EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107473/2019

Held in Dundee on 12 and 13 February 2020

Employment Judge I McFatridge
Tribunal Member E Coyle
Tribunal Member R Martin

Miss K Stanley	**Claimant** **In person**
Caversham Finance Ltd **t/a Brighthouse**	**Respondent** **Represented by** **Ms Wood,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

(One) The claimant's claim that she was unlawfully discriminated against by the respondent indirectly discriminating against her on grounds of race is not well-founded and is dismissed.

(Two) The claimant's claim that the respondent discriminated against her by victimising her in terms of section 27 of the Equality Act is well-founded. The respondent shall pay to the claimant the sum of Eight Thousand Five Hundred

and Twenty Four Pounds and Nineteen Pence (£8524.19) in compensation therefor.

(Three) In addition to the sum mentioned at (Two) above the respondent shall pay to the claimant the sum of Six Hundred and Eight Pounds and Twenty Seven Pence (£608.27) being interest due on the award up to 1 March 2020.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unlawfully discriminated against by the respondent under section 13, 19, 26 and 27 of the Equality Act 2010. The respondent submitted a response in which they denied the claims. They made the preliminary point that certain parts of the claim appear to be time barred. The case was subject to a degree of case management and during this process the claimant confirmed that she did not wish to pursue a claim for unfair dismissal under the Employment Rights Act 1996. A preliminary hearing was fixed in order to determine the issue of time bar which took place on 8 November 2019. Following that hearing Employment Judge Kemp dismissed the claims under section 13 and section 26 of the Equality Act 2010 but confirmed that the claim under section 19 of the Equality Act and the claim under section 27 of the Equality Act should proceed to a final hearing. Reference is made to the judgment issued by Employment Judge Kemp on 12 November 2019. The final hearing took place on 12 and 13 February 2020. At the hearing the claimant gave evidence on her own behalf. Evidence was then led on behalf of the respondent from Mr J Hunter a Store Manager with the respondent and Mrs H Swan the respondent's HR Business Partner. A joint bundle of productions was lodged by the parties. On the basis of the evidence and the productions the Tribunal found the following essential matters to be proved or agreed.

2. The claimant is of mixed race with her biological father from a Caribbean heritage and her biological mother being white. She was adopted into a white family. She was raised in the north of England and speaks with a

distinctive English accent. She identifies as mixed race and English. She describes her accent as having a Yorkshire twang and a bit of "urban edge" to it particularly when she is being effusive and extrovert. The claimant considered that her role as a Deputy Manager with the respondent called on her to be effusive, extrovert and enthusiastic. She is conscious of her accent. She is also conscious of her mixed race status having had various unpleasant experiences during her schooldays.

3. The claimant commenced employment with the respondent from 31 July 2014. She initially worked in the respondent's store in Stirling. She initially worked a 30 hour week which allowed her time to fulfil her childcare commitments. She is a single parent to a teenage daughter. At some point in or about 2016/17 the claimant indicated that she would be interested in promotion. The respondent has various internal processes which encourage sales advisers to put themselves on a path to taking further responsibility. As part of that process the claimant met with Mr Hunter who was the manager of the Dunfermline store at that time and who assisted and encouraged her in the process of becoming eligible for promotion. She was also in contact with the respondent's HR Business Partner Ms Swan at around this time. The claimant got on well with Ms Swan who she regarded as a role model type figure. In or about 2017 the claimant was promoted to become Deputy Manager of the respondent's store in Alloa. The claimant enjoyed the role. She got on well with the managers she worked with. She increased her hours to 39 hours per week. The respondent is an employer who allows employees a fair amount of flexibility in relation to hours. The claimant's view was that if she ever wanted to reduce her hours again this would not be a problem. The claimant was ambitious and saw herself as developing a long term career with the respondent.

4. There were a number of staff changes during the period from 2017 onwards and during the course of her first year as deputy manager the claimant ended up working for three separate store managers.

5. In or about September 2018 Mr Hunter was moved from the respondent's store in Dunfermline to the Alloa store. The Dunfermline store which Mr Hunter had previously managed was larger than the Alloa store. For

various reasons Mr Hunter had not sought the move to Alloa and was not particularly keen on this. He understood however that this move was part of a larger jigsaw whereby managers were being moved from store to store and he also understood that part of the reason he was being moved to Alloa was that he was seen as a manager who was keen on "compliance". By this he meant ensuring that all of the respondent's internal policies and procedures were fully carried out by store management and staff.

6. The claimant's claim of direct discrimination and harassment is no longer before the Tribunal and it is therefore unnecessary for the Tribunal to make specific findings about precisely what occurred prior to the claimant submitting her grievance other than to indicate that on the basis of the evidence the Tribunal were not satisfied that the allegations made by the claimant in her subsequent grievance letter were "false" in terms of section 27(3) of the Equality Act 2010.

7. On 8 November 2018 the claimant sent a letter of grievance to the respondent's HR Business Partner Ms Swan following a telephone conversation with Ms Swan. At that point the claimant had been absent from work since 2 November when she had left work following a verbal altercation with Mr Hunter. The claimant's letter of grievance was lodged (pages 71-72). It is as well to set it out in full

> "Dear Helen,
>
> I am writing this as a formal letter of grievance against my line manager at the Alloa store, Mr Jamie Hunter.
>
> Since the first week of October when Mr Hunter took over as the Store Manager he has subjected me to both gender and racial discrimination and bullying.
>
> I am a woman of ethnic origin with a distinctive voice and mannerisms that reflect this. Mr Hunter believes it is acceptable to walk directly behind me repeating my last sentence in a high pitched impression of me. This discriminatory and humiliating mimicry has been performance on the shop floor in front of customers and members of staff I manage as well as behind the scenes in the office and stock areas. Alone with him and to my face.

