



EMPLOYMENT TRIBUNALS

Claimant

Miss K Okonkwo

Respondent

AND

T M Lewin and Sons Limited

Heard at: London Central

On: 6,7, 10 and 11 February 2020 and
13 February 2020 in Chambers

Before: Employment Judge Nicolle

Members: Ms S Plummer

Ms S Pendle

Representation

For the Claimant: In person

For the Respondent: Ms R Thomas, of Counsel

RESERVED JUDGMENT

1. The claim for disability discrimination fails.
2. The claim for age discrimination fails.
3. The claim for sex discrimination fails.
4. The claim for unauthorised deductions from wages fails.

REASONS

The Complaints

1. By a Claim Form presented on 1 May 2019 the Claimant brought complaints of unlawful deductions from wages and discrimination by reason of age, sex and disability.
2. The Claimant remains employed by the Respondent.

The issues

3. The issues between the parties to be determined by the Tribunal are as follows:

Section 13: Direct discrimination on grounds of sex or age

4. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act (the “EqA”), namely:

5. Did the Respondent appoint the Claimant as senior sales consultant in 2010? If not, failure to do so then or later is alleged as less favourable treatment.

6. Did the Respondent, by Jessica Anderson, appoint the Claimant supervisor in July 2010? Failure to do so then or later is alleged as less favourable treatment.

7. Failing to consider the Claimant for vacancies as assistant branch manager at the Stratford store as they arose.

8. Failing to meet the Claimant for annual appraisal, or invite comment on the manager’s appraisal, or provide the Claimant with a copy of any written appraisal, from 2015 to 2018 inclusive.

9. Natalie Nugent (Ms Nugent) failing to act on her verbal response to a complaint by the Claimant in December 2018, that her pay would be increased or her post regraded.

10. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators at the Stratford store:

Group 1 (senior sales consultants)

- | | |
|----------------------|----------|
| 1. Edward | (male) |
| 2. Vesta | (female) |
| 3. Nasiba | (male) |
| 4. Helen Sutton | (female) |
| 5. Chrystella Mateka | (female) |
| 6. Hardip | (male) |
| 7. Eliezer | (male) |

Group 2 (assistant manager) (all male except Sonia Pinna)

- | | |
|-------------------|---|
| 1. Martin Wheeler | |
| 2. Martin | (transferred from Bluewater with M Wheeler) |
| 3. Sonia Pinna | |
| 4. Luke | |
| 5. Luis | |
| 6. Richard | |
| 7. Ralph Hinault | |

8. Neil
9. Zeeshan Choudhry

Group 3 (supervisor)

1. Lewis (suit specialist, male)
2. Eric Ahiwe (male)
3. Cynthia (female)

11. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of age or sex?

12. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

13. In respect of the age claim, the Respondent does not plead justification.

Disability

14. Does the Claimant have a physical impairment, namely pain and restricted movement of the right arm following an accident in December 2016?

15. If so, does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

16. If so, is that effect long term? When did it start and:

- a) has the impairment lasted for at least 12 months?
- b) is or was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?

17. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

18. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

Section 26: harassment related to disability

19. Did the Respondent engage in unwanted conduct as follows?

- a. on the Claimant's return to work 3 days after the 20 December 2016 accident, reprimanding her when she served a customer sitting down, "did you break your leg as well?"
- b. on return to work in March 2017, being told by Ralph Hanus (Mr Hanus) that as she could not cope (lifting heavier items) she would do better to find a job at Tesco; and
- c. in April 2017, being repeatedly asked by Zishan Choudhry (Mr Choudhry) when she was taking time off for further surgery as she would then be made redundant. The Claimant says she postponed the surgery as a result.

20. Was the conduct related to the Claimant's disability?

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

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

23. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 15: Discrimination arising from disability

24. The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within s.39 EqA is having to take off sick January-March 2017, and further time off for prospective surgery. No comparator is needed.

25. Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 24 above?

26. Has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Section 27: Victimisation

27. Has the Claimant carried out a protected act? The Claimant relies on:

- a) a witness statement she made in 2011 about abuse of a female colleague by a male manager; and
- b) a letter sent to HR on 30 June 2015 about appraisals.

Has she suffered victimisation as a result of these acts?

Time/limitation issues (EqA claims)

28. The Claim Form was presented on 1 May 2019 and early conciliation began on 12 March 2019. Accordingly, any act or omission which took place before 13 December 2018 is potentially out of time, so that the tribunal may not have jurisdiction.

29. Several of the claims are subject to time points. The episodes alleged as disability discrimination (December 2016, March 2017, April 2017) are subject to:

- a) whether she was disabled at the material times; and
- b) whether the tribunal has jurisdiction to hear the claims out of time.

30. The Respondent believed it would be more cost effective to decide this at the final hearing rather than at a proposed open preliminary hearing.

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

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

Unlawful deductions from wages – section 13 Employment Rights Act 1996 (“ERA”)

33. Were the following “properly payable” - s13 (3) ERA?

- a) bi-annual bonus payments of 10% salary, payable April and October (5% on each occasion) as identified in the particulars of employment;
- b) salary as a senior sales consultant (i.e. has she been appointed to that grade before June 2018?);
- c) salary as supervisor from 2013; and
- d) sick pay (other than statutory sick pay) after 3 days of sickness absence.

Time/limitation issues

34. For any deduction made before 13 December 2018:

- a) was there a “series of deductions”, ending on or after 13 December 2018?

- b) was the series interrupted by a period exceeding 3 months?
- c) if more than 3 months interruption in the series, was it “not reasonably practicable” to present a claim in time?
- d) in any event, is any deduction more than 2 years before the claim was presented? If so, the tribunal may not consider it – s.23(4A) ERA.

The Hearing

35. The Claimant gave evidence and called Helen Sutton (Ms Sutton), Lola Oluyemi and Sydlik Enuwosa as witnesses. The Claimant also provided witness statements for Mrs Ibrahim, Eric Ahaiwe, Christella Matoko and Liliane Uwambaye but who did not attend as witnesses. Janine Leightley, HR Director, (Ms Leightley), Ms Nugent, General Manager, Nicola Harrhy, Store Manager in Stratford, (Ms Harrhy) and David Dennis, Head of Retail for London, (Mr Dennis) gave evidence for the Respondent.

