EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106968/2020

Final Hearing Held by Cloud Video Platform on 18 – 22, 25 and 26 October 2021

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Employment Judge A Kemp
Tribunal Member E Coyle
Tribunal Member A Shanahan

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Ms Robyn Brindley	**Claimant** **Represented by:** **Ms C Curran,** **Friend**
ITX UK Ltd	**Respondent** **Represented by:** **Ms M Bayoumi,** **Counsel** **Instructed by:** **Mr D Lyons,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that

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1. **the claims made by the claimant under sections 13 and 26 of the Equality Act 2010 do not succeed and are dismissed.**

2. **The claimant's application to amend her claim to include a claim for breach of contract or unlawful deduction from wages in respect of a deduction from the sums due to her on termination for "undertime" is allowed.**

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3. **The claim for breach of contract or unlawful deduction from wages in that respect is continued to a hearing to address any further evidence the respondent wishes to lead on the merits of that claim, and evidence from both parties on remedy if it succeeds.**

4. **The claims for breach of contract or unlawful deduction from wages on other grounds are dismissed.**

REASONS

Introduction

1. This was a Final Hearing on the claims made by the claimant for direct discrimination and harassment under the Equality Act 2010 in relation to the protected characteristic of gender reassignment, together with claims as to notice pay, a claim for breach of contract, and for holiday pay, which is or at least may be a claim for unlawful deduction from wages. She was represented by a friend, Ms C Curran, who is not legally qualified or experienced. The respondent was represented by Counsel, Ms Bayoumi. The respondent denied all the claims made, and raised issues as to jurisdiction referred to below.

2. The hearing took place by Cloud Video Platform remotely in accordance with the orders made at the Preliminary Hearing on 26 March 2021. The hearing was conducted successfully, with the parties, representatives and witnesses attending (in the case of the witnesses they did so individually when called to give their evidence) and being able to be seen and heard, as well as being able themselves to see and hear. There were some breaks in connection which were managed at the time, and in particular communication difficulties during the evidence of Ms Russell that led to delay and the interposition of Mr Flood's evidence with agreement of the parties, but that was in due course resolved. The Tribunal was satisfied that the arrangements for the Final Hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause

list. It was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence it heard.

3. There had been three previous Preliminary Hearings in this case. The first was on 13 January 2021, and afterwards the claimant produced Further and Better Particulars of her claim, later considered as an amendment application. The second was on 26 March 2021 when a comprehensive list of claims made was noted, and arrangements made for the Final hearing. The third was on 6 April 2021 when the application to amend was considered, and afterwards granted.

Issues

4. The parties had agreed a list of issues, which the Tribunal adopted but with some modifications, as follows

   (i) Is any alleged detriment suffered by the claimant outwith the jurisdiction of the Tribunal under section 123 of the Equality Act 2010 and in that regard (a) was there any conduct extending over a period, and if so what conduct over what period, and (b) in the event that any claim is otherwise outwith the jurisdiction of the Tribunal is it just and equitable to consider the claim?

   (ii) Did the respondent directly discriminate against the claimant because of the protected characteristic of gender reassignment under section 13 of the Equality Act 2010 in the respects alleged by the claimant in her pleadings?

   (iii) Did the respondent engage in unwanted conduct related to the claimant's protected characteristic of gender reassignment under section 26 of the Equality Act 2010 in the respects alleged by the claimant in her pleadings?

   (iv) Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant under section 26?

   (v) Was the respondent in breach of contract in the payment it made for notice pay?

(vi) Was there an unlawful deduction from the wages of the claimant by the respondent in respect of its payment to her of holiday pay?

(vii) If any claim is successful, to what remedy is the claimant entitled? That includes issues of whether there were losses sustained by the alleged discrimination, the award for injury to feelings, and the proper quantification of the sums due in respect of notice and holiday pay.

Preliminary Matters

5. There were two preliminary matters that the Tribunal addressed prior to the hearing of evidence. The Tribunal had been provided with an Inventory of Documents, otherwise referred to as a Bundle, a List of Issues, and written witness statements. It had read all those documents before the start of the hearing. The Tribunal had noted that the witness statement of the claimant herself did not address the detail of the matters on which she sought to rely for the discrimination claims in her pleadings, did not refer by page number to any document provided, did not directly address the other claims and did not refer to the issue of remedy in detail. The Tribunal raised that with the parties at the commencement of the hearing. After hearing from them it resolved to proceed with hearing evidence, on the basis that the respondent intended to cross examine the claimant on the facts as alleged, by reference where appropriate to the documents that the respondent considered relevant, then to consider whether or not it, the Tribunal, would ask questions of its own.

6. The Tribunal further noted that the claimant had tendered a Schedule of Loss but had included within that claims not set out previously, and not referred to in the list of claims set out in the Note of the Preliminary Hearing on 26 March 2021. This was also the subject of discussion, and it was agreed by the parties, and accepted by the Tribunal, that the hearing proceed on the issue of the merits of the claim only leaving the matter of remedy to be determined at a separate hearing, if that was necessary. An issue as to amendment arose as addressed below.