On 2nd November 2018, Mr Hunter has confronted me in the back office wanting to discuss my attitude. I felt uncomfortable, ill at ease and on the verge of tears and informed Mr Hunter of this. He acknowledged he could see my distress but continued to question me about the reasons behind my alleged attitude. I again stated I did not wish to continue the conversation at that time as I did not feel we had a relationship that I felt comfortable or safe enough in to be open and honest with him at that time. My request to end the conversation and be allowed to continue my work was rejected. I felt no other option but to stand up and leave the situation as I was now weeping and feeling extremely embarrassed to be doing so in front of my line manager.

I was denied a meeting or conversation regarding a change in my working pattern and I have not been involved with any aspect of recruiting a new member of staff. Mr Hunter did not tell me he was holding interviews on Thursday 8th November 2018. I heard it through the work grapevine. I will be managing this new employee and will have had no input or have met them before this.

As regard to my working pattern, I have had the same day off for around 3 years. As a single working mum I have to find a balance between my work and personal responsibilities and have always managed to come to a workable arrangement with previous managers. I believe this is classed as an implied action. Mr Hunter made it his first priority to change my day off. It was his first sentence spoken to me after Good Afternoon. Despite my attempt at explaining my reasons behind my distress at him not consulting me or giving me reasons behind his decision Mr Hunter simply stated it was too important a day. I then offered to take an alternative day. This too was refused as being too important a day to the store. This refusal to take on board the parental policy, the apparent refusal to even acknowledge issues outside work that could impact negatively on my work rate, high standards for myself and possibly my future within the company is discriminative in its very nature. It feels relevant to mention that Mr Hunter has taken these specific days off himself.

My level of stress at work has increased to the point that on Wednesday 7th October I had to take myself off the shop floor to go and cry on 3 occasions. I am a 46 year old adult woman with a range

of coping mechanisms and they are all inadequate for how I am feeling at this moment in time. After speaking to a medical professional I have made an appointment at my doctors where I will be requesting a 7 day sick note commencing 9th November 2018.

I would like to request that Mr Hunter does not contact me in regards to me being off sick and that any queries are relayed to me by an alternative manager.

Yours respectfully,".

8. Following receipt of this e-mail Ms Swan contacted the claimant. She advised the claimant that there were two methods of proceeding. One was what she called a formal method and the other alternative which she suggested was described by her as an informal way forward. She said that this would involve a meeting attended by the claimant, Mr Hunter and Ms Swan to try to "sort matters out". She did not use the word mediation when suggesting this to the claimant. The claimant indicated that she would be happy to proceed down the informal route since she just wanted a resolution to the matter. What the claimant had in mind was that Ms Swan would have a conversation with Mr Hunter and point out to him that his behaviours were simply unacceptable in the 21st century. She also wanted a resolution of the issue regarding her day off. During the telephone conversation Ms Swan asked the claimant if she wished to move store. The claimant replied that she absolutely did not. The claimant also said that she did not want to leave the company.

9. The day off issue arose because, since she had started at Alloa, the claimant had had Saturdays off unless this date was required by any other member of staff for a particular reason. As a result the claimant ended up having two or three Saturdays off each month. Mr Hunter had indicated to the claimant that he was not prepared to allow this to continue. The claimant was concerned as it was important to her to have as many Saturdays off as possible so that she could do things with her daughter. She had suggested an alternative of Monday which meant she would still have two days in a row off but Mr Hunter had not been prepared to commit to this either.

10. Following her conversation with the claimant Ms Swan went to visit Mr Hunter. She advised him of the complaint and showed him the e-mail. Mr Hunter was extremely upset at the allegation against him and became tearful. He was concerned about the impact on his career. Ms Swan suggested to him that the appropriate way forward would be to have what she described to him as a 'mediation' meeting with the claimant. Mr Hunter agreed to this.

11. After Ms Swan left Mr Hunter decided that he would call together all of the staff in the store. He advised them that he was concerned about the degree of banter in the store and that this might be taken as discriminatory. He told the staff that there should be no more of such banter going forward.

12. Following this meeting it was Mr Hunter's position that, without prompting, a member of staff approached him in private and said that the claimant had previously told her that she was intending to "play the race card" and "get rid of Mr Hunter". This information was passed on to Mr Hunter's manager Mr Docherty who passed the information on to Ms Swan. In the meantime, Ms Swan had written to the claimant on 9 November inviting her to a meeting to take place on 12 November. The letter was lodged (page 73). The invitation was worded

> "We agreed that we will deal with the matter informally and that you will partake in the mediation process during week commencing 12th November 2018. I will contact you in due course to discuss the arrangements.
>
> Based on the above, we will postpone the formal grievance procedures after the aforementioned mediation process is completed."

13. The mediation meeting was arranged for 12 November to take place in the respondent's Stirling store.

14. The claimant duly attended the meeting with Ms Swan and Mr Hunter on 12 November. The claimant initially met with Ms Swan alone in the canteen. Ms Swan said at the beginning of the meeting that she had something to ask the claimant. She put to the claimant that another employee at the Alloa store had alleged that the claimant had said to them words to the effect that she was going to 'play the race card' and 'get Mr

Hunter sacked'. The claimant strenuously denied the allegation. She was extremely shocked and upset and felt completely undermined by the fact of the allegation being made and the way that it was put to her.

15. Mr Hunter then joined the meeting. There was a discussion between Mr Hunter and the claimant. The claimant raised with Mr Hunter what Ms Swan had told her and she refuted it once again. There was a discussion between the claimant and Mr Hunter. The claimant tried to get over to Mr Hunter why it was that she found what he was doing so offensive. Mr Hunter's position was that he admitted to copying the claimant's English accent but said this was just a joke. He maintained that the matter was banter. The claimant explained to Mr Hunter that she did not believe that he was a racist but that she did not view the way he was behaving as banter. She found it completely unacceptable to come from a manager. She indicated that Mr Hunter was not a friend of hers or someone with whom she had other than a working relationship. She said that although he may not have intended to be offensive and hurtful she found it so and that it was completely unacceptable.

