EMPLOYMENT TRIBUNALS

Claimant: Miss S McKenzie

Respondents: 1) Ms M Polland, 2) Top Shop/Top Man Ltd

Heard at: London South (Croydon**)**

On: 12-14 August 2020 & 20 August 2020 (in chambers)

Before:

Employment Judge Tsamados
With members:
Mrs C Wickerham
Ms Y Batchelor

Representation
Claimant: In person
Respondent: Mr R Santy, Solicitor

RESERVED REASONS

These are the reasons for the Reserved Judgment dated 30 November 2020.

Claims and issues

1. The Claimant, Miss McKenzie, is employed by the Second Respondent, Top Shop/Top Man Ltd, as a Sales Adviser in its concession in Wimbledon. Ms Polland, the First Respondent, was the Satellite Store Leader at the time of the events in question.

2. By a Claim Form presented to the Employment Tribunal on 20 November 2019 the Claimant brought complaints of race and age discrimination, unlawful deduction of wages and breach of contract against the First Respondent, On 30 December 2019, a Response was presented to the Tribunal by the First Respondent.

3. A Preliminary Hearing on case management was held on 24 February 2020. At that hearing, Employment Judge Balogun, added Top Shop/Top Man Ltd as the Second Respondent and dismissed the complaints of age discrimination and breach of contract on withdrawal by the Claimant. The

Response on behalf of the First Respondent was adopted by the Second Respondent. Both Respondents were given leave to provide an amended Response. The full hearing was listed for 12-14 August 2020, case management orders were set and the complaints of direct race discrimination and unauthorised deduction from wages were further identified.

4. The Respondents submitted amended Grounds of Resistance to their Response on 30 March 2020 and an Agreed List of Issues on 28 April 2020. These are the issues to be determined by this Tribunal. They are set out at pages 28 and 29 of the Joint Bundle of Documents provided by the Respondents' solicitors. A copy is appended to this Judgment.

5. At the start of the hearing, the Claimant clarified that she was not bringing a separate complaint of unauthorised deduction from wages but was seeking her arrears of pay as part of any compensatory award made in respect of the race discrimination complaint. The details of the pay arrears are set out in her Schedule of Loss which is at pages 4-5 of the Remedy Bundle provided by the Respondents' solicitors.

Evidence/Documents

6. The Respondents' solicitors provided the Tribunal with a bundle of documents running to 310 pages (which we refer to as "B" followed by the relevant page number where necessary) and a separate remedy bundle running to 12 pages (which we will refer to as "RB" followed by the relevant page number where necessary). In addition, we had a separate witness statement bundle containing the written statements of both the Claimant and the Respondents' witnesses.

7. We heard evidence by way of written statements and in oral testimony from the Claimant and her witnesses Ms Siobhan McKenzie (the Claimant's mother) and Ms Ashanti Poorman (a former work colleague). We heard evidence by way of written statements and in oral testimony from Ms Michelle Polland and Ms Beverley Durrant for the Respondents. We had two witness statements from Ms Polland. We were also provided with a statement from Mr Daniel Gibbs, who did not attend the hearing to give oral evidence. We advised the parties that this would affect the amount of weight we could give to his statement, if any.

8. We adjourned to read the witness statements and the referenced documents prior to commencing hearing evidence.

9. At the end of the evidence, we heard oral submissions from the Claimant and Mr Santy spoke to written submissions which he previously provided to us and to the Claimant.

Findings

10. We set out below the findings of fact we considered relevant and necessary to determine the issues that we are required to decide. We do not seek to set out each detail provided to the Tribunal, nor make findings on every

matter in dispute between the parties. We have, however, considered all the evidence provided to us and have borne it all in mind.

Background

11. The Claimant was 16 years old when she commenced employment with the Second Respondent in August 2017. She was employed as a Sales Adviser working for 8 hours a week, typically on Saturday mornings and Thursday afternoons. She worked at the Second Respondent's concession within Elys department store in Wimbledon.

12. The Claimant is black. All the other members of staff referred to in this Judgment are white apart from Ms Poorman who is also black.

13. The Second Respondent is a multinational fashion retailer. The events in question took place at either the Second Respondent's concession within Elys department store in Wimbledon or its store in Sutton (save for the Claimant's attendance at her grievance meeting held at the Second Respondent's outlet in Oxford Street). The First Respondent, Ms Polland, was employed by the Second Respondent at the time of the events in question as the Satellite Store Leader of the Wimbledon and Sutton outlets.

14. The Claimant had shopped at the Second Respondent's outlets for many years. She applied for a position as part-time Sales Adviser and was interviewed by Ms Natalie Keal who was the then Wimbledon Team Leader. The Claimant was offered the job. She did not meet Ms Polland during the interview process.

15. At the start of her employment, the Claimant was one of seven people working at Wimbledon. Ms Keal was her line manager (Team Leader). Ms Emma Gjnori was the deputy manager at Sutton. Ms Polland was the overall manager of both the Wimbledon and Sutton outlets. We were aware that staff members changed over time but were not provided with clear evidence as to who worked where and when.

16. We were referred to the Claimant's terms and conditions of employment with the Second Respondent dated 3 September 2017 which is at B37. We were also referred to a subsequent terms and conditions of employment document dated 25 June 2019 at B60, which the Claimant was given when she reached the age of 18 and which records an increase in pay.

17. Whilst the Second Respondent's disciplinary policy is in the bundle, its grievance procedure, which is of more relevance to this case, is not.

18. Whilst reference was made to the Second Respondent's staff handbook, we were not provided with a copy of this. The Claimant's evidence in any event was that she did not get a copy of the staff handbook straightaway but only when she was given access to "Tapp". This appeared to be at some point during the Claimant's employment but we did not hear evidence as to the specific date.

19. Ms Polland told us in evidence that Tapp was an internal app similar to

Facebook which allowed members of the Second Respondent's staff to interact with each other. Tapp included information as to the Second Respondent's policies and the availability of training. There is a Tapp Users' Guide at B176-180 but we were not specifically referred to it.

20. Reference was also made to something known as "PeoplePoint". This appeared to be a centralised internal electronic communication system which was introduced at some point during the Claimant's employment although we were not referred to a specific date. We heard evidence from Ms Polland that this allowed the Second Respondent's staff to clock in and out of work via a thumbprint to staff check and managers to set and to notify staff of work rotas, for notification and recording of absences from work, for staff to make requests for annual leave and for overtime. In effect this appeared to be a centralised method of recording and advising of attendance or otherwise at work and for adjustments to be made to the payroll accordingly. The weakness of it appeared to be that information could be recorded by staff and managers alike.

21. We were referred to the Second Respondent's diversity policy at B30-33. We note that this contains no reference to monitoring diversity of the workforce or of those applying for employment. We have no evidence that such monitoring took place or, if it did, the results of such monitoring.

22. We would also note from the evidence that we heard that none of the Second Respondent's witnesses (including Ms Polland) had received any specific diversity training. Further, they did not have any previous experience of dealing with complaints of race discrimination. In addition, there was an admitted lack of the application of a formalised recruitment procedure and any formalised procedure for the allocation of overtime to staff. We were concerned as to the impact of this, particularly given the disparity in the allocation of overtime (see below), Ms Polland's declared closeness to Mr Gibbs (who was employed at the time of the events in question as a Sales Adviser at Sutton but also working shifts at Wimbledon) and the appointment of a new member of staff, Rosetta, without any interview process being followed.

23. Whilst the Second Respondent has a centralised HR function, they would appear to have had a limited involvement in the events we were required to consider and we could not discern any level of advice or direction being given to the managers involved in these events beyond taking notes during the investigation into the Claimant's later grievance.