36. There was a bundle comprising 499 pages to which a small number of additional documents were added during the hearing. The parties provided the Tribunal with written closing submissions and addressed the Tribunal orally on these. The hearing before the parties was concluded on Day 4 (Tuesday 11 February) and the Tribunal met in Chambers to consider its decision on Wednesday 12 February 2020.

Findings of Fact

37. The Claimant commenced employment with the Respondent on 3 November 2008.

38. The Claimant’s employment terms were set out in an offer letter dated 16 October 2008 (the “Offer Letter”) and a contract of employment signed by her on 3 November 2008 (“the Contract”). The relevant terms of the Offer Letter and the Contract are:

Offer Letter

Company Bonus Scheme

39. T.M. Lewin currently operates a performance related bonus scheme, making it possible to earn a Company and personal performance related bonus of up to 10% of your annual salary, this is currently payable in two instalments of up to 5% each in April and October.

The Contract

40. Job Title: Sales Consultant.

The Respondent says that this was also referred to as Sales Assistant.

Bonus Scheme

41. The company operates a discretionary bonus scheme and reserves the right to amend/withdraw the scheme at its discretion and as the needs of the business dictate.

Absence and Sick Pay

42. You are eligible for statutory sick pay (SSP). On successful completion of your probationary period you are eligible for company sick pay which is three days' actual basic rate of pay in any 12-month rolling period.

Employee Handbook

43. This has a section entitled Equality and Diversity which includes a sub section entitled TM Lewin Statement. This statement includes:

- use and review as appropriate selection criteria and procedures to ensure as far as possible that individuals are selected, promoted and treated solely on the basis of their merits and those abilities which are appropriate for the job; and
- monitor equal opportunities and diversity issues to ensure our policy and practices are working.

Chronology

44. The Claimant was initially based in the Respondent's White City store. This is a large store selling both male and female apparel.

2009

45. In an email to Amy Hyder of 7 April 2009 the Claimant responded to an internally advertised position for a temporary marketing assistant and attached her CV.

46. The Claimant's appraisals dated 19 March 2009 and 2 October 2009 recorded her position as Sales Advisor. The appraisal dated 2 October 2009 recorded the appraiser's comment as being that the Claimant is "very hard working and helpful and is now ready to take the next step in her career". The objectives section included the next step as being training for Supervisor.

2010

47. The Claimant's appraisal dated 31 March 2010 stated that her position was Senior Sales Advisor. The Claimant says that this evidenced her promotion from

her initial position as recorded in the Contract of Sales Consultant. The Respondent says that they did not have a formal job title of Senior Sales Advisor. The objectives section of the appraisal included that the next step was training for Supervisor.

48. In a letter dated 27 April 2010 from Geoff Quinn, Chief Executive Officer (Mr Quinn) the Claimant was advised that her bonus for the year ending February 2010 was £946.48.

49. A reference letter dated 11 May 2010 recorded the Claimant's position as Sales Consultant.

50. A job description from July 2010 appeared to record that the Claimant's position was Supervisor but this form was only partially completed. The Respondent says that the Claimant did not receive a promotion in 2010. The Respondent points to the lack of any letters confirming promotion or pay increases which would have occurred had there been a promotion. Whilst the Claimant's salary was increased with effect from 1 April 2010 (as confirmed in a letter from Mr Quinn dated 25 May 2010) this was in accordance with the annual pay review and was not an increase to reflect a promotion.

51. The Claimant had a further appraisal on 13 November 2010. This recorded her job title as Senior Sales Advisor. In the appraisee comments the Claimant stated:

"I am strongly seeking a career progression. I am looking forward to taking up more responsibilities as an Assistant Manager".

2011

52. The Claimant transferred from the White City to the Berkeley Street store in February 2011. This is a smaller store and the Claimant's move was to enable her to gain additional experience of selling suits.

53. The Claimant's appraisal dated 24 March 2011 recorded her position as Sales Advisor (Key Holder).

54. In a letter from Mr Quinn dated 26 April 2011 the Claimant was advised that her bonus for the year ending 2011 was £517.50. The Claimant received no further bonus payment until 2017.

55. The Claimant was a recipient of emails from Yeston Wood, Regional Manager – Jermyn Street dated 27 November 2011 and 11 December 2011. The first of the emails was sent specifically to the Claimant's personal email address and concerned sales figures whilst the second was sent to a wider mailing list and was entitled "Managers". It again related to sales figures. The Claimant argues that her being a recipient of these emails evidences that she was performing a managerial role.

Incident of 16 December 2011

56. On 16 December 2011 there was an altercation between the Claimant's Manager in the Berkeley Street store, Mr Shabbir Hayat (Mr Hayat) and a female employee called Marta.

57. It was not until 1 April 2012 that the Claimant signed a handwritten statement in relation to this incident. The statement was written by Marta. Whilst the Claimant says that she told Marta what to write on her behalf the statement reads as if it was written by Marta in some respects as it refers to the Claimant in the third person.

58. The statement was signed by the Claimant as being a thorough representation of the events of the day. The Claimant relies on her submission of this statement as being a protected act and contends that she has been subject to victimisation, primarily a process of career regression, ever since.

59. The statement records an argument between Mr Hayat and Marta. It also refers to Mr Hayat placing his hand on Marta's arm and pulling her on arm for a couple of seconds.

60. In her witness statement the Claimant referred to there having been a physical assault. Further, she referred to herself as having been so traumatised by the incident that she was on her hands and knees. In response to cross examination she variously referred to Mr Hayat having touched Marta's arm, pulled it and grabbed it. The statement of 1 April 2012 makes no reference to the Claimant being traumatised and indeed refers to her having encouraged Marta to go downstairs to talk to Mr Hayat to sort things out.