16. Mr Hunter for his part was angry that the claimant had accused him of effectively being a racist and he found this to be completely unacceptable. He fixed on the claimant's statement that she did not believe that he was a racist as meaning that she was withdrawing her allegation. His position was that the claimant had accused him of being a racist and that she had then taken it back. He felt angry and aggrieved that the claimant had done this and felt that he could not trust someone that could, in the words he used at the tribunal, 'throw out an allegation for the sake of throwing out an allegation'. He indicated to Ms Swan and the claimant that he was not prepared to work with the claimant again. He said that it was a question of trust and he was simply not prepared to work with her.

17. Mr Hunter left the meeting and there was a discussion between Ms Swan and the claimant. The discussion centred around the claimant moving to another store. Various stores were initially mentioned but this was very quickly narrowed down to either Perth or Stirling store. The claimant felt devastated by Mr Hunter's remark. She felt that his statement that he was no longer prepared to work with her combined with Ms Swan's allegation

at the start of the meeting that the claimant was somehow trying to "play the race card" meant that the claimant's job and continued employment was in danger. She felt she had nowhere to turn and she had no options other than to agree with whatever was suggested. The claimant was devastated and started crying. Ms Swan said that she understood it must be difficult for the claimant and she would need time to think. The claimant had previously advised Ms Swan that she had a GP appointment and Ms Swan suggested that the claimant see her GP and perhaps take some time off work for a few days. Ms Swan said that she would speak to Mr Docherty who was the Regional Manager for the region in which the claimant worked to see what could be done. The claimant felt completely blindsided by the way the meeting had gone. She felt that her genuine concerns had not been listened to but that instead she had been made to feel she was the one who was in the wrong.

18. The claimant duly attended her GP on 14 November. An extract from the claimant's medical records was lodged (page 99-100). The GP notes the encounter stating

> "Patient attending issues at work, boss bullying her, finding herself questioning her ability, very teary at work. HR thinking of taking her to another store. Mood low, no suicidal thoughts or self harm denies any alcohol or use of rec drugs
> Asking for a few days till HR gets her to another shop. Med3 issued a tensive mood deteriorates further."

19. As noted the claimant was issued with a fit note indicating she should refrain from work for one week.

20. The claimant met again with Ms Swan on 16 November. There was a discussion about the claimant moving to either the Perth or the Stirling store. The claimant knew and got on well with the manager of the Perth store she had previously worked with when the manager had managed the Stirling store and the claimant had also worked there. The claimant felt that it would be inappropriate for her to move to the Perth store as there was already a Deputy Manager in post at Perth. If she moved, then

the Deputy Manager currently in post would be required to move stores and the claimant thought this would be unfair.

21. There was then a discussion regarding the Stirling store. At that time the Stirling store did not have a Deputy Manager as such. There was however both a Store Manager and a "Store Manager Designate" in that store. The way that promotion works within the respondent is that quite often when a manager is ready to be given their own store they will work in another store as "Store Manager Designate" which means that essentially they are fulfilling the role of Deputy Manager but that as soon as an appropriate vacancy comes along then they will leave to start at their own store.

22. The outcome of the meeting was that the claimant agreed to transfer to the Stirling store. She agreed that she would be a Customer Adviser at Stirling store which amounted to a demotion from her position as Deputy Manager at Alloa. The claimant would continue to be paid at the same rate as she was being paid as Deputy Manager in Alloa. So far as possible the claimant would be allowed Monday as her day off in her new role.

23. The claimant would reduce her hours to 30 hours per week. The Tribunal's view is that on the balance of probabilities there was a discussion between the claimant and Ms Ward along the lines that once the Store Manager Designate from Stirling was allocated their own store then the claimant would be made up to Deputy Manager of the Stirling store albeit no specific timescale was agreed for this and no commitment was made.

24. The discussion between Ms Swan and the claimant became emotional at times on the part of the claimant. As well as discussing work related issues there was a discussion of their respective experiences as single parents and other personal issues.

25. The claimant's belief at the end of this meeting was that she would be continuing in her career with the respondent and that although she would not formally be Deputy Manager she would retain that status to some extent as well as the pay. The claimant agreed to the transfer and agreed to start the following Monday at the Stirling store.

26. On 20 November Ms Swan wrote to the claimant confirming matters (page 77). The letter stated

> "Further to the concerns you raised in your email dated 8th November 2018, we subsequently agreed that you would participate in the mediation process and that I would facilitate. The meeting took place on 13th November 2018 in the Stirling store between you and Jamie Hunter (Store Manager, Alloa) to resolve the concerns you raised and agree how to support you both to work together going forward. I understand that we were all able to work together during the mediation process and have resolved the issues that were raised.
>
> I subsequently met with you on 16th November 2018 to discuss your working pattern going forward. We agreed that you would transfer from your role as a 39 hours per week Deputy Manager in the Alloa store to a 30 hours per week Customer Sales Advisor in the Stirling store.
>
> Katie, I would like to take this opportunity to thank you for participating in the aforementioned meetings and I am pleased that we have been able to reach an amicable outcome. With this in mind, we will deem that the grievance has been withdrawn as the matters have been resolved, therefore we will close this case.
>
> I am pleased that you are feeling better and have returned to work on 19th November 2018.
>
> If you have any questions, please do not hesitate to contact your line manager in the first instance. Alternatively, please do contact either myself or your regional manager."