Induction

24. The Claimant's store induction was undertaken by Elys. The Claimant's evidence was that she received no formal induction training from the Respondents. She said that, in effect, her knowledge of the Second Respondent's procedures was acquired through being a regular customer in the past, learning on the job, either by watching other members of staff or by trial and error. During her employment she further stated that she saw other new recruits being trained on till procedure, company policy and opening and closing shifts.

25. Whilst Ms Polland's evidence was that the Claimant had received formal training, this was contradicted by evidence given in the notes of an investigation meeting held with her as part of the Claimant's later grievance (at B157-160 at page 159). Indeed, Ms Polland accepted in evidence that she had no direct knowledge of whether the Claimant had received training, she had just assumed she did.

26. Ms Keal was at this time the Claimant's direct line manager.

27. We also note that the Claimant received a Record of Conversation ("ROC") in or around December 2017 because she made a mistake in processing a payment by way of a gift voucher, which resulted in the till being "down" by £40.

28. On balance of probability, we accept the Claimant's evidence that she received no formal training whereas others recruited after her did.

The allocation of overtime

29. We were referred to the staff rosters for Wimbledon for 13 to 2 February 2019, 28 April to 15 June 2019. Admittedly this is a small number of rosters, but it is all that the Respondents provided and indeed considered as part of the later grievance investigation. These rosters indicate the names of the staff employed at Wimbledon during those dates and the number of rostered hours and contractual hours given to each. These further indicate that the Claimant was given a limited number of hours over and above her contract hours as opposed to other part-time members of staff, in particular her then work colleagues Mr McLean and Mr Gibbs.

30. As the Claimant set out in her written evidence, for the week commencing 20 January 2019 Mr McLean was given 27.25 hours of overtime whilst she was given two hours, for the week commencing 27 January 2019 Mr McLean was given 18.5 hours whilst she was given 30 minutes (B49-50). She also stated that the disparity between herself and other members of staff in the allocation of overtimes was a consistent pattern throughout the course of her employment.

31. On balance of probability, having considered the evidence presented to us and having taken a step back and consider the totality of the evidence as to the various events in question, we accept the Claimant's evidence.

ROC December 2017

32. One of the Claimant's complaints of direct race discrimination is that she was issued with an ROC in or around December 2017. This is set out at paragraph 1.1.4 of the Agreed List of Issues (at B 29).

33. The Claimant's evidence was that she made a mistake with an External Brand Voucher having not come across one so complex before. This resulted in the till showing as being "down" by approximately £40. She stated that she took great pride in her work and was mortified. She

apologised to management, including Ms Polland and Ms Keal. The Claimant viewed this as a disciplinary measure which was quite serious and said that a certain number of ROC's could result in dismissal.

34. As a result of this error, she was given an ROC by Ms Polland. Ms Polland told the Claimant that it did not matter and that everyone has ROC's. Whilst apologising, the Claimant said that her error was caused by not being till trained. The Claimant's case is that she should have received till training and did not do so and she was penalised as a result of an error caused by the lack of till training. She alleges that she was penalised in this way whereas other members of staff were not.

35. The Respondents' position is that Ms Polland had no direct involvement in the issuing of an ROC. In her written evidence she was not involved in the issuing of an ROC and that they are not part of the disciplinary process, they are a way of recording that an issue has been raised with the relevant employee both for learning and development and loss prevention processes. She further stated that if an employee had a series of ROCs for a similar issue it was possible that disciplinary performance management processes might be initiated, but certainly that is not the case for the Claimant and so the ROC clearly had the desired effect.

36. On balance of probability, taking into account the lack of any documentary evidence as to the issuing of the ROC or the issuing of ROC is to other members of staff in similar circumstances, we determined that there was no obvious link to the Claimant's race.

37. However, when we stood back and took an overview of the situation in the light of our findings on the other acts of discrimination (below), we did feel that this was a matter relevant to the background of those matters in as far as it was the first indication of issues arising from the lack of training provided to the Claimant. But this did not change our view that this was not a matter in itself that we could reach a finding of race discrimination on.

<u>The Christmas party in 2017</u>

38. This matter arises by way of background and is not pleaded as an act of discrimination.

39. A Christmas party for the staff of the Wimbledon and Sutton outlets took place at a pub in Wimbledon in December 2017. Ms Polland gave out awards to staff members based on their work performance. The Claimant alleges that everyone received an award except for her and Ms Poorman. Ms Poorman said to the Claimant at the time: "isn't it funny we didn't get anything". The Claimant replied, "it might be because I am new", but Ms Poorman laughed and said, "get used to it, you'll never get an award here".

40. In her written evidence, Ms Polland stated that she had no involvement in deciding who won the awards, this was decided by a staff vote. She further stated that there were in the region of 10 to 12 awards given out and the total number of staff employed between the two outlets at any one time was around 18.

41. On balance of probability, we do not find that the Claimant's allegations are made out. But we can well understand the way it looked to the Claimant and to Ms Poorman, given that the two of them, the only two black members of staff, did not get awards and we can understand how that must have felt. We have also considered this having taken a step back and looked at the totality of the evidence with regard to the other events.

Incident on Saturday in January 2019

42. This matter arises by way of background and is not pleaded as an act of discrimination.

43. The Claimant's position is that on a Saturday in January 2019, she was scheduled to open the store and later handover to a colleague, Paeton, at approximately 1.15 pm. However, Paeton did not turn up for the shift. She tried contacting Ms Polland, at the Sutton store, and Paeton, both by telephone, but without success. She spent about 45 minutes after her shift had ended trying to resolve the problem, by which time she was late for a prearranged meal with friends. In the end she had to leave the concession, no one having returned her calls.

44. Before leaving, the Claimant said that she informed Elys' floor manager that there was a staff issue because someone had not turned up for work and that a colleague, Mr McClean, would be arriving at approximately 3:30 pm. She then left to meet her friends but arrive late.

45. During the meal, the Claimant received a message from Ms Polland to the store's WhatsApp group. The WhatsApp group consisted of at least 10 members of staff. Ms Polland said in her message that she could not understand why there were clothes on the rail in the Wimbledon outlet when it said on the daily planner the rail had to be cleared. Ms Polland also messaged "we are adults".

46. Whilst the message did not mention the Claimant by name, it was obvious to the Claimant and would have been obvious to the other group members that she was referring to her as she was the only one in work that day. She felt that Ms Polland was implying that she was lazy and incompetent. The Claimant believes that Ms Polland had based what she said in the message on a photograph of the clothes rail that Mr McLean had sent her. The Claimant found the message hurtful and humiliating because it was visible to most if not all of the other staff members.

47. The Claimant further stated that when she left the concession, the rail had been empty. She believes that the clothes on the rail were probably put there after she left by Elys' staff or customers. She further believes it would have been far more professional and reasonable for Ms Polland to message her privately to find out what had happened before singling her out in front of everybody.

48. Whilst the Claimant was cross examined on this incident and maintained her position, there was no further challenge to her evidence. We heard no

evidence from Ms Polland as to the incident and we were not provided with copies of the WhatsApp messages or the photograph.

49. On balance of probability, having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the events in question, we find the facts as set out by the Claimant and we agree with her contentions. Ms Polland's actions were indicative of a dismissive approach towards her as compared with Mr McLean, accepting his view rather than raising the matter first with the Claimant. Her response by sending the message was to point the finger at the Claimant on the stores' WhatsApp group in such a way that it was obviously the Claimant she was referring to because she was the only other person working that day. We accept that the Claimant felt humiliated in front of her work colleagues.

50. Further, we heard evidence from the Claimant that Ms Polland knew that she was not happy with messages being sent by way of the WhatsApp group. Indeed, the Claimant left the WhatsApp on 18 September 2019 (as indicated at B110).