61. We place greater reliance on the statement of 1 April 2012 than the more serious version of events contained in the Claimant's witness statement for this hearing. We find that the statement of 1 April 2012 is indicative of an argument, with some unwelcome physical contact from Mr Hayat to Marta, but falling short of a physical assault.

Other matters in 2012

62. The Claimant's job description dated 11 January 2012 gave her job title as Sales Assistant. There is no evidence that she complained that this wrongly recorded her job title.

63. The Claimant's appraisal dated 27 March 2012 recorded her position as Sales Advisor (Key Holder). The Claimant stated in the objectives that she agreed with her line manager's comments that she promised to work harder to improve in all areas of concern.

64. A return to work form dated 11 October 2012 recorded the Claimant's job title as Sales Consultant. This was signed by the Claimant and Mr Hayat.

65. In October 2012 the Claimant requested, and was granted, a transfer to the Stratford store. Whilst not directly relevant to our decision it would appear that the Claimant's request was at least in part as a result of a deteriorating working relationship with the Berkeley Street Store Manager, Mr Hayat.

2013

66. The Claimant's appraisal dated 8 March 2013 recorded her position as Sales Assistant. Francis Cremonesi, Stratford Store Manager, (Mr Cremonesi), stated that the Claimant provides "great support to the management team and brings a maturity to the store".

67. A letter dated 2 May 2013 recorded that the Claimant's position was Sales Consultant.

68. The Claimant's appraisal dated 2 November 2013 stated her position as Senior Sales. The Claimant commented that the appraisal was "very informative and objective".

2014

69. The Claimant's appraisal dated 16 April 2014 stated that her position was Senior Sales. During this appraisal with the new Store Manager, Christopher Allen (Mr Allen) the Claimant alleges that he told her that "you are not cut out for management". She says that she responded by using words to the effect of "then make the beauty out of the beast". Neither of these comments are recorded on the employee or manager comments on the appraisal and the only comment from the Claimant was "ok". We therefore find that there is no evidence to support the Claimant's contention that Mr Allen made such a remark.

70. The Claimant had a further appraisal with Mr Allen on 15 November 2014 which recorded her position as Sales Assistant. The Claimant wrote in the comments section as follows:

"Unfortunately, I do not agree with the contents and score of this appraisal for the following reasons:

- the Store Manager, Mr Allen did not follow procedures;
- I was not given the competency document to prepare my appraisal; and
- Mr Allen pre-awarded marks and gave no room for discussion.

2015

71. The Claimant sent a letter to Mr Allen entitled "denied performance appraisal" dated 29 June 2015 (the "Letter"). This was also emailed to Mr Chaudhry, Assistant Manager Stratford under cover of an email dated 30 June 2015.

72. The Claimant contends that the Letter constituted a further protected act. In the Letter the Claimant complained about the way Mr Allen had conducted her appraisal to include allegedly making up records and manipulating figures. She stated that she felt “defrauded” by his actions and that her career had been adversely affected. There is no contemporaneous record of any follow up action being taken in relation to the Letter. There is some uncertainty as to whether the Letter was actually sent to HR, but we do not consider this to be a material factor. The Claimant acknowledged in cross examination that the Letter did not refer to any matter capable of constituting a “protected act”. We therefore find that the Letter was not capable of being a protected act given that it concerned matters relating to the Claimant’s appraisal and did not include a matter potentially falling within section 27 (2) of the EqA.

73. The Claimant had a further appraisal on 10 July 2015 which recorded her position as Sales Consultant. The Claimant’s only comment was “ok”.

74. The Claimant did not receive another appraisal until 2019. The Respondent’s position is that this applied to all staff in the Stratford store. No evidence was presented to contradict this, and we therefore find this to be the case.

2016/2017

Accident and related matters

75. On 20 December 2016 the Claimant had an accident when she fell off a bus and broke her right arm. It is apparent from photographs submitted by the Claimant, and her medical records, that she was badly hurt.

76. Notwithstanding her self-evident injuries the Claimant returned to work on 23 December 2016. She claims that on her return that Rafal Hanus, Assistant Manager (Mr Hanus) saw her seated in the store and shouted at her “you told us you broke your arm did you break your leg as well?”. The Claimant relies on this as an act of discrimination arising from her disability and/or harassment on account of her disability.

77. The Claimant attended an appointment at Barts on 30 December 2016 and the diagnosis was recorded as right elbow radial head fracture and coronoid fracture, medial collateral ligament tenderness. The treatment plan was recorded as radial head replacement date to be arranged.

78. The Claimant underwent surgery on or about 21 January 2017.

79. The Claimant was off work on account of her injuries and recovery from surgery in the period from 23 December 2016 until about 1 March 2017.

80. The Claimant alleges that on her return to work that Mr Hanus told her that if she could not cope, she would do better to find a job at Tesco.

Incident of 28 March 2017

81. An incident took place between the Claimant and a colleague, whose name was redacted in the document in the bundle, on 28 March 2017. It was apparent from the evidence that the colleague in question was Mr Hanus. The Claimant complained that Mr Hanus had splashed her with water. His position was that it was a few drops and inadvertent. The Claimant contended that it represented a “physical assault”.

82. The record of the conversation dated 29 March 2017, compiled by an employee called Sebastian, includes reference to Mr Hanus saying that he had a lot of respect for the Claimant and to her being “older than some of us” to which the Claimant responding by saying “yes, much older you see how I work with all these kids”.

83. The Claimant threatened to take the matter of the “assault” to the police. She went on to state that she would be filing a formal complaint of ageism.

84. In an undated response from Mr Hanus following the incident on 28 March 2017 he stated that he considered that she was seeking to discredit him in light of her performance and behaviour management. He went on to state that the Claimant had called others “boy” or “little boy” or “you’re only a baby” and that she mentions her age with pride.

85. Mr Hanus in his statement went on to say:

“I believe she is aware of the current situation and must have heard that she may be paid off to leave”.