27. The claimant started work at the Stirling store. A few days after she started work she had a problem with her computer log in. She tried to log in using her usual credentials to the Deputy Manager area. The log in did not work. She contacted the IT helpdesk to find out what the problem was. They reverted to her and told her that she was now down as a Customer Adviser rather than Deputy Manager. The claimant felt a degree of concern at this but did not raise the issue with any member of management.

28. The claimant continued to work at the Stirling store without incident and without raising any further issues. She continued to be paid at the same

rate as she had been paid as Deputy Manager of the Alloa store. The internal document produced by Ms Swan in relation to the claimant's transfer was lodged (page 60). This shows the claimant moving from a Deputy Manager at Alloa on 39 hours per week to a Full Time Customer Service Assistant at Stirling on 30 hours per week. There is a note at the top indicating that "No change to hourly rate". This was an internal document which was not seen by the claimant prior to these proceedings.

29. In the early part of 2019 the respondent's management became concerned at the ongoing profitability of the business. The Financial Conduct Authority had issued new rules which made it difficult to provide credit to sub-prime borrowers who were the respondent's principal client base. As a result of this profits were reduced. A decision was made that a number of stores would be closed. Two stores in the Highland region were earmarked for closure. These were Stirling and Perth. No-one in the Highland region was involved in the decision to close these stores. Ms Swan was advised of the store closures in a meeting she was called to on 28 January 2019. She had been entirely unaware of anything in the pipeline prior to this. Mr Docherty the Regional Manager was advised at a meeting held around 29 January.

30. The claimant was advised of the store closures at a meeting which took place on or about 4 February. The claimant and other members of staff at the Stirling store were told they were at risk of redundancy. Ms Swan took part in the initial consultation meeting with the claimant simply with a view to supporting the manager who was principally responsible for carrying out this consultation meeting. Two further consultation meetings were carried out with the claimant. The documentation regarding the consultation process was lodged. The claimant specifically conceded at the Tribunal hearing that she took absolutely no issue with the fairness of the redundancy process.

31. As part of the normal redundancy process the claimant was invited to apply for any other roles in the area. The claimant did not consider that there were any other roles suitable or available. The claimant employment terminated on 30 March 2019 and the claimant received a statutory redundancy payment and a payment in lieu of notice.

32. At the same time as the store closures were announced the respondent announced a further reorganisation in that the post of Deputy Manager was removed from many of the stores which had previously had a Deputy Manager. The respondent's position was that in future they would only have a Deputy Manager post at certain large stores. Alloa was not one of the stores which would have had a Deputy Manager going forward.

33. In any event, the respondent had not got round to replacing the claimant as Deputy Manager of the Alloa store by the time of the reorganisation in February 2020. The respondent did however appoint a Senior Sales Assistant to the Alloa store in or about May 2020 to bring the complement of staff back up to what it had been before the claimant left. A Senior Sales Assistant would be paid less than a Deputy Manager.

34. At the time the claimant's employment terminated the claimant had understood that she had another job lined up. Unfortunately, this did not materialise at the end of the day.

35. The claimant commenced in a new post on 3 July 2019. Taking into account the notice pay which the claimant received the claimant has two months' wage loss until the date when she found alternative work.

36. As noted above the claimant had been off work sick between around 2 November and 19 November 2018. During the first part of this period she was off work because she had walked out of the store following an argument with Mr Hunter. During the second part from 14 November onwards she was off work because she had been signed off unfit by her GP having been told by Ms Swan to take a few days whilst investigate the possibility of moving the claimant to another store. During this period the claimant received statutory sick pay of £94.20 per week. The claimant's move from Alloa to Stirling and move from working 39 hours per week to 30 hours per week resulted in a reduction in her pay of £88.61 per week.

Matters arising from the evidence

37. We were satisfied that the claimant was giving truthful evidence to the Tribunal. She made appropriate concessions in cross examination but adhered to the salient points relating to her claim. Her account of the way

her treatment had impacted on her psychological wellbeing appeared to ring true without being in any way exaggerated. The Tribunal was less impressed with the evidence of the respondent's witnesses. It was clear that Mr Hunter saw himself as in some way being the victim in this matter. He used the opportunity of giving evidence to make unsupported and irrelevant attacks on the character of the claimant. His position was that at the meeting held with the claimant and Ms Swan the claimant accepted that her allegations against him were false. He spoke of understanding the complaint as relating to one specific incident whereby he had been in conversation with the claimant and at the end of it had said 'all right love' or something similar in a way which paraphrased the claimant's accent. His position was that the claimant had responded on that occasion with "och aye the noo" mimicking Mr Hunter's accent. It was his position that the conversation at the meeting referred purely to this incident and that the claimant accepted that she was in the wrong and should not have accused Mr Hunter. The Tribunal did not accept his evidence. Mr Hunter accepted that he had seen the claimant's grievance letter because he had been shown this by Ms Swan. He said he was extremely upset by the allegations contained in this. The allegation does not refer simply to one incident. Mr Hunter also gave evidence that very soon after Ms Swan told him about the grievance Mr Hunter had gathered together all of the staff in the Alloa store and told them that all banter must cease going forwards. Incidentally it was his evidence that the claimant was the person who was responsible for the high level of banter within the store. Mr Hunter said that immediately after this one member of staff came to him and told him that the claimant had said that she would be 'playing the race card' with a view to getting rid of Mr Hunter. Mr Hunter said that he had advised that person to contact the Regional Manager which she had done. He also said that since then he had met with the husband of that member of staff in the street and the husband had stated that the claimant had also made a similar remark to him. Mr Hunter could not explain why neither of these individuals were called to give evidence. It appeared to the Tribunal to be quite extraordinary that given Mr Hunter's clear view that the claimant had maliciously decided to make a false allegation against him, that she had then accepted this at the mediation meeting and that Mr Hunter had been perfectly happy to leave matters there.