7. The Judge explained to the claimant and her representative, who is not legally qualified and has very little experience of Tribunal matters, how the

Final Hearing would be conducted, the nature of questions in cross examination being to challenge evidence given that was not accepted and to put to the witness matters not covered by them which the party intended to, or had, led in its own evidence which that witness was able to comment on, and re-examination being to ask further questions in relation to matters raised in cross examination or by the Tribunal itself, as well as about making submissions. He advised that once evidence was given it was in only very rare circumstances that evidence would later be admissible, and that all issues that a party wished to raise should be raised during evidence, and then in submission.

Evidence

8. Evidence was given by the claimant first, followed by her mother Mrs Angela Stewart, sister Ms Melissa Brindley and father Mr Alan Brindley. Evidence for the respondent was given by Ms Pauline Russell, Mr Nathan Flood, Mr Aitor Orteiza and Mr Cesar Serrano. All of the witnesses had provided written witness statements as their evidence in chief, and were then cross examined. The Tribunal permitted some additional questions as examination in chief for Ms Russell and Mr Flood in respect of documentation accepted for inclusion although very late during the claimant's evidence. The Tribunal asked questions where thought appropriate in order to elicit the evidence and there was some re-examination. That was so particularly for the claimant in her evidence, and the Tribunal afforded her representative substantial latitude to do so in light of the issue over the contents of the witness statement referred to above

9. The parties had, as noted above, prepared an Inventory of Documents, much but not all of which was spoken to in evidence. During the course of the claimant's evidence when being questioned by the Tribunal she referred to documentation from Facebook postings she had obtained but thought she could not use, as that was after the date for exchange of documentation. The Judge explained that if they were evidence as to the credibility of another witness they could potentially be referred to in the cross examination of that witness without being in the exchanged documentation under Scots Law. Arrangements were made for the

respondent's advisers to be sent those messages to take instructions on them, and they were latterly admitted as further evidence.

10. During the evidence of Mr Flood, interposed when there was a problem with the connection for the evidence of Ms Russell, the claimant's representative asked to add further documents, which she said were evidence of a grievance being raised by the claimant in September 2018 which she said Mr Flood had addressed at a meeting with her shortly afterwards, being matters he said in his witness statement he could not recall. After hearing submissions from the parties the Tribunal resolved to see those documents before considering them further. They were then sent to the Tribunal and the respondent's representative. The Tribunal noted that they appeared not to be a grievance directly, but an investigation into unauthorised absence, and unprofessional conduct, but considered that it should be received under reservation as to whether it was relevant to the issues. Mr Flood was then questioned on it.

11. The Tribunal afforded Ms Curran considerable latitude in her questioning of witnesses, recognising that she was not legally qualified or experienced in litigation. She was tenacious in her representation of the claimant. Both representatives had clearly undertaken a great deal of work to prepare for the hearing.

Applications to amend

12. During the course of the claimant's re-examination her representative applied to amend the claims to include a further act of alleged discrimination in relation to a message sent to the claimant after her surgery to ask by what title she wished to be known, which was claimed to have been sent by an unprofessional manner. The question as to that had been objected to. The Tribunal heard the submission from the claimant's representative and the respondent's counsel in reply and concluded after a brief deliberation to refuse the application for reasons given orally at the time, but essentially as it was made very late in the process, there was no sufficient reason given as to why it had not been raised earlier either in the pleadings, list of issues, or witness statement for the claimant, and if it was to be allowed the respondent would be

entitled to time to take instructions on it, that may involve seeking further documents, leading to delay which was contrary to the overriding objective. The Tribunal referred to the test for amendment (which had been set out in the Judgment on the earlier amendment application referred to above). It did nevertheless feature in the evidence as noted below.

13. There was a later application to amend in relation to an issue as to a deduction from the last wage slip paid to the claimant, which arose from questions asked by the Tribunal particularly of Mr Flood, which is considered below.

Facts

14. The Tribunal found the following facts, material to the case before it, to have been established:

15. The claimant is Ms Robyn Brindley.

16. She is a transgender woman and was so for all material times for the purposes of the claim to the Tribunal.

17. The respondent is ITX UK Limited, and was until 1 October 2021 known by the name Zara UK Limited. It is a company incorporated under the Companies Acts. It is a fashion retailer with premises throughout the UK. It formerly had a store in Dundee.

18. The claimant commenced employment with the respondent on 10 August 2015. She was employed at the Dundee store as a Sales Assistant. Her hours of work were generally 20 per week, although there were occasions when she worked overtime, and periods when the contracted hours were 30 per week. Her contract of employment was amended in writing on 21 December 2017 to provide for 20 hours per week. She worked a variable shift pattern. Rotas for the following fortnight were placed in the store about a week or two before they were due to commence. The claimant was paid at an hourly rate at the level of the National Living Wage, and had a basic annual salary calculated on the basis of 20 hours per week at that level stated on the amendment to contract on 21 December 2017, further amended on 6 April 2018 to an annual salary of £8,165.00. No

amendment for the period thereafter was before the Tribunal although the level of the National Minimum Wage increased.