86. He referred to the Claimant having asked him how much she would be paid if she left. He also indicated that she had instructed a solicitor and takes notes on everything that is happening and that “no one will touch her”. Mr Hanus’ statement further records that the Claimant had said to him that she hates working in retail. He records that she complains that the business does not care about her because she should have been a manager by now.

Letter of concern and grievance

87. The Claimant was sent a letter of concern dated 6 April 2017. She responded to this in a letter dated 10 April 2017.

88. The Claimant attended a grievance hearing on 26 May 2017. The outcome of the grievance was recorded in a letter from Dan Carr, Head of Retail Operations (Mr Carr) dated 6 June 2017. In a five-page letter Mr Carr rejected the various matters forming the Claimant’s grievance. This included his finding no evidence to support the Claimant’s allegation that Mr Hanus had behaved in an aggressive and derogatory manner towards her. He concluded that the Claimant had behaved in a manner which was inappropriate and unacceptable

and perceived as threatening. He took into account witnesses verifying that she had said “take this outside”.

89. In relation to the allegation of ageism the Claimant had made against Mr Hanus, Mr Carr found no evidence to support this but referred to the Claimant having signed a card to a colleague with “Granny Kuni” and that there had been occasions when the Claimant had said to colleagues “you are just a boy”.

90. Mr Carr found no evidence that the Claimant had been subject to comments on account of her broken arm and incapacity. He recommended that an appointment should be made with occupational health. There is no evidence as to whether this appointment took place.

91. The Claimant had complained that she had not been considered for the role of Supervisor. He advised that she was welcome to apply for any Supervisor vacancies and should contact the Talent Acquisition Team and a telephone number was provided. The Claimant did not pursue this opportunity. The Claimant was also advised that her manager would arrange for her to attend the Retail Academy in order to complete refresher training.

92. The Claimant did not appeal the grievance outcome.

Ongoing medical position

93. On 2 June 2017 the Claimant attended an appointment with an orthopaedic surgeon at Barts. A letter dated 7 June 2017 from the surgeon recorded that she had “unfortunately developed a stiffness in her right elbow post radial head replacement and lateral collateral ligament repair”. The letter recorded that she had gone on the waiting list for the removal of the radial head replacement with arthrolysis.

94. It was not until 15 May 2018 that the surgical procedure was scheduled. However, on 11 May 2018 the Claimant cancelled the scheduled surgery, and this did not take place until 2019. The Claimant says that she postponed the surgery because of her concerns regarding her job. There is no documentary evidence of such concerns being communicated to the Respondent by the Claimant or any pressure from the Respondent for the Claimant to postpone or cancel the surgery. We therefore find that it was not due to the Respondent’s actions that the surgery was postponed.

2018

95. On 20 May 2018 the Claimant was promoted to the position of Senior Sales Assistant. The Claimant’s position is that this did not constitute a promotion as she says she had held the position since 2010.

96. The Claimant’s promotion was confirmed in a letter from Pippa Corps, HR Co-Ordinator (Ms Corps) dated 21 June 2018. This letter advised the Claimant that her salary would be increased to £10 per hour effective from 20 May 2018.

97. Tom Welsch, Store Manager at Stratford (Mr Welsch) had verbally advised the Claimant that her salary would be increased to £10.50. This figure was also stated in a change form with an effective date of 20 May 2018 with the authorising managers being Ms Leightley and Mr Welsch.

98. The Claimant responded to Ms Corps in an email of 21 June 2018 challenging the pay increase to only £10 as opposed to £10.50 which had been communicated to her. Ms Corps responded in an email of 22 June 2018 to confirm the correct salary banding of £10 and that Mr Welsch had erroneously referred to a figure of £10.50.

99. There then followed email correspondence between Mr Welsch and Ms Corps in the period 9 July to 12 July 2018 in which Mr Welsch argued in favour of keeping the figure of £10.50 but ultimately the company's stipulated pay band of £10 for all Senior Sales Consultants was adhered to. At no point was the Claimant actually paid at the higher figure of £10.50.

100. In a letter dated 26 September 2018 a Consultant Rheumatologist from Barts advised that the Claimant had developed chronic widespread pain following the 16 December 2016 accident when she broke her arm. Further, she was diagnosed as having fibromyalgia.

Pay complaint

101. At an unspecified date in December 2018 the Claimant alleges that Ms Nugent failed to act on her verbal complaint that her pay would be increased and/or her post regraded. The Tribunal heard no evidence on this.

2019

Further grievance and Tribunal Claim

102. In an email of 27 February 2019 to Amy Solomon (Ms Solomon) the Claimant raised a grievance concerning:

- Lack of equal pay
- Discrimination
- Lack of performance bonus

103. In an email of 4 March 2019 to Ms Solomon the Claimant complained about the limited sick pay she had received following a further accident when she damaged her leg and said that she was entitled to full salary for six months, and half her salary for a further six months before SSP kicks in.

104. Ms Solomon replied to the Claimant to state that the Respondent operates a discretionary sick pay scheme with employees being entitled to their full salary for three days in a rolling 12-month period.

105. On 12 March 2019 the Claimant commenced early conciliation and on 12 April 2019 the ACAS early conciliation certificate was issued.

106. The Claimant attended a grievance hearing on 29 April 2019 which was conducted by Sam Perry, Store Manager.

107. On 1 May 2019 the Claimant presented her ET1.

108. On 31 May 2019 the Claimant was sent a grievance outcome letter by Ms Perry. Ms Perry rejected all elements of the Claimant's grievance under the following headings:

- Lack of equal pay
- Discrimination (age and sex)
- Disability discrimination
- Lack of performance bonus

109. It is not necessary for us to set out details of this five-page letter as they are covered elsewhere in this decision.

110. In an email of 3 June 2019, the Claimant appealed against the grievance outcome.

111. A grievance appeal hearing took place on 11 June 2019 and was conducted by Barry Thompson, General Manager (Mr Thompson).