38. The Tribunal would have expected some more assistance from Ms Swan's evidence relating to what happened at the mediation meeting however her evidence essentially glossed over whatever conversation had taken place between the claimant and Mr Hunter. All three witnesses, including the claimant, accepted that at one point the claimant had said she was not accusing Mr Hunter of being a racist. The Tribunal's understanding was that what the claimant meant by this was what she explained at the hearing which was that all she wanted was for Mr Hunter to stop doing what he was doing which she found to be offensive. We quite accepted that it was not Mr Hunter's intention to be racist but this was how she saw it and she wanted the behaviour to stop.

39. Ms Swan's evidence was that the claimant and Mr Hunter had spoken in general terms about the allegation but she could not be specific about what has been said or even about what incidents had been discussed.

40. Both Ms Swan and Mr Hunter confirmed the claimant's position that Mr Hunter had indicated during the discussion that he was no longer prepared to work alongside the claimant. Mr Hunter said that this point had been made by Mr Hunter during the general conversation between the three of them rather than, as the claimant said, at the end of the meeting. The Tribunal's view was that it was probably said by Mr Hunter during the meeting and then again confirmed by Ms Swan at the end of the meeting following her conversation with Mr. Hunter as he was leaving. It was absolutely clear to the tribunal that Mr Hunter had said that he did not trust the claimant following the allegation she had made and that he was not prepared to work with her in future.

41. Ms Swan accepted that at the very start of the meeting she had put to the claimant the allegation that a member of staff had accused the claimant of playing the race card with a view to getting rid of Mr Hunter. The respondent's position in her pleadings was that the claimant had not denied this. Ms Swan's evidence did not entirely coincide with this. Her evidence was somewhat vague on the subject and when pressed she became somewhat uncomfortable and could not really say what had been her intention in raising the matter. What she said was that she had offered to the claimant that she would "investigate the matter further". She said

that the claimant had not reacted to this and had not asked for the matter to be investigated further. She did not say that the claimant had accepted that she had ever said this nor that she did not deny it. The Tribunal preferred the claimant's version which was that she was absolutely flabbergasted that such an accusation could be made and that it would be made in those circumstances and that she most certainly did deny it. Ms Swan's evidence was that the claimant had at some point during the meeting accepted that she would be the person who "might as well move" but accepted that this was after Mr Hunter said that he was no longer prepared to work with the claimant. Ms Swan did say that she would have been prepared to move Mr Hunter but accepted that this option had never been explored. Mr Hunter was not asked what his view on this would have been.

42. There were some matters where we preferred the respondent's position as opposed to that of the claimant. These were generally on the basis of concessions made by the claimant in relation to what was agreed at the second meeting with Ms Swan where the claimant agreed to transfer to the Stirling store. The claimant's initial position was that she had agreed to move to a sales adviser post on a purely temporary basis and that this was to last six weeks. The Tribunal's view was that there was certainly a discussion between the claimant and Ms Swan to the effect that the Stirling store had a Store Manager Designate rather than a Deputy Manager and that it was extremely likely that the Store Manager Designate would be moving on in the near future which would mean that the claimant could move back up to the role of Deputy Manager. The Tribunal's view was that no binding agreement was made that this was definitely going to happen nor was a specific time limit put on it. The Tribunal accepted that the claimant probably thought that she would retain the "status" of Deputy Manager despite working in a Customer Sales Assistant role particularly as she continued to be paid at the Deputy Manager rate. The Tribunal therefore accepted her evidence that she had been surprised when she discovered that her log in had been changed a few weeks later. At the end of the day however we accepted that Ms Swan had not given her any assurance or commitment in relation to this. The second point was in relation to the number of hours which the claimant would work in her new

role. We accepted the claimant's evidence that had she remained in Alloa the issue of changing her hours to 30 hours would not have arisen. That having been said we believed that, following what was by all accounts an amicable discussion between the claimant and Ms Swan at their second meeting, the claimant indicated that it would suit her to have her hours reduced to 30 hours when she went to the Stirling store and that Ms Swan agreed with this.

43. The Tribunal accepted Ms Swan's evidence that she had been entirely unaware of the likelihood of any store closures at the time she dealt with the claimant's grievance. We accepted that she did not become aware of what was happening until around 28 January. At the end of the day the claimant did not cross examine her on this point and our understanding was that the claimant had initially felt extremely suspicious about the apparent coincidence but, having heard Ms Swan's evidence, was prepared to accept that the store closure was not something in contemplation at the time the claimant had been transferred.

Discussion and decision

Issues

44. The claimant claimed that she had suffered discrimination in the form of victimisation and indirect discrimination on grounds of race.

Discussion and decision

45. Both parties made submissions. The respondent's legal submission was lengthy and correctly set out the legal framework which was relevant to the claims. The claimant's submission did not go into legal detail but essentially summarised matters as she saw them. Although the Tribunal found both sides' submissions to be helpful there is probably little to be gained by repeating them. They will be referred to where appropriate in the discussion below.

46. Given that there are two claims it is as well to deal with them sequentially. The first claim made by the claimant was a claim of indirect race discrimination. This is defined in section 19 of the Equality Act.

"(1) A person (A) discriminates another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it put, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

The Tribunal understood the claimant's position to be that the PCP which she considered to be discriminatory was the respondent's decision to move her to the Stirling store. The respondent's position was that the claim could not succeed because there was no valid PCP. It was their position that even if there was one it was not in fact applied and finally it no particular disadvantage suffered by the claimant because of her race. The respondent's position was that the PCP did not amount to a policy but was in fact a one-off decision. There was no suggestion of repetition such as is required for it to be a policy. It was also their position that in any event it was not applied to the claimant.