<u>January 2019 Claimant's attempt to transfer to Kingston</u>

51. This matter arises by way of background and is not pleaded as an act of discrimination.

52. The Claimant's evidence is that she attended an informal interview with the manager of the Second Respondent's Kingston outlet with regard to an opening at the concession within Bentalls department store. The manager asked the Claimant why she wanted to transfer and she replied that there were no prospects of advancement within Wimbledon. The interview went well and the manager said that she would contact Ms Polland to confirm a few matters and then go ahead with the transfer.

53. After about two weeks, Ms Polland telephoned the Claimant and told her to take the phone into the office area for privacy. In the phone conversation Ms Polland was angry that the Claimant wanted to transfer to Kingston. Ms Polland said "it's like you belong to me and then you want to belong to them" or words to that effect. The Claimant stated in evidence that Ms Polland made her feel like something she personally owned.

54. The Claimant's further evidence is that she felt confused and guilty and could not help crying. Ms Polland said that the rest of the conversation could be continued in person when she arrived at Wimbledon later that afternoon.

55. When the Claimant arrived at Wimbledon Ms Polland called her to the office and told her that the position in Kingston had been filled and there was no possibility of a transfer. The Claimant stated in evidence that she was shocked and upset and that she felt that Ms Polland had intervened personally to block the transfer. Ms Polland continued to criticise her for her disloyal nature and asked her why she wanted to transfer. The Claimant's evidence is that she said it was, for example, the pay issues, lack of

progression and what she had written in the WhatsApp group. The Claimant further stated that she asked Ms Polland if she could raise a grievance but Ms Polland warned her off by saying that it was a "long road", implying that it would not be worth going down it.

56. During her later grievance interview on 17 September 2019 (B88-108 at page 101) , the Claimant stated that Ms Polland had called her to say that she thought her actions in seeking a transfer to Kingston were really disrespectful and she had no loyalty to her. She asked why she wanted to move, and the Claimant said it was because of pay issues. In cross examination, the Claimant stated that Ms Polland wanted to commodify her by saying these words and was making the issue one of loyalty and belonging.

57. In her witness statement evidence Ms Polland stated that she was aware in around January 2019 that the Claimant had decided that she was interested in transferring to the Kingston store and had had conversations with the management there. She believed that this arose after the Claimant had fallen out with Mr McLean. She repeated this in oral evidence. Ms Polland also stated in her witness statement evidence that she had invested significant time and effort in seeking to resolve this issue (between the Claimant and Mr McClean) for the Claimant and so naturally was disappointed that the Claimant felt that clearly she had not resolved the matter to her satisfaction and was looking to leave. Ms Polland was aware that the Kingston manager was not as flexible as she was and she wanted to ensure that the Claimant understood what a big leap it would be going from a small concession to a large flagship store. Ms Polland denied scolding the Claimant or making any references to her being disloyal. Ms Polland denied blocking the transfer from happening and said that she did not have the power to do so in any event.

58. We were referred to the notes of the interview with Ms Polland on 2 October 2019 as part of the later grievance process (B118-134). At page 129 Ms Polland was specifically asked if she knew the reason why the Claimant had applied for a transfer to Kingston and she stated no although would have had a conversation about the "Harry thing" (being a reference to Mr Mclean).

59. By this time the Claimant was having problems with Ms Polland with regard to her pay (which we deal with later on) and then there was the issue with the WhatsApp messages. The Claimant accepted that she had issues with Mr McLean but these were not sufficient not sufficient to make her want to leave the Wimbledon outlet.

60. Ms Polland admitted that she was annoyed having invested a lot of time and effort in resolving the issues with Mr McLean.

61. On balance of probability, considering the evidence before us on this point and having stood back and considered the totality of the evidence we heard as to the events in question, we do see that it is more probable than not that the events happened in the way that the Claimant describes. It is of significance that Ms Polland admits her annoyance having invested a lot of

time and effort in the Claimant, albeit she marginalises this to be about the issue with Mr McLean. We feel it is indicative of a wider annoyance and disappointment that the Claimant is seeking a transfer and she is warning her off the job. It is concern to us that the job offer subsequently fell through although we have no clear evidence to suppose that Ms Polland did this we feel that it is an appropriate influence for us to draw given the terms in which the offer was expressed to the Claimant by the Kingston manager. We were also concerned about the words used which did indicate that she viewed the Claimant as hers, and as the Claimant described it, had commodified her.

62. In this context, we also heard evidence as to a work colleague, Erida, being appointed as the Claimant's "workplace buddy" by Ms Polland. Ms Polland's evidence was that this was as a result of the Claimant stating she felt uncomfortable speaking to Ms Keal because Ms Keal and Mr McLean were close. Her further evidence was that the Claimant was happy with this saying it was a good idea. However, we do acknowledge that the Claimant was concerned that appointing a buddy was intended to drive a wedge between her and her mother (to encourage her not to discuss workplace affairs with her).

Training

63. This is pleaded as an act of direct race discrimination at paragraph 1.1.2 of the Agreed List of Issues at B 29.

64. We have indicated above our findings as to the lack of formal induction training being provided to the Claimant.

65. With regard to till training or cashing up training as it is referred to, the Claimant's evidence is that from around the middle of 2018 onwards she was required to open up nearly every Saturday and carried out closing shifts. This involved cashing up. There were some duties that she could not undertake because she was not yet 18 until 6 April 2019. Around this time, she asked Ms Polland if she could be trained for cashing up. Ms Polland replied no because she was unlikely to progress in the staff structure. The Claimant's further evidence is that she said she wanted to be a Team Leader to which Ms Polland laughed and said that it would not happen because she did not work hard enough. She asked Ms Polland for examples but Ms Polland said it was an overall impression and she could not go into specifics.

66. The Claimant's further evidence is that Ms Polland told her that she would not rota the Claimant to cash up again as it would not lead to the progression she was seeking. This was the day before the Claimant found out that she was scheduled to close alone again in June 2019. The Claimant stated that she contacted the Sutton store to find out why she had still not received formal cashing up training. We were referred to B58 which is an email exchange between the Claimant and Ms Ryall in which the Claimant indicates that she is happy to cash up but not comfortable with taking on more responsibilities without being spoken to about it, asked or trained.

67. In evidence, Ms Polland stated that it was not true that the Claimant had not received any till training. She said that this is something that she would have done as part of her induction at Elys and learnt on the job from her colleagues. Ms Polland's further evidence is that further training is offered through Tapp and is employee driven and there was training available should employees wish to do it. However, we accept that there is a difference between training on the job and proper training and we did find that her evidence was evasive and did not actually state that she knew that the Claimant had training.

68. Ms Polland's further position is that she took it that the Claimant did not want to cash up without being given additional pay. Similarly, in the notes of her interview as part of the Claimant's later grievance investigation (at B152-153) Ms Ryall stated that whilst the Claimant had never requested training on cashing up, she thought she had been, but did not want to cash up and wanted more money to do so. The Claimant said in evidence that this was one of the reasons but not the only one and pointed to the email exchange she had with Ms Ryall at B58 in support of this. The claimant further stated that she knew how to cash up front of house but it was back of house, carrying out reconciliation of sales and losses and printing a report that she had no training on. Further she had previously received an ROC in respect of incorrectly processing a gift voucher (as we have dealt with above).

69. On balance of probability, having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the events in question, we accept the Claimant's evidence as supported by the B58 email exchange.

<u>The WhatsApp messages between Claimant and Ms Polland</u>

70. We were referred to a number of WhatsApp messages between the Claimant and Ms Polland at B65-75 which were sent during the Summer of 2019. This issue was raised by the Respondents to challenge the Claimant's credibility and indeed the veracity of her claim in that they are relied upon to indicate that at the time the Claimant and Ms Polland got on well. Ms Polland's evidence was that these exchanges show that she was supporting the Claimant both professionally and personally and offering her additional over-time shifts.

