not been subjected to less favourable treatment in relation to that meeting either in being asked to attend it at all, or in the content or tone of the meeting and there were no facts from which we could conclude or infer discrimination. We concluded that had Matthew Walters (or any male Shift Leader) raised concerns regarding their rota patters or days off and had Paul Mayer had any issues regarding their attitude to work, a similar meeting would have taken place and there were no facts from which we could conclude or infer discrimination.
142. We considered that the respondent had undertaken a detailed investigation into the claimant's grievance, and reached a reasonable conclusion on the conduct of Mr Mayer, and that Mr Lewis had specifically considered and investigated and carried out a reasonable investigation into the claimant's allegations on appeal, of sex discrimination.

143. Having considered all the matters before us both on an individual basis, and as a whole, we concluded that the claimant had not proven, on the balance of probabilities, facts from which we could conclude or even infer, in the absence of an adequate explanation, that the respondent had committed any act of discrimination. There was no evidence that the claimant was treated less favourably because of her sex or that he engaged in unwanted conduct related to the claimant's sex.
144. In relation to her dismissal, the claimant had indicated that she did not consider that Hayley Young had dismissed her because she was female. Rather it was the claimant's case that she was dismissed because it was effectively an outcome of a failure by the respondent to follow process and manage her complaints properly; that if they had, she would not have been dismissed.
145. Having concluded that she was neither treated less favourably by Paul Mayer because of her sex, or subjected to unwanted conduct by him related to her sex, we concluded that the claimant had not demonstrated that there was anything in the decision to dismiss that amounted to less favourable treatment of the claimant because of her sex or that the unwanted conduct of dismissal related to her sex.
146. There was no suggestion from the claimant that she had been treated any less favourably than a male would have been treated had he brought the same complaint. We concluded that the claimant had been dismissed because of capability and not for reasons related to her sex.

Decision

147. In those circumstances, it is therefore our unanimous conclusion that the dismissal was not unfair and the Claimant's claim for unfair dismissal should be dismissed.
148. It is also our unanimous conclusion that the claims of direct sex discrimination and harassment related to sex are not well-founded and should be dismissed.

Employment Judge R L Brace

Date 18 November 2019

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON 20 November 2019

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FOR EMPLOYMENT TRIBUNALS