47. The Tribunal's position was that the claimant had not established that a PCP had been applied to her which met the requirements of section 19. The Tribunal agreed with the respondent that what we had here was not the application of a PCP but a one-off decision. The tribunal considered that the legal position was as set out in the case of ***Gan Menachem Hendon Ltd v Ms Zelda De Groen [2019] UKEAT 0059/18*** at paragraph 59 where Swift J. stated:

"while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of

more general application, or some evidence from which the existence of such a practice can be inferred. What is relied on must have what Langstaff P referred to as 'something of the element of repetition about it'."

48. We considered that, contrary to what the respondent's agent indicated, this was a decision which had been made by the respondent but at the end of the day we considered that it was very much a one-off decision made by Ms Swan based on the circumstances before her rather than a PCP which was applied by the respondent. We also considered that the claimant had not established in any way that even if the PCP had been applied to her that this had a disparate impact on employees who shared her protected characteristic. There was nothing before us to suggest that being moved to Stirling was something which would have a disparate impact on employees who were mixed race as opposed to those who were not. For this reason we considered that the claim of indirect discrimination did not really get off the ground and ought to be dismissed.

49. The second claim was a claim of victimisation. Victimisation is defined in section 27 of the Equality Act 2010. This states

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

In this case it was the claimant's position that she had carried out a protected act by sending her letter of grievance to the respondent on 8 November 2018. The Tribunal considered that this was a protected act falling within section 27(2)(d) of the Equality Act 2010. The claimant in her grievance letter quite clearly makes an allegation that she had been subjected to "both gender and racial discrimination and bullying". She goes on to refer to "discriminatory and humiliating mimicry".

50. It was the respondent's position that the grievance could not be a protected act because the terms of section 27(3) were engaged. The Tribunal did not accept this. As noted above the claims of direct discrimination and harassment which had initially been made by the claimant had been dismissed on the basis that the Tribunal had no jurisdiction to hear them. The Tribunal therefore did not hear detailed evidence as to whether or not Mr Hunter had in fact carried out the discriminatory acts alleged by the claimant. That having been said, on the basis of the information before us, including the claimant's own evidence we did not consider that we could possibly make a finding that the allegations were false. In any event it was absolutely clear to us from the basis of the claimant's evidence that the claimant was making her allegations in good faith. It therefore appeared to the Tribunal that section 27(3) had absolutely no application in this case.

51. Having established that there was a protected act the Tribunal then required to consider whether the claimant had been subjected to a detriment because she had committed a protected act.

52. The respondent's position was that the move to Stirling was not a detriment because at the end of the day this was something which the claimant agreed to. The Tribunal's view was that we required to look carefully at what actually happened in this case. There is no doubt that the claimant moved to Stirling. We considered there were two questions

which required to be answered. The first was whether the move to Stirling was something which the claimant was subjected to and secondly whether it was in fact a detriment.

53. For the avoidance of doubt the Tribunal's view was that the claimant's subsequent dismissal for redundancy was not something which, on the evidence, she was subjected to directly because she carried out a protected act. The Tribunal accepted the evidence of Ms Swan that the store closures were not in her mind at the time it was decided that the claimant moved to Stirling. There is no doubt that the claimant was selected for redundancy because by the time of the store closure she was working at the Stirling store but in the view of the Tribunal there was nothing to suggest that the respondent deliberately subjected her to dismissal because of the protected act.

54. As noted below this may be a distinction without a difference given that if the respondent did subject her to the move to Stirling because of the protected act then the respondent is responsible for compensating her for all that reasonably and foreseeably flows from this but the Tribunal felt it as well to emphasise that we did not make a finding that the respondent deliberately moved the claimant to a store which they knew was going to close.

55. Regarding whether the claimant was subjected to the move to Stirling or not we note the respondent's position that this was something the claimant agreed to. The claimant's evidence was that she had absolutely no intention of moving store at the point where she put in her grievance. The Tribunal accepted her evidence that she put the grievance in because she wanted Mr Hunter's behaviour to stop. The Tribunal accepted her evidence that what she had in mind was HR giving Mr Hunter a talking to at the very least or perhaps sending him on training as to what was and was not acceptable behaviour for a manager in the 21st century. She quite accepted that Mr Hunter might not realise the effect of his behaviour on individuals of mixed race such as herself but she certainly felt his behaviour to be discriminatory. It was clear to the Tribunal that the claimant was someone who had encountered racism previously in her life and had a fairly well worked out strategy for dealing with it. In dealing with

it we mean dealing with it both internally in the way that she dealt with the psychological effects of it and also externally in how she wanted it brought to the attention of others who would be in a position to stop it.

56. The claimant put in her grievance and it was clear from her evidence that she was glad initially that Ms Swan was dealing with this since Ms Swan was someone for whom she had a great deal of respect. She felt that Ms Swan would deal with it professionally and that the matter would be resolved. We accepted the claimant's evidence that the word mediation was not used but actually what the claimant agreed to was an informal meeting with Mr Hunter which she thought would be Mr Hunter being told how to properly behave in future and an agreement that he would desist from the behaviour which she was finding to be very upsetting.

57. We entirely accepted the claimant's evidence that instead of this she is immediately subjected to an allegation that she is "playing the race card" and that she is effectively trying to get rid of a manager that she doesn't like by making unfounded allegations of racist behaviour. The Tribunal felt that the way Ms Swan dealt with this allegation was extremely odd. Ms Swan accepted that she had not investigated the allegation but said that this was because the claimant didn't appear to want her to investigate it. The allegation, if correct, was a very serious allegation against the claimant. Despite being questioned by the Tribunal at length Ms Swan could not give any coherent explanation as to why she would want to ask the claimant whether or not she wanted this allegation of misconduct against her to be investigated.