71. In cross examination, the Claimant accepted that they were friendly messages but this did not mean that the discrimination that she complained of did not take place. She stated that the type of racism she complains of is covert and polite and that whilst she and Ms Polland had a rapport, she did suspect her of being racist. She said it was only in the telephone conversation in August 2019 (regarding the recruitment of Rosetta and which we come to later on) that her suspicions were confirmed. Indeed, in cross examination Ms Beverley Durrant, the then Watford Store Leader, who investigated the Claimant's later grievance, stated that she was surprised by how suddenly the relationship between the Claimant and Ms Polland had deteriorated.

72. We also take account of the fact that Ms Polland was the Claimant's employer and the Claimant was seeking to increase her hours from June 2019 onwards (as at B45).

73. On balance of probability, having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the other events in question, we find that whilst these messages do indicate a rapport between the Claimant and Ms Polland at that time, this has to be viewed in the light of the employer employee relationship and certainly changed after the later events and is not at odds with the Claimant's complaints of race discrimination.

<u>The errors with the Claimant's pay</u>

74. These are pleaded as acts of discrimination unless otherwise stated. They are set out at paragraph 1.1.1 of the Agreed List of Issues at B29.

75. The Second Respondent's Team Leaders dealt with rostering staff but did not deal with pay. Individual employees and managers could input some information onto PeoplePoint and regarding absences and shifts worked. However, the Wimbledon pay roll was approved by Ms Polland, save in her absence when it was dealt with by Ms Ryall. Ms Ryall approved the Sutton pay roll. We refer to the notes of the later grievance interview with Ms Ryall at B144.

76. The Claimant stated that other members of staff had pay errors but not to the extent she did. Ms Ryall referred to two other staff with pay errors but did not say where they worked (at B144). Ms Keal said that she was not aware of anyone else with pay errors (at B158). The Respondents provided two examples one of which is referred to in an email at B64 but works at Sutton.

77. Turning then to deal with the range of dates set out in paragraph 1.1.1 of the Agreed List of Issues which are said to be between October 2000 and 17 July 2019. From the evidence before us we identified these as below.

27 October 2017

78. The relevant payslip for this period is at B113. Whilst this was included in the Agreed List of Issues at paragraph 1.1.1 (at B29), we heard no evidence on it and make no findings.

31 August 2018

79. The relevant payslip for this period is at B114. Whilst this was included in the Agreed List of Issues at paragraph 1.1.1 (at B29), we heard no evidence on it and make no findings.

February 2019

80. The relevant payslip is at B204 and there is email correspondence referring

to the issue at B37-38.

81. The Claimant was off sick with tonsillitis for two weeks in February 2019. When she got paid for February 2019, her payslip showed an absence deduction of £89.24 which was incorrect. She told Ms Polland but got no response. She went to Ms Ryall who rectified the error in Ms Polland's absence by giving her cash from the till, albeit at Ms Polland's behest. The Claimant had to travel to Sutton to collect the money and then she had to travel to her bank to pay it in. This is dealt with at paragraph 29 of the Claimant's witness statement and by Ms Ryall in her grievance interview at B144-6. Ms Ryall identified that the wrong code had been input for the absence on Peoplepoint and as a result the Claimant had been put through first day sick for every day of her entire absence. We were also referred to an email at B38 which records the error. This is from "Michelle SM". The bundle index refers to it as correspondence between Michelle Ryall and the Second Respondent. On balance of probability, we find it was Ms Ryall given the notes of the interview and the reference to the document in the bundle index.

82. The Claimant's complaint is the fact that the error was made in the first place.

83. It is not clear where the correcting pay adjustment was later made, although an email at B39 states that the Second Respondent would adjust the March 2019 payslip and that payslip does show a pay adjustment, but of £40.02 gross (at B205).

27June 2019

84. The relevant payslip is at B115.

85. In June 2019 the Claimant received a payslip which showed that she owed the Second Respondent £21.70. She contacted Ms Polland on 28 June, which was her pay day, and told her what had happened but Ms Polland responded in a curt manner and was dismissive about the issue. She said to the Claimant that she did not understand what she wanted her to do about it and she would have to wait until the end of July. The Claimant was shocked. She was also frustrated because of the regularity of these pay errors. When Ms Polland went on holiday again, she contacted Ms Ryall, the Deputy Manager at Sutton who went to some lengths to resolve the matter and arranged for a fast-track payment to be made to the Claimant for early July 2019 by way of bank transfer (rather than being given cash which she had to collect on the previous occasion). It appeared that Ms Polland and Ms Keal for some reason thought that the Claimant had been paid while she was on unpaid study leave from one May to 14 June 2019 whereas this was not the case. The Claimant did not understand why they would both think this when her request was clearly to take unpaid leave.

26 July 2019

86. The relevant payslip is at B116.

87. On 26 July 2019 a deduction of £136.69 was made from the Claimant's pay and described as "recovery". The Claimant was working on the day that she found out and mentioned the matter to Ms Polland. Her response was that it must be in respect of tax. However, it was clear from the payslip that it was not, given that the payslip states "tax – 0.00". In addition, the Claimant had already spoken to HMRC who confirmed that was not. When the Claimant explain this to Ms Polland, she said "it seems like a lot of money for someone like you to earn". The Claimant believes that by this she was referring to her and that the words, someone like you, meant her as a black girl, because by then she had serious suspicions that Ms Polland was being racially discriminatory.

88. In evidence she stated that whenever black customers came into the store, Ms Polland commented that they could not afford what they were looking at and she would assign someone to follow them around. It was also discussed in the department store that she had argued with the manager at a neighbouring concession who was black and the rumour was that Ms Polland called the manager the "N word" under a breath as she walked away. However, she accepted in oral evidence that these were just rumours and gave Ms Polland the benefit of the doubt. We therefore do not make any specific findings with regard to these matters.

89. In evidence, the Claimant also stated that Ms Polland had queried how it was that the Claimant's grandmother had the means to buy the Claimant a Tiffany bracelet. The Claimant stated that she could not help but give Ms Polland a very disapproving look when she said this. And further that she sensed that Ms Polland knew she had crossed the line and offended her and she quickly apologised. Ms Polland's evidence was that she did not say this and she did not even know that the Claimant had a Tiffany bracelet. On balance of probability, having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the events in question, the majority of the Tribunal panel found that this was something that Ms Polland said, particularly given the earlier findings as to her behaviour and attitude towards the Claimant.

90. The Claimant's evidence as to the July 2019 deduction continued that the conversation ended with Ms Polland ensuring her that she would send an email to find out what the deduction was for. However, the Claimant has never seen any email that may or may not have been sent and we were not provided with a copy of one.

91. We reach the following findings in respect of the payroll issues. Ms Polland had sole responsibility for approving payroll matters. This must extend to checking that each member of staffs' payroll details had been correctly entered. It was only in her absence that the payroll was dealt with by others. The Claimant was the only member of staff at Wimbledon who experienced this level of problems with her pay (we refer to B76 which is the Claimant's grievance email dated 3 September 2019). Only two examples of problems experienced by others were provided by the Respondents and these were staff working at Sutton. The errors occurred over a series of months. The evidence indicated that Ms Polland gave the Claimant's payroll errors a lack of importance and priority. The comment that this seems a lot of money for

someone like you to earn does appear to be linked to the Claimant's race. In addition, having stood back and considered the totality of the evidence we heard as to the events in question and in particular we have considered that the Claimant wanted to work more hours but others got more hours where she did not and she wanted to transfer to Kingston but this was blocked by Ms Polland and that generally Ms Polland overlooked the Claimant's concerns and requests and was dismissive in her attitude towards her.