19. The respondent had a disciplinary policy. It included as an example of gross misconduct unauthorised absence, theft or dishonesty and misappropriation and/or unauthorised use of Company funds and/or property.

20. The respondent had a grievance policy, a policy on Equal Opportunities and a Bullying and Harassment Policy, amongst others.

21. The store in Dundee had three departments, Menswear situated on the first floor, Ladieswear situated on the ground floor, and Childrenswear situated in the basement. Each department had a manager. The store had a General Manager responsible for it. In addition there were a number of Sales Assistants working at the store, and members of staff working as Stockroom Assistants. There was a stockroom on each of the three floors.

22. For the period material to the present claim the General Manager was Pauline Russell, Ms Russell having been employed by the respondent from July 2016, the manager of the Menswear department was Alanna McGill, the manager of the Ladieswear department was Emily Czerek, and the manager of the Childrenswear department was Roslin Coats. Sharon Chalmers had been the Deputy Manager. When she went on maternity leave Carol Hammond undertook that role, and remained in it when Ms Chalmers returned part-time.

23. Ms Russell undertook training with the respondent including on issues of discrimination, bullying, harassment, and victimisation in the workplace completed on 27 July 2016.

24. The claimant was contracted to work in the Ladieswear department, but spent the majority of her time working in the Menswear department. Sales Assistants could be required to work in other departments as and when required, or otherwise carry out other roles such as in the stock room, including moving boxes and other items. The Job Description for that role included such activities.

25. The claimant was the only transgender woman working in the store.

26. In late 2017 the claimant reported back pain to her General Practitioner which she attributed to lifting heavy boxes at work.

27. On 19 December 2017 the claimant texted her sister to say that she was scared to phone in sick the following day as Ms Russell would answer. The claimant had the perception that Ms Russell spoke to her abruptly and did not approve of periods of absence.

28. On 21 December 2017 her GP issued a fit note requesting modified hours and duties. The fit note was not before the Tribunal.

29. On 31 December 2017 the claimant asked to leave work early. She had made a written request for that as early as January 2017 but the rota issued about mid December 2017 had not mentioned the claimant having such leave. Ms Russell denied that request as she believed that otherwise the store would not have sufficient staff at what was a busy time. The practice was to raise any queries immediately after the rota was issued, but the claimant did not do so at that time.

30. In July 2018 the claimant worked nine consecutive days including days of overtime. The days had been worked partly as overtime by agreement between the claimant and Ms Russell, and the claimant was tired after doing so. On the last of those days the claimant held a discussion to give a handover to Ms Berry at a time when the claimant, ought to have been working in the fitting room elsewhere within the store. Ms Russell spoke abruptly to both the claimant and Ms Berry to the effect that having a handover there and then was not appropriate.

31. The day after that meeting the claimant and Ms Russell had a further discussion, at which the claimant raised her voice at Ms Russell, shouting at her. The claimant did not then attend for work on the following two days and did not report that absence in accordance with the respondent's procedures.

32. The claimant reported further back pain in August 2018 after doing overtime.

33. On 13 September 2018 Ms Russell held an investigation meeting with the claimant into allegations that the claimant had had unauthorised absences

in respect of the said two days when she did not attend for work, and that her behaviour and conduct was unprofessional, being a reference to the claimant having raised her voice and shouted at her manager. A handwritten note of that meeting was taken on 13 September 2018. Ms Russell recommended that there was a case to answer. No further documentation in relation to that matter or how it was handled thereafter was before the Tribunal.

34. In September 2018 the claimant sent a text message to her sister to the effect that it was in order for her sister to come to the store, as Ms Russell was not in that day.

35. The respondent had a policy that staff did not serve members of their family or friends under a staff discount scheme during working hours. On occasion Ms Russell spoke to the claimant if she thought that she, the claimant, was taking an undue amount of time speaking with a family member. On one occasion on a date not given in evidence Ms Russell said to the claimant (when her sister was in the shop to make purchases) something to the effect of "what are you doing?" in an abrupt manner.

36. Ms Russell also spoke to the claimant on occasion about what she thought was the claimant taking too long to speak to other staff when in the stockroom. Ms Russell further spoke to the claimant on occasion to give her advice or direction on how best to serve customers or similar matters. She also raised with her what she perceived to be the claimant spending too long a period discussing matters with family in the shop.

37. Ms Russell spoke to other staff or the respondent who acted in a similar manner to address such issues. She could be abrupt when doing so. Her treatment of all of the staff, including the claimant, was similar in that respect.

38. On 4 January 2019 the claimant had agreed to work an hour overtime to 5pm. The claimant later realised that she had agreed to do her sister's makeup and asked to leave at 4.30pm but was told by Ms Russell that she could not. Ms Russell did so as otherwise the store would be under-staffed.