58. The claimant's position was that the allegation completely threw her and that she was totally flabbergasted. Up to that point she had felt that her grievance was going to be dealt with in an adult and mature way. She was now faced with an allegation against herself and 'in her words' she felt that she might not have a job any more. The Tribunal were in no doubt that this coloured the way matters went forward in the meeting.

59. The Tribunal were also puzzled as to why Ms Swan went ahead with the meeting in circumstances where Mr Hunter was aware of the allegation and expressed the view that the claimant was completely in the wrong by

making a malicious allegation against him. The chances of a properly agreed mediated solution in those circumstances were not high.

60. As noted above the evidence of Ms Swan and Mr Hunter as to precisely what was said in the discussions between the claimant and Mr Hunter during the meeting were much more vague than one would have thought likely. The Tribunal accepted the claimant's position which was that Mr Hunter put it to her that all this was banter and the claimant indicated that whilst it might be viewed by Mr Hunter as banter she found it extremely offensive. The Tribunal accepts that the claimant probably said during this that she was not accusing Mr Hunter of being a racist but that this in no way amounted to her withdrawing her allegation or saying that the allegation of discrimination she had made was not true.

61. The view of the Tribunal was that any mediated settlement in those circumstances was doomed but in order to further complicate matters Mr Hunter says quite clearly that he is no longer prepared to work with the claimant because he no longer trusts her. Both Ms Swan and Mr Hunter accept that this was said and the claimant also confirms that this was what was said although she indicates that it was put to her most clearly by Ms Swan at the end of the meeting after Mr Hunter left. Matters then moved immediately into a discussion of where the claimant can be moved to. Mr Hunter leaves and Ms Swan then tells the claimant to leave matters with her so that she can investigate a potential move for the claimant. The Tribunal noted that Ms Swan's evidence was that she would have been prepared to look at moving Mr Hunter in these circumstances but the fact is that at the end of the day she did not investigate this at all. She arranged a further meeting with the claimant in order to discuss the move but does not arrange a further meeting with Mr Hunter. Mr Hunter's position is that the meeting has had the satisfactory outcome in that the allegation of discrimination against him has been withdrawn and the claimant is having to move shop.

62. The Tribunal accepted that thereafter the claimant agreed to the move and that she agreed to the reduction of hours to 30. The Tribunal's view was that she would not have agreed to either had it not been for the fact that

Mr Hunter had said that he was no longer prepared to work with her and if the discussion about moving had not been instigated by the respondent.

63. The claimant's evidence was that she at one time worked 30 hours which was helpful for her childcare commitments but had been working 39 hours for a couple of years without a great deal of difficulty. Her view was that if she had wanted to cut her hours to 30 whilst still at the Alloa store she would have been able to do this without any problems. She had not applied for this because she did not need to.

64. She indicated that the events around the grievance and particularly the way the initial meeting with Mr Hunter and Ms Swan had gone had somewhat spooked her and that in those circumstances she felt it would probably be as well to work 30 hours for a while.

65. As noted above the Tribunal's view is that the issue of the claimant's precise status was probably left somewhat vague. The claimant was aware that there was a strong possibility that the Store Manager Designate in Stirling would move on and she would be made back up to Deputy Manager in early course. Ms Swan did not demur from this albeit it is clear that all of the paperwork in the case indicates that the claimant was taking a demotion to Sales Administrator albeit she would keep the same hourly rate as she had received as Deputy Manager.

66. The view of the Tribunal is that the move to Stirling was not something which the claimant agreed to but was something to which she was subjected. Once she was told that Mr Hunter was not prepared to work alongside her then she was willing to try to make the best of a bad job by agreeing the move to Stirling but if the claimant had not put in her grievance and Mr Hunter had not reacted to it in the way he did the claimant would not have moved to Stirling.

67. The respondent's representative also suggested the move to Stirling was not a detriment since it was in fact more convenient for the claimant. The Tribunal did not consider this to be the case. The claimant was moved from a job which she liked where she worked as Deputy Manager of a store. The new job was of considerably lower status. The Tribunal were in no doubt that the move amounted to a detriment.

68. As noted above the Tribunal's view is that the move to Stirling which we have decided was a detriment was something that the claimant was subjected to because she put in her grievance. The grievance was a protected act and it therefore follows that the claimant was unlawfully discriminated against by being victimised contrary to section 27.

Remedy

69. The Tribunal's jurisdiction in respect of remedy in this case is contained in section 124 of the Equality Act 2010. The claimant provided a schedule of loss (pages 55-58) and she confirmed during the course of the hearing that this set out her position regarding the impact of the discrimination on her.

70. It is as well that we set out our findings using the same headings as the claimant.

Loss of earnings

71. The claimant claimed for what she described as the nine hours a week lost started from six weeks after the date she commenced working in the Stirling store (19 November) to the date of her redundancy which was 30 March 2019. She calculated the weekly difference as £88.61 and was therefore claiming £1506.46 (17 weeks).

72. The Tribunal's view was that this wage loss was not recoverable by the claimant since it was not caused by the discrimination. The Tribunal considered it to be a finely balanced decision however as noted above the Tribunal did not accept that there was any kind of binding agreement that the claimant would return to working 39 hours per week after six weeks. Our view was that the claimant genuinely understood that it was very likely that she would return to the Deputy Manager role once the Store Manager Designate was allocated their own store and left Stirling. The Tribunal's view of the evidence was that Ms Swan agreed with the claimant that this was a likely outcome but there was absolutely no fixed agreement that the claimant would return to a Deputy Manager role within six weeks.

73. Furthermore, as noted above, the Tribunal accepted Ms Swan's evidence that if the claimant had wanted full time hours in the Stirling store this could

have been arranged. We note that at no time did the claimant contact Ms Swan to ask her to increase her hours back to 39 and the claimant worked 30 hours up to her dismissal. In all the circumstances the Tribunal did not consider that this loss was one properly attributable to the discrimination which took place.