92. Whilst we do not go as far as to suggest that any of the payroll errors were deliberate, we do find on balance of probability that Ms Polland did not apply herself to the pay issues raised or give them the attention they needed. The Claimant was the only person having such pay issues and it was clear that when others intervened the matters were resolved swiftly.

Requests to increase hours

93. These are pleaded as acts of discrimination and are set out at paragraph 1.1.3 of the Agreed List of Issues at B29 as being refused overtime hours and the First Respondent refusing to increase the Claimant's contracted hours.

94. In March 2019 the Claimant asked Ms Keal about increasing her contractual hours. Ms Keal suggested that it was a possibility and that she would discuss it with Ms Polland. After a month had elapsed without hearing anything further, the Claimant contacted Ms Polland herself. We were referred to the Claimant's WhatsApp message to Ms Polland dated 29 April 2019 at B45. Ms Polland's response was that there were no extra hours available.

95. The Claimant's further evidence was that she regularly asked Ms Polland to increase her hours but was told that the Second Respondent did not have the available payroll to do this. However, the Claimant was aware that several other employees, Lydia, Rosetta and Alfie were recruited in June, September and December 2019 respectively. We were referred to their employment terms at B61, 82 & 189 respectively.

96. In cross-examination, Ms Polland said that Alfie was brought in as temporary cover because extra stock was being brought into Wimbledon as a result of Sutton facing being close down. She further stated that Wimbledon had been given additional payroll for this purpose. She was unable to explain why he was recruited for Wimbledon. She also stated that another member of staff, Marina, was recruited to Sutton on the same basis as Alfie.

97. The Claimant responded in evidence that both members of staff were still work at Wimbledon although Ms Polland replied that she did their employment position. We were somewhat surprised by this answer because whilst we accepted that she might not know the position now given that she left the Second Respondent's employment in January 2020 this did not explain why she would not know the position at the time of her employment.

98. The Claimant's position was that if they had both been recruited at that time why had she been told there was no additional payroll? She pointed to the investigation meeting notes of an interview with Ms Polland in relation to her later grievance which begin at B118. At B123 in the middle of the page, Ms Polland states that "Harry left Wimbledon and Lydia replaced Harry. Lydia now coming to Sutton to replace Jack who has just gone to Uni and Rosetta replacing Lydia. All like for like vacancies no extra hours." This appeared in contradiction to Ms Polland's evidence to the Tribunal. Whilst we had been provided with some rosters, these were incomplete and do not cover the period beyond mid-June 2019 (at B48-57). On balance of probability, we did find Ms Polland's explanation to be unsatisfactory and preferred the evidence of the Claimant.

99. On 30 August 2019, the Claimant again asked to increase her contracted hours. She told Ms Polland, Ms Ryall and Ms Keal that she could be much more flexible as she had finished sixth form and would be available five days out of seven per week. Ms Keal sounded positive about the prospect and said that she would speak to Ms Polland who would then contact the Claimant the following day.

100. The following day, on 31 August 2019, the Claimant was working at the Wimbledon concession, when Rosetta, a sales adviser from the Oasis concession, came over to hug her and say that they would be working together. Rosetta was very happy and told the Claimant about not having to do an interview and that Ms Keal and Ms Polland had just offered her the job. In addition, she stated that they had both assured her they would be very comfortable to accommodate her limited flexibility.

101. The Claimant's evidence was that Rosetta had limited availability because she was only 16 years old at the time and ought not to have been carrying out opening and closing shifts. In addition, she was also still in sixth form and so would have limited flexibility around studying hours.

102. Ms Polland's explanation at B124 of the investigation meeting which was part of the investigation into the Claimant's later grievance was that the reason she did not interview Rosetta was that she had been told by Ms Keal that they had worked together in Ely's for two years and her customer service was really good. However, this would mean that Rosetta was 14 years old when she started her employment which certainly appears improbable.

103. On balance of probability, we accept the Claimant's evidence and in any event the Respondents did not dispute that Rosetta was given the job in the manner described.

<u>31 August 2019 Claimant's telephone conversation with Ms Polland</u>

104. This is the conversation in which the Claimant alleges that Ms Polland said to her "I don't know whether I'm being really thick or you are" which is set out at paragraph 1.1.5 of the Agreed List of Issues (at B-29), as an act of discrimination.

105. The Claimant's evidence is that whilst she appeared happy for Rosetta on the surface, underneath she was very hurt. She made her excuses to Rosetta after she had told her about the job and she went to the locker room to get her phone and called her Nan for guidance and support.

106. She explained to her Nan what had happened and expressed her concern about what she had heard from Rosetta and the concerns that she felt having been told there was no payroll for overtime or any increase in hours. In evidence she expressed to us her shock and hurt at being told that Rosetta was not even interviewed whereas she had battled for months for extra hours and to be treated equally.

107. We have no reason other than to accept the Claimant's evidence on face value and can well understand how she would have felt in the circumstances.

108. After speaking with her Nan, the Claimant called Ms Polland and asked if Ms Ryall had passed on the message about her wishing to increase her contracted hours and to find out if this was still a possibility. Ms Polland again told her that the company could not afford it. The Claimant pointed out that this was not consistent with the recruitment of Rosetta. She said that she felt Ms Polland was prejudiced towards her and that Rosetta not being interviewed made her feel like "she would rather give the hours to anyone but her".

109. Ms Polland reacted very angrily and spoke to the Claimant in a condescending tone and told her that she did not know and understand the intricacies of payroll. During the conversation Ms Polland used words to the effect "I don't know whether I'm being thick or you are?" and "I don't have to answer to you". In addition, she told the Claimant that Rosetta's recruitment was nothing to do with her. The Claimant was shocked at what Ms Polland said to her and the tone she had taken and started to cry.

110. During the investigation into the Claimant's subsequent grievance Ms Polland was asked about the conversation. We refer to B127-129 of the notes of her interview. Ms Polland states that she found the Claimant's tone during their telephone conversation to be incredibly rude, abrasive and demanding, wanting to know why the Second Respondent had taken Rosetta on. Ms Polland further states that she told the Claimant in quite a stern way that she did not feel it was her business as she not even told Ms Keal. She states that she tried to explain about the payroll issues but none of this had any impact on the Claimant. She denied making any remark along the lines of her or the Claimant being thick.

111. Whilst Ms Polland referred to two witnesses, Felicity and Barb who were by the phone at that time, we note from their subsequent grievance investigation interviews that one of them stated that she heard no cross words and the other referred to an incorrect date of the conversation and so is not even clear if she was referring to the same conversation as the one in question (a matter not picked up by Ms Durrant who conducted the grievance investigation).

112. Ms Polland also states in the investigation meeting that she spoke to Ms Keal about the conversation and told her to tell the Claimant that if she thought she was being short with her it was because Loss Prevention Sutton store at the time. However, she denied asking Ms Keal to apologise for her behaviour. When asked during the grievance interview to explain what she meant by being short with the Claimant, Ms Polland explained that she did not use her usual tone of voice, she was just to the point, factual, just more stern, than the Claimant was used to hearing from her (B129).