39. On 1 February 2019 the claimant underwent gender reassignment surgery. Ms Russell sought to support the claimant having adequate time off to recover from that. She sent a series of Facebook messages to the claimant from 10 February 2019 expressing hope that the operation had gone well, sending her love, and adding hearts and kisses to the messages. Ms Russell also sent the claimant flowers, which Ms Russell paid for herself. Ms Russell asked her by what title she wished to be known. The messages were sent on Facebook but could be seen only by the claimant. The claimant replied in a manner that did not indicate that she had any difficulty with the question asked or manner in which it had been asked.

40. On 24 April 2019, by which time the claimant had returned to work, the claimant sent her sister Melissa Brindley a text about Ms Russell checking up on her.

41. In June 2019 the claimant was attending to a female customer in the store, who had requested jeans in a size eight. The claimant gave the customer that size of jeans. Ms Russell noted that, thought that the customer was a size four, and spoke to the claimant afterwards in an abrupt manner, saying that the claimant should have known better than to do that and to know that that customer was not a size eight. There was a queue of customers nearby and one of them expressed surprise at the manner in which the claimant had been spoken to.

42. Also in June 2019 delivery crates required to be dealt with at the store, and the claimant was instructed by Ms Russell to do so. When the claimant said that she was working alone on Menswear such that if she did so that part of the store would be left unattended, Ms Russell told her to get the crates herself. She did so as she considered that that had a higher priority.

43. In June or July 2019 the claimant was in the stock room and making a mobile telephone call about ten feet from the TGT terminal, which was used to send messages to other stores and similar tasks. Ms Russell asked her to do so outside the shop as there was a policy of not making calls near that TGT terminal, which was used to send and receive confidential messages.

44. On 12 July 2019 the claimant reported low mood and anxiety to her GP.

45. On 29 August 2019 the claimant called the Dundee store to find out the number to call Head Office in relation to what she thought were mistakes in her pay. Ms Russell answered the phone and told her to call back later as the store was busy that day. Ms Russell did so for that reason.

46. On 20 September 2019 the claimant reported to her GP feeling stressed and that "her manager wis bullying her - singling her out for criticism and scrutiny not levelled at co-workers". She was absent from work for a period of seven days in the period to 23 September 2019. On the return to work form completed thereafter she referred to workplace stress and that she felt like she was "spoken to bad" without naming the person she felt did so. The manager completing the form, Carol Hammond, noted on it that the claimant was to let anyone know if she felt stressed.

47. On 18 October 2019 Ms Russell instructed the claimant to move from the Menswear department and carry out work in the stockroom to supply the Ladieswear department. Ms Russell did so as another member of staff had called in sick that day, and she judged that the replenishment of the Ladieswear department had a higher priority than the Menswear department. On that same day the claimant was not allocated a specific break in the rota, and when she raised that with Ms Russell was told to take it when another member of staff could relieve her, which meant that the break took place very late in the shift. Ms Russell did so to ensure that the shop floor was adequately covered

48. On 22 October 2019 Ms Russell asked the claimant at about 5pm to move from Childrenswear, where she had been working, to Ladieswear to clean up items there. Ms Russell did so as she believed that that was a better use of the claimant's time, and there was a greater need to tidy up the Ladieswear department, which was busier than the Childrenswear department in the evening.

49. On 18, 20, 21 and 22 October 2019 the claimant was late for work for reasons that included roadworks, forgetting her lunch and heavy traffic. On one of those days Ms Roslin Coats of the respondent arrived after the claimant, but doing so was not late, and in any event was not on four days

within a short period of time. A meeting was held with Ms Coates on 9 November 2019 to address those four latenesses at which she was issued with a first written warning. On 14 November 2019 the claimant was issued with a letter confirming that first written warning. The claimant did not appeal the same.

50. On 24 November 2019 the claimant called the respondent to advise that she was unable to attend work that day and said that she was still drunk after socialising the previous night. The issue was investigated by Ms Czerek at which that explanation was repeated, after which there was a disciplinary hearing held before Ms Russell, who issued a final written warning to the claimant on 11 December 2019. It was confirmed by letter to her dated 17 December 2019. The claimant did not appeal the same.

51. On 11 December 2019 the claimant sent and received text messages with her sister Melissa. The claimant raised what she perceived was the treatment she received from Ms Russell in particular. Her sister gave her advice on raising her concerns with Ms Russell formally. The claimant did not take that advice at that stage.

52. On 20 December 2019 the claimant was spoken to by Ms Russell in relation to giving a staff discount otherwise than during her lunch hour. Ms Russell did so as the store was busy that day, and she considered that staff should be working when on shift and not attending to staff discounts in accordance with her understanding of policy.

53. The claimant was absent from work for a period for stress from 6 – 19 January 2020 which she stated was due to family reasons on the return to work form.

54. On 14 January 2020 she reported to her GP having low mood and not sleeping, but her mood had been much better at a telephone consultation on 19 March 2020.