112. Mr Thompson sent a grievance appeal outcome letter to the Claimant dated 28 June 2019 and rejected all elements of the appeal and set out his decision in a five-page letter under the following headings:

- Position as Sales Consultant
- Management duties as Sales Consultant
- Victimisation as result of previous incident
- Bonus or pay increases relating to store performance
- Training and promotion opportunities
- Performance appraisals
- Deduction of monies while of sick
- Return to work in 2017
- Bonus issues

113. In both the grievance and grievance appeal outcome letters the Claimant was advised of steps that she could take to maximise her prospects of career progression to include speaking to her Store Manager to ensure monthly development meetings take place and applying under the Respondent's Sales Manager Talent Programme. The Claimant did not pursue such opportunities.

Bonus Schemes

114. A new bonus scheme was introduced in FY 19. This provided that bonuses would be awarded monthly to the stores that exceed their Sales Target and in doing so, deliver their Budget Margin percentage. This provided the opportunity for participants to earn between 5 and 15% of their salary each month provided that they hit their individual Sales Target.

115. The Stratford store was generally not successful, and the Claimant has not received such a bonus since its introduction.

116. An exception to this was in June 2019 when Stratford hit its target and all participants were entitled to a bonus payment of 10% in the July payroll subject to their meeting their individual Sales Target.

117. The Claimant was also eligible to benefit from the Respondent's "Top Gun" bonus scheme which provided for what were initially benefits such as attending breakfast with management in a hotel but progressed to cash payments for various high performers with eligibility both monthly and annually.

2019 appraisal

118. The Claimant had an appraisal with Ms Harry on 19 June 2019. This recorded her job role as "Sales Senior". The Claimant was criticised for a very low, at 11%, data capture figure against a company expectation of 85%. The Claimant says that she was often too busy to capture customers' contact details.

119. The appraisal listed the Claimant's strengths as customer service, product knowledge and commitment and her weaknesses as teamwork and that in a Senior Sales role it was not just about the money.

120. In the comment section on the appraisal the Claimant said that she was long overdue being an Assistant Manager. She claims that during the appraisal that Ms Harry had said words to effect of "if you are still here". Ms Harry denies this.

Further incidents

121. In an email of 29 August 2019 to Ms Harry the Claimant complained that she was the only Senior Sales Consultant prohibited from doing refunds. Ms Harry says that she gave the Claimant the option of this function being reinstated but that she chose not to.

122. In an email to HR of 26 September 2019 the Claimant complained about an incident on the shop floor and what she regarded as the intimidating attitude of Mr Dennis towards her.

Promotion opportunities

123. The Claimant complains that she has been denied the opportunity of promotion commensurate with her performance and abilities throughout her

employment. She contends that she has not been provided with the same opportunities as are given to younger and/or male employees. Before looking at the position of comparators it is necessary to set out the Respondent's process for promotions.

124. The Respondent, as is typical in the retail industry, has a relatively high turnover of staff. This is particularly the case in the Stratford store given its location and long hours.

125. The Respondent says that promotion opportunities are advertised through various means to include on the company's website, on a closed facebook page, on notice boards in stores, by word of mouth from Store Managers and in what are referred to as weekly in store "huddle" meetings. More recently the opportunity exists for interested employees to put themselves forward for promotion through the Sales Manager Talent Programme.

126. Store Managers will sometimes identify employees with the requisite skills and experience for progression and provide them with guidance as to appropriate next steps.

127. Mr Dennis says that there are some occasions where as a result of an urgent need there will be no open recruitment process but a new Store Manager, for example, would be parachuted into the location. This happened on several occasions at Stratford as a result of performance and staffing issues. In particular there was a major concern in the store as a result of frauds of approximately £10,000 during 2019. In effect the store was subject to remedial measures.

Comparators

128. The Claimant complains that she was not provided with the same opportunities as other employees. She believes that this was on account of her age and/or sex. She also repeatedly referred to her disability in the period since her 16 December 2016 accident and to victimisation.

129. The Claimant listed a total of 19 comparators in her Claim Form. In a document providing examples of "victimisation" dated 2 October 2019 the Claimant sought to add a further five names but the Tribunal did not allow these to be considered given that they were under the heading of further particulars of victimisation rather than further comparators to the claim dated 1 May 2019 for direct age and sex discrimination

130. It is not necessary or proportionate, for this decision to detail the career background and chronology of the 19 named comparators. Many of them are not appropriate and easily discarded. We therefore focus on those of the comparators who represent the most realistic ones from the Claimant's perspective.

131. The Tribunal heard very little evidence, and saw extremely limited documentation, regarding the promotion process whether generically or in

respect of individual appointments. The only documents included in the bundle were undated job specifications for Sales Manager positions at Stratford. The Claimant's position is that she did not see these documents and it is not clear in what form they were advertised.

Individual comparators

Martin Wheeler

132. He was appointed as an Assistant Manager on 24 May 2012 and moved to Stratford as Assistant Manager (a position he had previously held at Bluewater) on 26 November 2013 and left the Respondent's employment on 11 April 2015. His date of birth is 26 October 1987 and therefore significantly younger than the Claimant (born on 24 February 1964) but his position is not comparable to that of the Claimant given that was already an Assistant Manager prior to commencing at Stratford.

Christella Matoko

133. She joined the company as a Sales Consultant on 5 July 2014 and moved to Stratford on 1 February 2015. She was promoted to Supervisor in Stratford on 14 May 2015 and left the Respondent's employment on 14 May 2016. Her date of birth is 5 November 1988.

Neal Jethwa

134. He started as a Sales Manager on 16 December 2016 and moved to Stratford on 20 May 2018 and left the Respondent's employment on 7 November 2018. His date of birth is 6 March 1984. Prior to starting at Stratford, he had been a Concession Manager at the White City store and when the store closed, he was transferred to Stratford as a Sales Manager. He was therefore already a Manager before commencing at Stratford and not promoted whilst there.

Lewis Martey-Thomas

135. He started as a Senior Sales Consultant in Stratford on 1 October 2017 and was promoted to the role of Executive Tailoring Consultant on 1 November 2018. This promotion was made by Mr Dennis as a result of his performance as a Senior Sales Consultant. His date of birth is 14 February 1983.