Adjustment to redundancy

74. The claimant considered that her redundancy payment ought to have been adjusted in an upward direction to take into account the fact that in her view but for the discrimination she would have been working 39 hours per week rather than 30 hours per week during the period taken into account in calculating a week's pay for the purposes of her redundancy payment. For the reasons given above the Tribunal did not consider this to be payable.

The difference between statutory sick pay and wages for the period of absence in November 2018

75. The Tribunal accepted the claimant's evidence that she had been paid statutory sick pay for this absence. Ms Swan's position was that the respondent would normally pay full pay. Neither party had lodged a pay slip. The Tribunal felt that the claimant's evidence was based on what she had actually been paid whilst Ms Swan's evidence was based on what she believed ought to have occurred. In the circumstances we preferred the claimant's evidence. That having been said we accepted the respondent's submissions that the commencement of this absence pre-dated the protected act and that therefore could not be properly be viewed as a loss caused by the claimant's victimisation. Again the Tribunal considered it finely balanced since it would appear that the second week of the absence was to some extent at least associated with the suggestion from Ms Swan that the claimant take a few days until Ms Swan sorted out the details of her move to Stirling. The Tribunal note however that the extract from the medical records refers to the reason for the absence as being "boss bullying her, finding herself questioning her ability, very teary at work." This would appear to relate to Mr Hunter's behaviour rather than the victimisation. As noted above the Tribunal did not have jurisdiction to

consider the allegation of direct discrimination involving Mr Hunter. It was therefore our view that we should not make a payment in respect of the difference between statutory sick pay and the claimant's full pay.

76. The claimant was out of work for a period of two months from her dismissal on 30 March until she started her new job and lost earnings in the gross amount of £3332.00. She received Universal Credit payments of £807.81 during this period and is therefore claiming a net amount of £2524. The respondent's representative was critical of this because their view was that the claimant had a job arranged when she left the respondent's employment and ought to have taken up this job. The Tribunal did not hear any detailed evidence as to why the job did not in fact materialise but at the end of the day considered that the two month wage loss was a natural consequence of the discrimination. It could not be said in any way to be an excessive amount of time to be without a job in the circumstances. The Tribunal therefore awarded the sum of £2524.19 under this head.

77. The claimant's new job pays a salary of £18,000 per annum for the first six months and will thereafter rise to £20,000 per annum. The claimant sought a payment of £1000 in respect of the difference in pay over six months however this was predicated on the Tribunal accepting that the claimant ought to be compensated on the basis that she was working 39 hours per week. As noted above the Tribunal was satisfied that the reduction to 30 hours was something which the claimant agreed and was not something which flew from the discriminatory act. The claimant's earnings in her new job are more than she was earning with the respondent working 30 hours per week. Accordingly, there is no wage loss and nothing is awarded under this head.

Injury to feelings

78. The Tribunal was satisfied that the claimant had suffered serious personal distress at the way she had been treated. She felt that she had tried to behave in a professional manner by presenting her grievance in a dignified and restrained way. It appeared to the Tribunal that she had genuinely expected the respondent to deal with this properly and she had co-operated with Ms Swan in agreeing to meet with Mr Hunter. She felt

absolutely devastated and betrayed by the way she was treated. The allegation that she was "playing the race card" was, she felt, designed to undermine her and cause her to be compliant. As a result of this she has lost a job which she enjoyed and where she had seen herself as progressing professionally to become Store Manager at some point.

79. The claimant considered that the appropriate award should be in the middle Vento band as adjusted in the latest Presidential Guidance.

80. The Tribunal's view was that although we agreed entirely that the claimant had been treated in a discriminatory way we felt that this was, at the end of the day, something which fell into the lower Vento band. The claimant appears to have only consulted her GP on the one occasion regarding the matter. There is no record of her being prescribed any medication. Whilst the Tribunal accepted the claimant was extremely upset by the turn of events in November the claimant appears to have then worked well at the Stirling store and no further incidents occurred. The Tribunal felt that the claimant categorised this in the middle band because of her upset at the belief that Ms Swan may well have known of the proposed branch closures at the time she transferred the claimant to Stirling. In her final submissions the claimant accepted that this was simply something she had had a suspicion about and, as noted above, the Tribunal accepted entirely Ms Swan's evidence regarding this. We believed that the claimant also, by the end of the Tribunal hearing, accepted that Ms Swan had not deliberately set her up to be made redundant a few months later.

81. Following the recent Presidential Guidance the lower band runs from £900 to £8800.

82. In England and Wales we note that following the case of ***Simmons v Castle*** a 10% uplift is applied in all cases where compensation is awarded for personal injury including injury to feelings awards. The Tribunal's view is that the ***Simmons v Castle*** 10% uplift does not apply in Scotland but we accept that in terms of paragraph 12 of the Presidential Guidance we are required to adjust our general approach to the level of compensation to take account of this. Taking all of the above matters into consideration

the Tribunal believed that £6000 was an appropriate level for the injury to feelings award.

Interest

83. The Tribunal's view is that interest should run on the injury to feelings element of the award from 31 March 2019 to the date of payment. The interest runs at 8% per annum and the amount of interest up to 1 March 2020 is therefore £440. The Tribunal considers that interest should run on the wage loss from 31 May 2019 to the date of payment. The interest on this sum to 1 March 2020 is £168.27. The total award including interest to 1 March 2020 is therefore

Wage loss	£2524.19
Injury to feelings	£6000.00
Interest	£608.27
Total	**£9132.46**

Employment Judge: **Ian McFatridge**
Date of Judgment: **03 March 2020**
Date sent to Parties: **03 March 2020**