55. On 23 March 2020 the store closed due to the Covid-19 pandemic. It remained closed until early July 2020.

56. In early to mid July 2020 the claimant and others were offered the opportunity to work more hours at the store. The claimant sought to

increase her hours from 20 to 40 per week, sending a message for that to Ms Russell, and when that was agreed signed a form to confirm that, provided to her by Ms Russell (the form was not before the Tribunal). The agreement was that the claimant would increase hours for the month of August 2020 on a temporary basis to 40 per week. Ms Russell did not immediately send that form to Mr Flood, as she thought that that claimant was asking to change the hours to 30 per week.

57. On 27 July 2020 the claimant was working in the store. There was a diary entry for that day which had what amounted to handover notes, which included stating "Perfume there is some behind C/D [cash desk] in drawer put in pillar take out any that aren't out on shop floor and put in accessory SR [stock room]". The claimant understood that the tasks included that she was required to clear away used items in the pillar drawer and a drawer behind the cash desk. The items she removed included a bottle of Men's perfume, which was she thought empty. The respondent called fragrances for men or women perfume. The bottle had a security tag attached to it by Sellotape. It had been removed from the box in which it had originally been placed. There were about eight bottles to remove at that time and the claimant put some of them in pockets in her work shirt to avoid a second trip. The claimant put the said bottle of Men's perfume in the top right pocket of her work shirt. She later removed the other bottles from her pockets, but forgot that that one was there when she was called onto another cash desk. When she went to leave the store at the end of her shift, wearing a puffa style jacket on top of her work shirt, the security alarm went off as it had been triggered by the security tag. Another member of staff, Danielle Walker, noticed that. So did Ms Russell. Ms Russell came over to the claimant, and suggested that she try to exit the store again as the alarm may have been triggered by a customer standing nearby. She did so and the alarm went off again. Ms Russell asked her if she had anything of the respondent's on her, and the claimant said that she did not. She then took the bottle of perfume from her shirt pocket when she remembered about it. Ms Russell asked her how it had got there, or words to that effect, and she said that she did not know. That question and answer were each repeated. Ms Russell took the bottle of

perfume and told her to go home. Ms Russell put the bottle in the back office.

58. Ms Russell attempted to obtain advice from HR on how to handle that matter by trying to call Mr Nathan Flood of HR, but did not receive an answer.

59. Either that evening or some time the following day Ms Russell spoke to the Deputy Manager Ms Carol Hammond. She told her what had happened as set out in paragraph 55 above.

60. Mr Flood contacted the store the next day, having seen the series of missed calls, and spoke to Ms Hammond as Ms Russell was not in work that day. He understood from Ms Hammond that the claimant had set off an alarm and had done so as she had on her an item of property of the respondent. He understood the item to be men's perfume and that the claimant had not given an explanation for it. Ms Hammond referred to the suspension of the claimant. The decision Mr Flood took was to suspend the claimant pending an investigation.

61. The claimant was suspended from work on 28 July 2020 by Ms Coats who met the claimant in the store that day, as confirmed by letter to her of that date which stated that she was not to enter the store unless specifically invited to do so, pending an investigation into the incident on 27 July 2020. The letter stated that suspension was not a disciplinary sanction and that there would be an investigation. She was told by Ms Coats that the suspension was on basic pay, and that was confirmed in a written note of the meeting signed by Ms Coats and the claimant, although not referred to in the said letter. The claimant remained suspended until the store later closed permanently as referred to below.

62. The claimant asked her friend Ms Carolann Curran to assist her. Ms Curran sent emails to Mr Flood about the meeting and asked to attend it. It was agreed that Ms Curran be able to speak to the claimant during breaks but not be within the same room.

63. The claimant attended an investigation meeting on 30 July 2020, held by Ms Coats. Ms Czerek was present to take notes. The notes of that meeting

are a reasonably accurate record of it. The claimant left it after not being permitted to consult with her friend for a further time, who had not been allowed to accompany her but who had been permitted to consult with her on earlier occasions. At the meeting she was shown statements from Ms Walker and Ms Russell, which the claimant said were lies and in relation to the statement of Ms Russell that it was incomplete as it omitted an explanation she had given.

64. On 31 July 2020 the claimant reported to her GP that her manager had falsely accused her of stealing, which she felt was “part of longstanding bullying/victimisation by her manager”. She was given a fit note stating that she was not fit for work until 3 August 2020. It was handed to the respondent on or around 31 July 2020.

65. On 31 July 2020 the respondent wrote to the claimant to rearrange the investigation meeting, confirming the suspension, and providing for other matters including as to sickness absence if that occurred. The re-arranged meeting was to be undertaken by a different manager than Ms Coats. The letter stated “For the period of your suspension, should you be sick, you are required to comply with your normal sickness reporting requirements. Payment for sickness will be in line with the Short Term Absence Policy. I will ensure that I maintain regular phone contact with yourself during the period of investigation to keep you informed of any changes to your suspension or any future actions that will be occurring…..” The said policy was not before the Tribunal. The respondent also had a Suspension Policy which was not before the Tribunal.

66. The respondent did not at any stage specifically write to the claimant to inform her that her suspension was terminated, and that she was on a period of sickness absence instead.