113. After the telephone conversation, the Claimant again telephoned her Nan and explained to her what had happened. She was very upset and went to the toilet to compose herself before she returned to the till, acting like nothing had happened. Shortly after this, Ms Keal arrived for her shift and approximately 20 minutes later the phone rang and Ms Keal answered it and had a conversation with Ms Polland. Sometime later, Ms Keal approached the Claimant and told her that Ms Polland said to say sorry for earlier, it was because Anne-Marie (of Loss Prevention) was in. The Claimant did not think she could hide the upset on her face, and Ms Keal acknowledge this was somewhat shocked and ask her if it was that bad? The Claimant replied it was fine as she did not want to discuss the matter with her

114. We refer to the interview with Ms Keal on 17 October 2019 which was undertaken as part of the investigation into the Claimant's subsequent grievance (at B157-160). Ms Keal states that during a telephone conversation with Ms Polland, which is stated to have been on 31 July 2019 (but more probably than not must be the one to which the Claimant refers), Ms Polland asked her to ask the Claimant if she thought she had "been off on the phone". However, she denied that Ms Polland had asked her to apologise to the Claimant on her behalf. Ms Keal further states that she spoke to the Claimant who told her that she was not happy that Rosetta had been hired. Ms Keal additionally states that she later telephoned Ms Polland and told her this and Ms Polland responded, "yes that was what it was about". Ms Keal also comments that the Claimant was very off on that day and walked away when Rosetta, who worked in the opposite department, came over to ask questions about coming to work for the Second Respondent. Ms Keal describes it as "a very strange day"

115. We considered the following matters. having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the events in question. We decided on balance of probability that it was more probable than not that Ms Polland had relayed a message for the Claimant via Ms Keal as an apology. Simply asking Ms Keal to tell the Claimant that if she thought she was being short or off with her was because Loss Protection were there is an incomplete answer. It lacks the obvious missing ingredient which was to say sorry or to apologise. In addition, we then thought why would Ms Polland even say as much simply on the basis that the Claimant might think she was being short. This was more consistent with a conversation occurring the way that the Claimant alleges. It did strike us that the conversation must have more probably have been the way that the Claimant described it for Ms Polland to

even say as much as she admits to Ms Keal. The description of the conversation and Ms Keal that the Claimant describes also seems more probable than not and the wider circumstances certainly support the degree of upset that the Claimant describes not simply because Rosetta had been appointed but the manner in which had happened. We have also taken into account that Ms Keal is not asked and does not mention her involvement in Rosetta's recruitment as alleged by Ms Polland in her earlier grievance interview held on 2 October 2019 (at B124). We also take into account that within the same grievance interview Ms Pollard states that at the time of the telephone conversation she had not even told Ms Keal about Rosetta's recruitment which does appear to indicate that she took the decision to appoint Rosetta without interview

116. We therefore find on balance of probability that the conversation and events occurred as described by the Claimant.

117. We also considered the words that were used by Ms Polland during the telephone conversation and that she admitted that she was short/harsh with the Claimant and that it was out of the ordinary, and that the Claimant said in evidence that she was the only member of staff that Ms Polland spoke to in this manner. We heard no evidence from the Respondents addressing this latter point. As to the words used, we were concerned that calling the only black member of staff "thick" and the other comments made by Ms Polland as to "someone like you" and as her grandmother having the means to buy a Tiffany bracelet, were words which were often seen as hallmark words denoting racism.

118. In the circumstances having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the events in question we do feel that it is appropriate for us to properly draw the inference that Ms Polland was behaving in a racially discriminatory manner towards the Claimant.

119. In cross-examination Ms Polland said that Rosetta was recruited by Mr Gibbs and Ms Keal and that it was Ms Keal who offered her the role. However, as we have pointed out this is at odds with what was said by Ms Polland in her grievance interview and is not supported by anything Ms Keal said in her grievance interview (and not picked up by Ms Durrant who was investigating the grievance". Would also add that when the Claimant asked to increase her hours, the skill indicated that she would need to ask Ms Polland. Further Ms Polland said in her supplemental statement that Rosetta was recruited to replace another member of staff who had gone to Sutton and that she did not know why Rosetta was not interviewed. Moreover, in her supplemental witness statement she states that she understood that Rosetta had initially spoken to Mr Gibbs about coming to work for the Second Respondent, that he put in a recommendation to Ms Keal who offered her the role. And to repeat at B124 Ms Polland stated that she took it from Ms Keal that she and Rosetta had worked together in the least for two years and her customer service was really good. The Claimant has told us that Rosetta was aged 16 years old at that time which does make this seem improbable.

120. For the sake of completeness, Ms Keal states in her grievance interview at B157 that she could never authorise overtime or anything like that. At B 158 she states that "we had hired someone else - Rosetta" . However, the interviewer does not pinned down what extent if any Ms Keal was involved in Rosetta's recruitment.

121. On balance of probability, having considered the specific evidence and having stood back and considered the totality of the evidence we heard as to the events in question, we believe that Ms Polland offered Rosetta the role without interview when knowing the Claimant wanted to increase her hours.

122. In oral evidence Ms Durrant said that she would not have recruited a member of staff without interview on this basis. Indeed, she used the word "unusual" to describe the process. She also stated that she could understand why the Claimant would question it but she did not believe it had anything to do with race.

<u>The headcount explanation</u>

123. We heard evidence as to the need to have a certain number of staff working in each of its outlets at any given time and that each outlet was allocated a certain amount of money in respect of its payroll.

124. The evidence arose during the grievance investigation and from the letter from Ms Durrant to the Claimant of 14 November 2019 containing the outcome of her grievance (B163-170). This was referred to as the "headcount". The Respondents' relied on this to justify why it was not possible to simply increase the Claimant's hours of work when she requested additional hours. At B166 Ms Durrant explains that if the headcount in a store is four and one person leaves, their hours cannot be allocated to someone else because this leaves the headcount too low and could negatively impact on the ability to cover trading hours in the store.

125. In oral evidence the Claimant acknowledged that she understood the headcount explanation but said that it did not happen in practice. She said in oral testimony that when Rosetta joined Lydia was still working at Wimbledon and that when Camilla left Ms Keal's hours were increased. She did not accept the argument that this was purely down to headcount issues. She made the point that if it was purely innocent, why was it only her that was refused overtime, why was this explanation not given at the time and why was Ms Polland so rude to her when she queried it. In particular, she stated that at the time of Rosetta's recruitment in August 2019 the Wimbledon headcount was only three.

126. The only documentary evidence as to rosters were provided with is at B48-57. We would say that we found the rosters unclear and incomplete. But what they do show is that some days there was only one person working, eg B50 and B53 and we know that the Claimant was the only member of staff working on the day of the rail incident. And on at least one day there was no one working at B56. We have already made the point that they do show that others were given over time, especially Mr McClean as opposed

to the Claimant. Whilst Ms Durrant refers to information received from the payroll team as to the number of hours of overtime given to the Claimant since January 2019 and which she relies upon as demonstrating that the Wimbledon had been allocating the Claimant over time (at B165), no documentary evidence was provided in support and Ms Durrant's evidence was that she had not considered the amount of overtime allocated to any other member of staff in Wimbledon.

127. However, we did follow the headcount issue. But on balance of probability, we do feel that it was a bald excuse given to the Claimant as and when it suited the Respondents, given the extent to which others got over time/extra hours.

128. Further, we note that after Ms Polland had left and a new manager replaced her, the Claimant stated that he had been nothing but entirely professional affair in all scenarios, there had been no further errors in her pay and no ROCs is and she has had over time every week that has been possible to provide. This is not challenged by the Respondents and we have no reason other than to accept the Claimant's evidence on face value.

<u>October 2019 recruiting of Marina</u>

129. For the sake of completeness, we refer to this. It was not disputed she was recruited. Ms Polland said that Marina was recruited to Sutton due to its imminent closure. It was otherwise not explored in evidence and so we make no further findings on it. In any event, we did not believe that it took matters any further.

<u>Being discouraged from bringing a grievance?</u>

130. This is set out at paragraphs 53 and 54 of the Claimant's witness statement. In essence she sets out her attempts to get HR's details from Ms Polland and her a negative response amounting to discouraging her in pursuing a grievance. However, this was not put to Ms Polland in evidence and so we make no findings on it.