Nasiba Rakhmonova

136. She started as a Sales Consultant on 26 June 2016 and was transferred to Stratford as a Senior Sales Consultant on 11 October 2017 and then promoted to Sales Manager on 6 May 2018 before leaving the Respondent's employment on 18 September 2018. Her date of birth is 13 November 1981.

Vesta Ambrose

137. She started as a Sales Consultant on 10 July 2017 and moved to Stratford on 10 December 2017. She was promoted to Sales Manager on 6 May 2018 and left the Respondent's employment on 15 June 2019. Her date of birth is 27 July 1979.

Eduard Susma

138. He started as a Sales Consultant on 26 May 2016 and was promoted to Supervisor in Stratford on 1 February 2017. He was later promoted to Assistant Manager before leaving the Respondent's employment on 23 June 2018. His date of birth is 12 August 1988.

Vincenzo Ciacciarelli

139. The Claimant also complains that in 2015 she was passed over for the position of Assistant Manager in Stratford on 10 May 2015 in favour of Mr Ciacciarelli, an older male. His date of birth is 20 December 1956.

Diversity Profile

140. The Respondent produced a document setting out the gender and age profile of employees in the positions of Sales Consultant, Supervisor, Sales Manager and Store Manager as at 2010, 2014 and 2017.

141. The 2017 figures are most relevant. In terms of the gender profile the figures are as follows:

	Male	Female
Sales Consultant	188	138
Senior Sales Consultant (including Supervisor)	47	50
Sales Manager (including Assistant Manager/ Holding Sales Manager)	37	21
Store Manager (including Holding)	40	17

142. As would be expected the age profile is concentrated in the 21-40 age band. In 2017 there were a total of 45 employees in the 41-50 category, 26 in the 51-60 and five over 60 against the job titles set out above.

The Law

Burden of Proof

142. Under s13(1) of the EqA read with s9, direct discrimination takes place where a person treats the claimant less favourably because of a protected

characteristic than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

143. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she/he was.

144. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

145. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

146. The Court of Appeal in Madarassy, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. race) and a difference in treatment. LJ Mummery stated at paragraph 56:

"Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

147. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870:

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other".

148. Showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof Bahl v Law Society [2003] IRLR 640, EAT per Elias J at para 100, approved by the Court of Appeal at [2004] IRLR 799.

Disability

149. Section 6 EqA defines disability as:

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.

150. A person has a disability if she has a mental or physical impairment which is long term (i.e. has lasted 12 months or more or is likely to do so); and has a substantial adverse effect on her ability to carry out normal day to day activities (S.6 and Schedule 1 EqA). The term 'normal day to day activities' includes the ability to participate in professional working life.

151. In determining whether an impairment has a substantial adverse effect, a tribunal should determine the effect the disability would have if it was not for the effects of any ongoing medical treatment – the 'deduced effects'.

152. The Guidance stipulates that an event is likely to happen if it 'could well happen' (see para C3). This definition of the word 'likely' reflects the House of Lords' decision in Boyle v SCA Packaging Ltd 2009 ICR 1056, HL. Dismissing the employer's appeal, the House of Lords held that the Court of Appeal had been correct in endorsing the 'could well happen' over the 'more probable than not' approach. According to Baroness Hale, the word 'likely' in each of the relevant provisions of the DDA (now EqA) simply meant something that is a real possibility, in the sense that it 'could well happen', rather than something that is probable or 'more likely than not'.

153. How long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the tribunal hearing.

154. S.15 EqA provides that a person (A) discriminates against a disabled person (B) if:

- A treats B unfavourably because of something arising in consequence of B's disability; and
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

155. There is no need for a comparator in order to show unfavourable treatment under S.15. It is possible to demonstrate 'unfavourable' treatment without needing to resort to a 'compare and contrast' exercise. A claimant bringing a claim of discrimination arising from disability under S.15 is entitled to point to treatment that she alleges is unfavourable in its own terms.

156. In Pnaiser v NHS England and anor 2016 IRLR 170, EAT, Mrs Justice Simler summarised the proper approach to establishing causation under s.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

157. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or
- that the treatment, although arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

Age and Sex

158. Under s13(1) of the EqA read with s5, direct discrimination takes place where, because of age or sex, a person treats the claimant less favourably than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

159. In order to show that there has been unlawful direct discrimination for which a respondent is liable a tribunal must be satisfied that there has been:

- less favourable treatment (than an actual or hypothetical comparator); and
- such treatment was on the grounds of the claimant's protected characteristic.

160. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285, the House of Lords said:

“In order for a disadvantage to qualify as a “detriment”, it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However, contrary to the view expressed by the EAT in Lord Chancellor v Coker, on which the Court of Appeal relied in the present case, it is not necessary to demonstrate some physical or economic consequence”.

161. The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute “detriment”, a justified and reasonable sense of grievance about the decision may well do so.

162. S 23(1) EqA provides there must be 'no material difference between the circumstances relating to each case'. The comparator must not share the claimant's protected characteristic. Shamoon is authority that the circumstances of the comparators must not be materially different.

Age discrimination

163. Section 5(1) EqA states that a reference in the Act to a person who has the protected characteristic of age is ‘a reference to a person of a particular age group’, and a reference to persons who share that characteristic is ‘a reference to persons of the same age group’. An ‘age group’ is a group of persons defined by reference to age, whether to a particular age or to a range of ages — S.5(2). In other words, whenever the EqA refers to the protected characteristic of age, it means a person belonging to a particular age group.

164. The definition of ‘age group’ in S.5(2) EqA allows the claimant to define the disadvantaged age group as he or she wishes. The Explanatory Notes accompanying the EqA state that an ‘age group’ would include, for example, ‘over-50s’ or ‘21-year-olds’. While a person aged 21 does not share the characteristic of age with ‘people in their 40s’, the Notes state that a person aged 21 and people in their 40s can share the characteristic of being in the ‘under-50’ age range (see para 37). According to the Code of Practice on Employment issued by the Equality and Human Rights Commission an age group can also be relative, consisting, for example, of people who are ‘older than me’.