67. The claimant had further consultations with her GP in August and September 2020 still feeling stressed.

68. The claimant sent a message from her representative Ms Curran on 5 August 2020 to give her account of the incident on 27 July 2020, and to intimate a grievance. She alleged harassment by Ms Russell from 2017, and that she had been falsely accused of theft which she said was

unfounded and discriminatory. In her grievance she did not allege that she had given Ms Russell an explanation for how she had the bottle of perfume on 27 July 2020 that day.

69. The grievance was acknowledged and arrangements made for it to be heard by an independent manager, Mr Serrano. The allegations against the claimant were not proceeded with to a formal hearing under the disciplinary policy at that stage, in light of the grievance having been raised, as confirmed in an email to the claimant sent on 5 August 2020. It did not refer to her not being suspended, or on a period of sick leave and sick pay.

70. On 6 August 2920 at 16.40 the respondent wrote to the claimant to inform her of an important announcement due to be made the following day at the Dundee store. It stated "I understand that you are currently on annual leave with suspension currently in place at this time. For the purpose of this important announcement, you are permitted to enter the store in order to attend…." The message had been drafted by Mr Flood, but was sent by one of his colleagues.

71. On 6 August 2020 at 17.50 the respondent wrote to the claimant to invite her to a grievance meeting, to be held by telephone on 11 August 2020.

72. On 7 August 2020 the respondent announced the prospective closure of the Dundee store. The claimant attended that meeting remotely online.

73. A grievance hearing with the claimant, accompanied by Ms Curran, and Mr Cesar Serrano of the respondent was held on 11 August 2020. A transcript of that hearing is an accurate record of it. The investigation did not include the allegation of theft or matters regarding that allegation.

74. Following the meeting Mr Serrano received a written witness statement from employees Sharon Davison, Alanna McGill and Carolyn Berry each answering questions he had asked. Sharon Chalmers' statement was that Ms Russell "treated all staff members with the same regard". Alanna McGill stated that she had been asked by Ms Russell to reprimand the claimant after Ms Russell believed that the claimant had not followed diary instructions. She had witnessed Ms Russell ask the claimant what she

was doing during a shift many times to make sure she was doing as asked. Mrs Webb stated that Ms Russell acted in an abrupt manner when speaking to her, and the claimant, in relation to the handover in July 2018, but from Ms Russell's point of view it may have been justified, at the time the claimant was working in the ladieswear department and in hindsight perhaps it was not the best time to have the conversation. She thought that Ms Russell spoke to her in the same manner.

75. He held a meeting with Ms Russell on 20 August 2020 in which he put the allegations made by the claimant to her. The transcript of that meeting is an accurate record of it. Mr Serrano did not investigate the claimant's grievance that the respondent's allegation that she, the claimant, had been guilty of theft on 27 July 2020 was itself an act of discrimination or bullying on the protected characteristic of being a transgender woman as she claimed that it was unfounded. He understood that that was to be investigated separately under the disciplinary policy. He allowed the claimant time to provide additional information which he extended, but the claimant did not do so in the timeframe he allowed.

76. On 25 August 2020 Mr Serrano sent a letter to the claimant rejecting her grievance, and confirming that she had a right of appeal. Ms Curran sent an email on the following day to explain that they had not yet obtained further evidence they were seeking. The claimant exercised her right of appeal by email from her representative on 7 September 2020. She provided further allegations and supporting evidence. The appeal was acknowledged and arrangements made to have it heard by an independent manager Mr Aitor Orteiza.

77. The claimant held consultation meetings by telephone with Mr Flood of the respondent in relation to the prospective redundancy, on dates not given in evidence. There were alternative roles at other stores which the claimant could have considered, but she did not wish to do so as the commute required made them impractical for her.

78. In the period following lockdown on 23 March 2020 the store had established a WhatsApp group for all employees at the store in Dundee to assist them keeping in touch. In the period towards the closure of the

Dundee store Emily Czerek arranged two team meals, and posted messages about them. The messages were sent to all employees at the store, including the claimant, and another employee on maternity leave, who were not then at work. A neighbouring store, Lush, sent some items as gifts to the staff at the store. Details of them were also circulated by posts on that group. No one on the group was individually invited to the meals or to participate in the Lush products. The claimant did not attend the meals she was concerned that it would be awkward as she remained suspended. She did not seek to obtain any of the Lush products as she does not use them. She had not received any message from Ms Russell stating that it was in order for her to come to the store or attend the meals.

79. Ms Russell sent a message on social media to her team to the effect that she had a gift for each of them. She left a number of bracelets at the store and posted a photograph of them. Not all of the team members received such a gift, including the claimant and two others.

80. On 15 September 2020 the Dundee store closed and on that date all save one of the staff working there, including the claimant and Ms Russell, were made redundant. No further disciplinary investigation or hearing into the allegations against the claimant arising from the incident on 27 July 2020 was ever held in light of that dismissal for redundancy.