<u>Grievance process</u>

131. Whilst the Claimant has not pleaded the conduct or outcome of the grievance process as part of her claim, we do believe it is relevant to consider it if only to form an overall view of the events. We have already referred to it above in respect of the various investigation meetings with members of staff including Ms Polland as well as Ms Durrant's outcome letter.

132. By email dated 3 September 2019 the Claimant raised a grievance against Ms Polland. This is at B76. In essence, the Claimant complained that she was being denied extra hours and treated unfairly because of her race. The grievance sets out specifics of this, up to and including the incident involving Rosetta and the remark made during the course of the telephone conversation with Ms Polland referred to as "am I being thick". The grievance email attached screenshots of a number of text messages

between herself and Ms Polland at B77-80. We note that in this email the Claimant refers to working with two others at that time.

133. The Second Respondent undertook a number of investigations with staff in furtherance of the grievance. The bundle contains notes of those interviews which were conducted by Ms Durrant as follows: the Claimant dated 17 September 2019 at B88-108; Ms Polland dated 2 October 2019 at B118-134; Ms Barbara Webb, the Team Leader at Sutton dated 2 October 2019 at B135; Ms Felicity Le Cras, Sales Advisor at Sutton dated 16 October 2019 at B140; Ms Ryall dated 16 October 2019 at B141-156; and Ms Keal dated 17 October 2019 at B157-160.

134. By letter dated 14 November 2019, Ms Durrant wrote to the Claimant setting out the outcome of the investigation into her grievance. This is at B163-170. The letter set out the evidence that had been considered and summarise the grievance as follows:

- *Being treated unfairly because of your race, specifically these examples combined:*
  a) being denied extra hours
  b) other staff being recruited when you had requested extra hours
  c) being paid incorrectly

- *Michelle Polland saying "are you thick?" during a telephone conversation*

Additional to your grievance email you raised some extra points at the meeting. Whilst these did not form part of your formal written grievance, I have also addressed the points below:-

- *Feeling like you have to be involved in WhatsApp messaging*
- *not wanting to cash up any more*
- *not being paid for travel expenses*
- *an ROC for unauthorised absence that you felt was unfair.*

135. In respect of the denial of extra hours, Ms Durrant found against the Claimant. Whilst her findings indicate that she checked with the payroll team who informed her that the Claimant had completed 113.25 hours of overtime since January 2019 from which she concluded that the store had been allocating over time to the Claimant, were not provided with any documentary evidence in support of this and Ms Durrant said in evidence that she had not considered any statistics as to how much overtime had been allocated to others during the same period.

136. In respect of the recruitment of other staff when the Claimant had requested extra hours, Ms Durrant found against the Claimant although she indicated that the information relating to the allocation of overtime could have been communicated more clearly to her so that she understood how the payroll planning/recruitment process worked.

137. In respect of being paid incorrectly, Ms Durrant found against the Claimant. We note that Ms Durrant found that the errors were not made by one person and they were not all inputting errors. She also found that both Ms Polland and Ms Ryall acknowledged that there had been issues with pay errors and they followed up on each one and as far as they were aware they had resolved all of the queries to date. Ms Durrant apologised for these errors which she was confident were not deliberate and not actioned by any one person. However, she did find that the Claimant was still entitled to an outstanding amount of £242.90 in respect of her salary. There does

not appear to be in any consideration as to Ms Polland's attitude or approach to the Claimant or whether anyone else had the degree of payroll errors.

138. With regard to the "are you being thick?" comment, Ms Durrant found against the Claimant. We have made our findings as to this particular allegation above and we do not propose to repeat them here.

139. We do not propose to set out the findings with regard to the additional points raised by the Claimant given that they did not form part of the incidents relied upon as direct discrimination.

140. At the end of the letter, Ms Durrant set out a number of recommendations which address matters that she felt concerned about during the process. These are set out at B170 and include the need to tighten up on reporting lines and communication, as well as the provision of training for those responsible for payroll input and exceptions on Peoplepoint and full till training for the Claimant.

141. The letter ended by advising the Claimant as to her right of appeal within 10 calendar days of receiving the letter.

142. The Claimant did not appeal. In oral evidence she stated that she could see no point in doing so and in any event was concerned about the time limit within which to commence Tribunal proceedings and had started the Early Conciliation process.

143. The Claimant gave evidence that she did send an email to Clare Rudden, the Second Respondent's HR Officer, raising her concerns arising from the outcome of the grievance. However, this is not in the bundle although we have what appears to be a reply from Ms Rudden at B187. This dealt with a number of concerns raised by the Claimant and indicates that on her return to work on 23 November 2019, after a period of ill health absence, was to be provided with till training and TAPP training.

<u>Other matters</u>

144. The Claimant is seeking loss of benefits in the sum of £97.60 which is set out in detail within her Schedule of Loss within the Remedy Bundle (RB4). She referred to this in evidence and it is also part of her grievance. The sum that she seeks its reimbursement of travel expenses incurred when she was required to travel to Sutton to be paid her outstanding wages and then to her bank to pay it in and to the grievance meeting. Whilst the Second Respondent denies this within its counter schedule of loss (at RB 11), we had no evidence from the Respondents on it.

145. The Claimant has also claimed loss of earnings in the sum of £98.48 wrongly deducted as an illness deduction however we heard no evidence about this at all beyond what is set out in her Schedule of Loss (RB4).

146. Whilst we had a witness statement from Mr Gibbs, in view of its contents and his lack of attendance we attached no weight to it.

147. Finally, we would note that Ms Polland is no longer in the Second Respondent' s employment and that she was made redundant leaving in January 2020 along with other members of staff.

Relevant Law

148. Section 13 of the Equality Act:

> *Direct discrimination*
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Conclusions

Time limits

149. Section 123 governs time limits under The Equality Act 2010. It states as follows:

> *(1) [Subject to sections 140A and 140B,] 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.*

150. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

151. The factors to take into account (as modified) are these:

a. the length of, and reasons for, the worker's delay;
b. the extent to which the strength of the evidence of either party might be affected by the delay;
c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

152. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or

to the chances of a fair hearing by the element of lateness.

153. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account (Apelogun-Gabriels v Lambeth LBC and another [2002] IRLR 116, CA).

154. If the delay was because the worker tried to pursue the matter in correspondence before rushing to Tribunal, this should also be considered (Osaje v Camden LBC UKEAT/317/96.

155. Where a claim is outside the time limit because a material fact emerges much later a tribunal should consider whether it was reasonable of the worker not to realise s/he had a prima facie case until this happened (Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490, EAT)

156. We did give consideration to the time limits within which to bring complaints of direct discrimination as set out in section 123 of the Equality Act 2010. We also considered whether this was a situation where there was a continuing course of conduct and/or whether to exercise our discretion to extend time. The claim form was received by the Employment Tribunal on 20 November 2019 following a period of Early Conciliation between 13 November and 14 November 2019. This would mean that the earliest incident that could be in time would be on 14 August 2019.

157. However, neither party raised any time limit issues in evidence or submissions. Whilst the Claimant was unrepresented, the Respondents were professionally represented.

158. In any event we formed the view from our findings that this was a continuing course of conduct by Ms Polland extending into the start of the time limit. We did feel that the matters that we have determined did point to a discriminatory regime as has been identified within case law as to what is commonly referred to as continuing discrimination. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a 'continuing discriminatory state of affairs'.

159. We also note in particular that, the pay issue was still live during the course of the grievance process and the outcome letter identified that the Claimant's pay was still wrong in November 2019 (as explained at B187) and she was paid her outstanding wages in the November 2019 pay roll (as referred to at B166) and that the grievance process did not conclude until receipt of the outcome letter on 14 November 2019 (at B163-170). By this time, the Claimant was in the Early Conciliation process.