Harassment

165. Under s26, EqA, a person harasses the claimant if he or she engages in unwanted conduct related to age, and the conduct has the purpose or effect of (i) violating the claimant’s dignity, or (ii) creating an intimidating, hostile, degrading,

humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

166. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

“An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.’

Victimisation

167. Under s27 EqA, it is victimisation for a respondent to subject a claimant to a detriment because she had done a protected act. A ‘protected act’ includes making an allegation (whether or not express) that someone has contravened the EqA.

Time Limits EqA

S123 provides:

- (1) Proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the

person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

168. Guidance was provided in analysing what constitutes conduct extending over a period in Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96.

169. Extension of time under s123(3) is the exception rather than the rule Robertson v. Bexley Community Centre [2003] IRLR 434. The factors that may be taken into account are broad as in s33 Limitation Act and include:

- a) the length and reason for delay;
- b) the extent to which the cogency of the evidence is affected;
- c) promptness with which Claimant acted; and
- d) steps taken to obtain advice.

170. Prejudice is a relevant factor. A respondent may be prejudiced by having to meet a claim they would not otherwise have to do so but they may also suffer forensic prejudice due to fading memories, lack of witnesses and lost documents. Forensic prejudice will be crucially relevant and may well be decisive Miller v. MOJ UKEAT/0003/15.

Unlawful Deduction from Wages

171. S13(3) ERA provides:

Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

S23 provides:

(1) A worker may present a complaint to an [employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an [employment tribunal] shall not

consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
 - (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
- (3) Where a complaint is brought under this section in respect of—
- (a) a series of deductions or payments, or
 - (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

Conclusions

172. We will set out our decision against the various claims identified in the list of issues. In the interest of keeping our decision to manageable lengths we will not set out all the facts previously identified.

Unauthorised deduction from wages

173. This claim is limited to events subsequent to 30 April 2017 in accordance with s.23(4A) of the ERA.

Bi-annual bonus payments of 10% of salary, payable April and October (5% on each occasion)

174. We find that the Claimant had no contractual entitlement to any bonus payments or payments at any specified levels. It is clear from the Claimant's contract of employment that the bonus scheme was discretionary, and that the Respondent expressly reserved the right to amend or withdraw it at its discretion.

175. In any event we find that the Claimant was substantially out of time to bring a complaint in relation to nonpayment of the bi-annual bonus given that the last occasion on which it was paid was in 2011.

Salary as a Senior Sales Consultant – (i.e. had she been appointed to that grade before June 2018)

176. Any adverse differential in salary would only be compensable as an unauthorised deduction from 30 April 2018. The only question we therefore need to consider is whether the Claimant should have been paid at the higher rate for a Senior Sales Consultant as a result of already having been appointed to this position in 2010. The hourly differential being 44p given that the hourly rate for a Senior Sales Consultant in 2018 was £10.

177. Whilst we find that there was some uncertainty regarding the Claimant's exact job role in 2010 and 2011, we find that the overwhelming evidence is consistent with her not having been promoted and having remained as a Sales Advisor. This was documented on numerous occasions whether in appraisals, reference requests or return to work forms. There is no evidence of the Claimant correcting a misleading statement as to her job description, and given that she challenged many aspects of her employment, we would have expected her to do so had she regarded it as an issue at the material time.

Salaries Supervisor from 2013

178. Save for a single job description referring to the Claimant as a Supervisor in July 2010 there is no evidence that she was appointed to this position whether in 2013 or otherwise. Whilst there is some evidence that whilst at Berkeley Street the Claimant performed some quasi managerial functions, to include being a key holder and receiving emails regarding financial performance, we do not find that she was promoted and as a result not paid the applicable rate for her actual position from 2013 onwards.

179. In any event we find that any claim predicated on such an appointment would be significantly out of time. It would have been reasonably practicable to present a claim far earlier.

180. We also find that the time which has elapsed from the purported promotions does not represent a continuing course of conduct with a series of deductions,

but rather isolated events interrupted by a period of significantly more than three months.

Sick Pay (other than statutory sick pay after three days; sickness absence)

181. We find that the Claimant had no contractual entitlement to full pay in a period of sickness absence of more than three days in any given 12-month period. This is consistent with the Contract. Whilst there were limited occasions when the Respondent would exercise its discretion to make payments beyond this, we do not find they gave rise to a variation to the express contractual terms based on custom and practice.

Victimisation

Witness statement 4 April 2012

182. We find that this was not a protected act. Whilst the statement related to an argument between a male manager and female employee in the Berkeley Street store it was not a complaint of sex discrimination and/or sex harassment.

Letter sent to HR on 30 June 2015 about appraisals

183. The Claimant acknowledged that this letter did not involve a complaint regarding a protected characteristic. As such it could not possibly constitute a protected act.

184. In any event we find that any claims for victimisation resulting from the above matters constituting protected acts would be substantially out of time. We find that there was no evidence of a continuing act. We further find that these represent historical matters which would not have been known to all the subsequent managers with responsibility for the Claimant and in respect of whom she complains. Indeed, many of these managers were not even in the Respondent's employment in 2012 or 2015. We reject the Claimant's contention that there was some form of corporate conspiracy against her as a result of these purported protected acts which permeated through the business and followed her from Berkeley Street to Stratford. We find no evidence to support this.

Harassment related to disability and discrimination arising from disability

185. We will address these issues in conjunction as the only matters relied on are the various alleged remarks made to the Claimant in the period 20 December 2016 until April 2017.

Did the Claimant have a disability?

186. It is necessary for us to consider whether the Claimant had a disability in the period December 2016 until April 2017 and not whether she would fulfil this definition subsequently or at the date of the hearing. We find that whilst the

Claimant had an impairment as a result of the 20 December 2016 accident that this did not constitute a disability at the material time. We reach this finding for the following reasons:

- a) it was not apparent to the Claimant or the Respondent immediately after the accident as to the extent of the Claimant's physical injuries. Indeed, she returned to work after three days; and
- b) the initial medical report indicated that whilst the break to the Claimant's arm was a bad one that there was a good prospect of a reasonable, if not full, level of recovery and it only became apparent subsequent to the first surgery and a few months physiotherapy that a less positive prognosis existed.