81. On 29 September 2020 the respondent wrote to the claimant to confirm that as she was no longer in the employment of the respondent the investigation into the allegation of the attempted theft of perfume was not concluded, an outcome for it could not be provided, and the matter was closed.

82. The claimant received a payment in respect of notice, and holiday pay in her September 2020 payment from the respondent. She also received a statutory redundancy payment. In the payment for the final salary there was a deduction for what was referred to as “undertime” of 120 hours in the total of £1,046.40. That deduction was made as the payroll department understood that the claimant had been on sick leave from and after 31 July 2020 to the date of termination, rather than suspended on full pay.

83. On 25 September 2020 the grievance appeal hearing was held, attended by the claimant and her representative. A transcript of that hearing is an accurate record of it. Mr Orteiza contacted Ms Sharon Chalmers, Ms Berry and Ms Emily Czerek of the respondent on 30 September 2020 seeking answers to a number of questions. Ms Czerek and Ms Berry each provided a form of statement by emall on 2 October 2020 and Ms Chalmers provided a form of statement by email on 7 October 2020.

84. Mr Orteiza met Ms Russell on 5 October 2020 and put the allegations made by the claimant or on her behalf to her. A transcript of that meeting is an accurate record of it.

85. Mr Orteiza did not check whether the disciplinary allegation against the claimant was to be investigated or not in light of the closure of the store and termination of the claimant's employment. He did not himself investigate the allegation that Ms Russell had made an unfounded allegation of theft against the claimant.

86. On 8 October 2020 Mr Orteiza wrote to the claimant to confirm the outcome of her grievance appeal. He allowed it in small part, on the basis of her perception of certain matters, for example a feeling of being unsupported, but otherwise rejected it as he believed that there had not been discrimination or harassment. There was no further right of internal appeal.

87. The claimant commenced early conciliation in relation to the respondent on 21 October 2020 and the Certificate for that was dated 21 October 2020.

88. The Claim Form in the present claim was presented to the Tribunal by the claimant on 29 October 2020.

89. In May 2021 the respondent made a further payment to the claimant, the amount or detail of which was not provided in evidence.

Submissions for claimant

90. The following is a very basic summary of the submission made by the claimant. Time was allowed for her to prepare that and to read the skeleton

argument that the respondent's counsel had prepared. The claimant's representative prepared a written submission which was sent by email, and read by the Tribunal both before an oral submission and afterwards. She also supplemented it orally, both initially and when given an opportunity to respond to the respondent's submission.

91. The claimant argued that the evidence of the claimant and her witnesses should be accepted. She set out in detail arguments in favour of the position adopted by the claimant. She criticised the evidence for the respondent in a variety of respects. She alleged in particular that Ms Russell had been inconsistent in her evidence, and had been "gaslighting", as she put it, the claimant. She explained the basis of that submission in the email. She also argued that Mr Flood had not been truthful in his evidence. She noted the absence of witnesses of fact from the respondent, and criticised the grievance process including the appeal, arguing that the grievances should not have been rejected where they were. She said that there had been direct discrimination and harassment because of the claimant was a transgender woman. She argued that the claimant's claim should therefore succeed. When prompted on the issue of the claim for notice, she sought to amend that to include claims for breach of contract and unlawful deduction from wages in respect of the undertime deduction.

Submissions for respondent

92. The following is again a very basic summary of the written submission, which was supplemented orally. The respondent argued that all acts prior to 21 July 2020 were outwith the jurisdiction of the Tribunal. There were no acts extending over a period, and it was not just and equitable to extend the jurisdiction to them. It was accepted that the incident on 27 July 2020 did fall within the jurisdiction, as did matters thereafter, and that the earlier matters were of evidential relevance to such claims.

93. The respondent argued that the claimant had the onus of proof to establish a prima facie case but had not done so. There was no basis to hold that there had been discrimination on the protected characteristic relied on. There was no evidence of a comparator, a lack of particularisation of the

claim, and a lack of evidence. Evidence from the claimant was not to be accepted, and evidence from her family members was from her rather than another source. The claimant had not set out why she sought to make the claim, and added new claims as she went along. The respondent's witnesses should be accepted. Pauline Russell had acted to manage matters, which included issues of the conduct of the claimant. The issues raised had been investigated and considered further on appeal, but no evidence to substantiate the allegations found. The claim should be dismissed.

94. On the issue of amendment, that was opposed as coming far too late, and in circumstances where the respondent had set out its position in the counter schedule of loss. It was a new claim out of time. Whilst it was argued that some matters were covered in the suspension policy it was accepted that that was not before the Tribunal, but that was as the issue had not been raised by the claimant. If the amendment were to be allowed, and it should not be, then the respondent would wish to lead further evidence on the merits. It was entitled to change from full pay when on suspension to sick pay, that had happened, and although there were emails that confused matters that was not determinative.

Law

95. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

96. Section 7 of the Equality Act 2010 ("the 2010 Act") provides that gender reassignment is a protected characteristic.

97. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

98. Section 23 of the Act provides

"**Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of sections 13, 14 and 19 there must be no material difference between the circumstances relating to each case…."