Burden of Proof

160. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less

favourably because of race than that person treats or would treat others. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

161. Under section 136 of the Equality Act 2010, 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 that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

162. The Tribunal can take into account the Respondents' 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.)

163. We have as we have indicated also looked at the events in question as a whole as well as individually so as to form an overview of the situation that the Claimant faced at work during the relevant times.

164. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondents' explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

165. We have considered the evidence that was put before us and have reached findings of fact as indicated above having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts where we felt it appropriate to do so. Unless otherwise indicated we have drawn a comparison between the way in which the Claimant was treated and the way in which a hypothetical comparator was or would have been treated in circumstances of no material difference other than race. This was defined at paragraph 2.1 of the Agreed List of Issues as a white person working as a Sales Assistant in the store where the Claimant worked.

166. We would comment that the Respondents did not provide much in the way of evidence as to such processes as the allocation of overtime hours and the recruitment and selection of staff. In addition, we had limited evidence as to the hours worked by staff within Wimbledon and the provision of overtime, and there was no evidence presented as to the breakdown of staff within the Second Respondent's workforce nationally, within London or within other outlets to the Wimbledon concession. This was of significance in determining whether or not the Respondents had put forward a non-discriminatory explanation for the way in which the Claimant was treated particularly in respect of the allocation of overtime and the recruitment of staff.

Outcome on liability

167. We have reached the conclusion that the following acts of unlawful direct race discrimination (taken from paragraph 1 of the Agreed List of Issues at the 28-29) made out against both the First and Second Respondents:

    a. the series of payroll errors between February and July 2019;

    b. not being given till training induction training;

    c. Being refused overtime hours and the First Respondent refusing to increase the Claimant's contracted hours;

    d. The First Respondents saying "I don't know whether I'm being really thick or you are " during a telephone conversation in August 2019.

168. With regard to the alleged act of unlawful discrimination at paragraph 1.1.4 of the Agreed List of Issues, whilst we did not find that this in itself amounted to unlawful race discrimination, we nevertheless took into account as forming part of the background as to the issue of lack of training.

169. Whilst we were not requested to make any specific recommendations to the Second Respondent and are not seeking to do so, we would make the following comments which we hope will be of some assistance to the Second Respondent in the future:

    a. The lack of formal procedures or systems being in place and reduced to writing lends itself to possible favouritism and/or unlawful discrimination whether conscious or subconsciously;

    b. The lack of structured and specific diversity training for staff leads to possible unlawful discrimination whether conscious or subconsciously;

    c. The lack of training for those dealing with the issue of race and other forms of discrimination at work leads to possible inadequate investigation and resolution of complaints and grievances;

    d. The lack of direction from an HR function potentially compounds the situation of line managers not experienced in dealing with issues of race

and other types of discrimination in failing to adequately investigate and resolve complaints and grievances;

e. The apparent lack of diversity monitoring or willingness to look for such information if it is available does not assist the Second Respondent in taking a general overview of any issues of lack of diversity arising from favouritism and/or allocation of overtime and/or in the recruitment and selection of staff and on a local level in terms of carrying out adequate investigation and resolution of complaints and grievances as to unlawful discrimination at work;

f. All of this of course potentially affects the way in which managers behave towards members of staff and deal with complaints of discrimination and in particular allows the sort of situation that we have found in this case to exist and to go unchallenged.

Outcome on remedy

170. We find that the First and Second Respondents are jointly and severally liable for the acts of discrimination we have set out above.

171. We considered our powers to award compensation pursuant to section 124 of the Equality Act 2010 and the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction Ltd [2017] EWCA Civ 879 second addendum 25 March 2019 (the original Presidential Guidance being issued on 5 September 2017) This is the Presidential Guidance that was in force at the time of the presentation of the Claimant's claim. The Presidential Guidance relates to what are commonly known as the Vento Guidelines arising from the case of Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871, [2003] IRLR 102 as it has been affected by subsequent case law and updated to take into account inflation.

172. Having considered the evidence provided to us and the documents contained within the Remedy Bundle we make the following awards:

Loss of benefits

173. £97.60 in respect of the non-payment of the Claimant's travel expenses. Whilst there might not be any contractual obligation to pay this, we do see it as within our discretion to make such an award of compensation.

Injury to feelings

174. In her witness statement, the Claimant explained that she found her treatment at work right up to bringing the Tribunal proceedings to be very stressful and she suffered considerable anxiety and upset. This is set out at paragraphs 87 to 92 of her witness statement.

175. We were referred to documents within the Remedy Bundle in support. We have taken into account the letter from the Claimant's Doctor dated 27 February 2020 referring her for counselling which refers to the Claimant

presenting with anxiety symptoms and panic attacks since October 2019, worsening lately due to stress related to employment (RB2-3). We also took into account a letter dated 13 May 2020 setting out the dates of therapy sessions with the Claimant (RB6). We further took into account the letter from the Claimant's Doctor dated 2 June 2020 relating to the Claimant suffering from anxiety and panic attacks since October 2019, secondary to the stress caused by work and the subsequent legal proceedings (RB10).

176. We have taken into account the Claimant's age at the time of the events in question, but it was her first job and also the period of time over which the events took place.

177. We have also taken into account the comments made to the Claimant by the First Respondent as well as the First Respondent's attitude and behaviour towards her.

178. We have also taken into account the lack of any real investigation into the issue of race discrimination beyond a superficial approach. Indeed, beyond asking the various protagonists whether there were any issues of race discrimination, Ms Durrant did not really explore the matter and did not even take the basic step of looking at comparative evidence broken down in terms of race relating to the allocation of overtime and as to the recruitment and selection of staff. There are also several areas which needed further to be pursued from answers by staff in the various interviews but these were not.

179. The Claimant was on occasion tearful and upset during her evidence. At the end of her testimony, in answer to a question from Miss Batchelor, she said the following:

I was made to feel really worthless and voiceless by Michelle Polland and HR. I feel like loads of the things I said happened were entirely dismissed. It made me feel very insecure and I have anger management problems and aggression and I am not that kind of person. I have been made to feel ostracised, for example sending the picture of the rail and Michelle commenting on it.

I was made to feel inferior, as people with less experience than me were given training and they invested time in others and not me, disregarding what I have done. And then others come along. N never worked a day in her life before coming into Top Shop and now she is in a senior position. We both started at the same time and she has nothing more than me.

I felt insecure and scared of life. How I am coming across? My first job at 16. Is this it, how it is to have a job? Is this how life is? Is this how I am expected to go through this as a black person all my life? Is it worth going to Uni. I was very hurt.

180. We found this very poignant and compelling and it gave us a clear insight into how she felt about the way she had been treated at work.

181. We were also concerned by what was said in the Respondents' written submissions on the final page in the context of remedy. This was to the effect that because the Claimant still works for the Second Respondent she could not possibly be as distraught as she made out on the witness stand and would have looked for another job in retail. Further, the written submissions state that the panic attack that the Claimant described in her written evidence came on as a result of making false allegations against Ms Polland and believing that this led to Ms Polland losing her job. Whilst we accept that the Respondents' representative was entitled to challenge the

Claimant's evidence and credibility, we did feel that the written submissions were expressed in inappropriate terms, went further than was appropriate and was not based on the evidence but on assertion alone.

182. We believe that this is a case which falls within the mid band of Vento which following the relevant Presidential Guidance is between £8800 and £26,300 and we have also taken into account the impact of the unlawful treatment on the Claimant's health. Whilst the Claimant had asked for £10,000 within her Schedule of Loss (at RB4-5) we think that a higher award is justified. Doing the best we can, we believe that an award of £16,000 is appropriate.

183. We therefore make a total award of £16,097.60.

Employment Judge Tsamados
Date 8 December 2020