187. We therefore find that it would not have been until at earliest June 2017 that the Claimant would potentially have had an impairment which was likely to have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

188. Further, we find that any claim for harassment and/or discrimination arising from disability are significantly out of time given that the last act relied on was in April 2017. Whilst the Claimant made various references to her disability subsequent to this date this did not form part of her pleaded claim in respect of non-access to promotions, failure to achieve promotion and failure to make reasonable adjustments.

189. We do not find any evidence of a continuing course of conduct on account of disability and given that we have found that the Claimant did not have a disability in the material time this is, in any event, not directly material to our decision.

190. It is not necessary for us to make findings on whether the comments alleged to have been made by Mr Hanus and Mr Chaudray between 20 December 2016 until April 2017 were made.

Sex Discrimination

191. We find no evidence which could infer that the Claimant was treated less favourably on account of her sex whether in respect of her named or hypothetical comparators. We therefore find that the burden of proof does not switch to the Respondent. We make this finding for the following reasons:

- a) there is no evidence that the Respondent promotes a disproportionate number of men over women. Indeed, the evidence of Ms Sutton was that there were if anything more female managers than male managers; and
- b) a significant number of women were appointed to managerial positions at the Stratford store during the Claimant's employment to include Ms Nugent, Ms Ambrose and Ms Rakhmonova.

192. We find that the individuals named by the Claimant are not suitable comparators as they are not materially the same.

193. Whilst Ms Ambrose and Ms Rachmaninoff were promoted to Assistant Manager at Stratford the Claimant was also promoted to Senior Sales Consultant at the same time.

194. We find that the principal reason why the Claimant was not promoted was not because she is female but rather as a result of her not availing herself of the internal means available to explore potential opportunities and put her name forward. Her approach was to rely on her managers to promote her and complained when they did not.

195. We find that whilst there were no tangible criticisms of the Claimant's performance that she had become increasingly demotivated and suspicious of the Respondent and its managerial/supervisory employees as time progressed. We find that she was quick to take offence and interpreted relatively minor matters as being much more serious than they were as a matter of fact and inferred without good reason that they formed part of a course of discriminatory conduct towards her, rather than what we find represented isolated day-to-day work place incidents.

196. The Claimant by her approach of making what we find to be a disproportionate issues out of relatively minor matters, for example, her complaints regarding Mr Hanus splashing a small amount of water in 2017, that he had used "ageist" language and in September 2019 regarding what she described as Mr Dennis' "intimidating" approach to her are all indicative of hostility towards management. We therefore find that this would have been an understandable reason for a reluctance by managers to push the Claimant's career forward and not as a result of her gender.

197. We also find that there was evidence that the Claimant did not present with the softer interpersonal skills and teamwork which the Respondent regarded as significant factors in assessing a potential candidate for promotion to a managerial position.

198. In any event we find that there was no continuing course of conduct of discrimination on account of the Claimant's sex and that her complaints in relation to her named comparators are all out of time.

Age Discrimination

199. As an employee of 55 the Claimant is older than the majority of the Respondent's employees. Most employees in store-based roles are in the age group between 20-40. The Claimant has been by some substantial margin the oldest employee in the Stratford store since the departure of Mr Ciacciarelli.

200. It is therefore inevitable that when comparing the Claimant's position with that of successful candidates for promotion the overwhelming majority, with the

one exception of Mr Ciacciarelli, were substantially younger than the Claimant. What we need to consider is whether, in the opportunity for and consideration of candidates for promotion, the Claimant was treated less favourably on account of her age. We find that she was not. We make this finding for the following reasons.

201. The circumstances of the majority of the complainant's comparators are materially different to her own. Of the comparators identified only three were promoted to Assistant Manager at Stratford, namely Mr Susma, Ms Ambrose and Ms Rakhmonova. All the others identified had already reached at least that level in other stores. Further, even the three who were promoted to Assistant Manager were all promoted from Senior Sales or Supervisor. At the time of their promotions the Claimant was a Sales Assistant.

202. We also refer to the matters set out above relating to sex as reasons why the Claimant was not considered for promotion and in the interest of brevity do not repeat these as they are equally applicable to age.

203. In any event we find that there was no continuing course of conduct of discrimination on account of the Claimant's age and that her complaints in relation to her named comparators are all out of time.

Age and sex generally

204. The Claimant clearly has an educational background which exceeds that of most of her colleagues. However, this is not the same as necessarily having the skills the Respondent requires for its store based managerial positions. These are often less tangible. We find that whilst the Claimant was on an upwardly mobile career trajectory during her time at White City, and initially at Berkeley Street, that her prospects stagnated once she went to Stratford. We do not find that this was on account on her protected characteristics.

205. We find it to be clear that the Claimant had a consistently high level of sales performance. This is well documented and is acknowledged by the Respondent.

206. In relation to promotion opportunities whether on account of age or sex there is no evidence that despite having a very good working relationship with her that the Claimant raised these matters with Ms Leightly on her regular visits to the store. We find that had the Claimant had a genuine wish to explore promotion that she would have done so either with Ms Leightly or other managers. She did not do so. We find that the Claimant failed to take pro-active steps to enhance her prospects of progression, for example, requesting a transfer to a smaller store in a managerial role.

Time limits generally

207. In relation to our findings on claims being out of time we consider whether it would be appropriate to extend the applicable time limits whether under the EqA or ERA. Whilst different tests apply, we find that the answer is the same in that it would not be appropriate. The claims are significantly out of time and there is no reason why it would not have been reasonably practicable to initiate proceedings

under the ERA much earlier and nor would it be just and equitable to extend time under the EqA.

Employment Judge Nicole

Dated: 6 March 2020

Judgment and Reasons sent to the parties on:

09/03/2020

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For the Tribunal Office