5 99. Section 26 of the Act provides:

"26 **Harassment**

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

10 (b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

15 (a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(*b*).

……….

(4) In deciding whether conduct has the effect referred to in

20 subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that

25 effect.

(5) The relevant protected characteristics are—

……..

Religion or belief"

100. Section 39 of the Act provides:

30 "**39 Employees and applicants**

An employer (A) must not discriminate against a person (B) –

……..

(c) by dismissing B

(d) by subjecting B to any other detriment."

101. Section 123 of the Act provides

"**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

5 (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—

10 (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."

102. Section 136 of the Act provides:

15 "**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A

20 shows that A did not contravene the provision."

103. Section 212 of the Act defines "substantial" as "more than minor or trivial."

104. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive97/80/EC.*** Those provisions remain part of

25 retained law under the European Union (Withdrawal) Act 2018.

(ii) Case law

(a) Direct discrimination

105. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v***

30 ***Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough***

Council [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

106. Further guidance was given in ***Ahmed***, in which the then President of the EAT Mr Justice Underhill, as he then was, explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. …..…
>
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……
>
> In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what

was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

107. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Cause of Less Favourable Treatment

108. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

109. It is also not enough that the protected characteristic exists, and is part of the background facts. That was explained in the case of ***Ahmed*** (and where the principle applies equally to the protected characteristic of gender reassignment) as follows:

"The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

110. The issue was addressed more recently by the EAT in ***Gould v St John's Downshire Hill [2020] IRLR 863,*** (a case of alleged discrimination because of marriage) as follows:

"…the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied – but for the protected characteristic or step the act complained of would not have happened – and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not

materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was also an issue addressed in ***Nagarajan***.”

Comparator

111. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

112. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

113. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> “Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'”

Substantial, not the only or main, reason

114. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a “substantial reason” for the decision. In ***O’Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part

of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

115. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

"In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

116. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following (in a case which concerned the protected characteristic of disability):

"5

Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been

treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.

6

In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

Harassment

117. The terms of the statute are reasonably clear but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

118. Paragraph 7.9 of the Equality and Human Rights Commission's Code of Practice states that it should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. In ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** it was held that whether or not there is harassment must be considered in the light of all the circumstances. But it is not enough only to point to the relevant characteristic as the background of the events or to pray in aid commonly held views***: UNITE the Union v Nailard [2018] IRLR 730*** and ***Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495***

119. The Code of Practice states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant's perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended. Elias LJ in ***Land Registry v Grant [2011] IRLR 748*** focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".

120. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (***GMB v Henderson [2017] IRLR 340***) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (***Bakkali v Greater Manchester2018 IRLR 906***). Relates to is not the same test as "because of".

Burden of proof

121. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or harassment, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both

from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*****.**

122. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

123. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage.

124. The rationale for the two stage approach had been identified by Advocate General Mengozzi in ***Meister v Speech Design Carrier Systems GmbH, [2014] All ER (EC) 231***, as follows:

> "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim … A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions."

125. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn was confirmed by the Court of Appeal in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352***. In that same case there was an appeal, and it is reported as ***Royal Mail***

Group Ltd v Efobi [2021] UKSC.33. The Supreme Court dismissed the appeal, and confirmed that the analysis remained as above.

126. In ***Igen*** the Court said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established:

> "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."

127. The same principle applies to the other protected characteristics that can be relied upon, including that of gender reassignment.

Jurisdiction

128. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96***).

129. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

130. Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran***

UKEAT/0274/14 that is contrary to the line of authority culminating in ***Ratharkrishnan***.

131. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be relevant to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

132. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although that is not exhaustive and all the facts are to be considered.

Gender reassignment

133. The respondent accepted that the claimant held at all material times the protected characteristic of gender reassignment under section 7 of the Equality Act 2010.

134. In November 2015 the government equality office published Guidance on the Recruitment and Retention of Transgender Staff.

(iii) Amendment

135. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at

Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

136. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order…."

137. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and

Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

138. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;
> *(a) The nature of the amendment*
> Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
> *(b) The applicability of time limits*
> If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.
> *(c) The timing and manner of the application*

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

139. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

140. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

141. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

142. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

> "was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

143. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128***

144. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***. It is a multi-factorial approach considering all material circumstances.

145. In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised matters and held that there was a balance of justice and hardship to be struck between the parties.

Observations on the evidence

146. The Tribunal considered that all witnesses before it sought to give honest evidence. They all believed that they were telling the truth, and gave evidence from their perspective.

147. The **claimant** gave evidence first. There were some aspects of her evidence which affected our assessment of the reliability of that evidence, partly as noted below. It was clear that the claimant had not had a perfect record at work, with a first written warning for a series of four absences in October 2019, and an unauthorised absence in November 2019 when she said that she was drunk in the morning after a night out, and not fit to work, after which a final written warning was issued. That is evidence of performance issues, or conduct issues, which indicated that some form of management of her may have been necessary. It included the evidence from September 2018 that the claimant herself introduced. It was not a grievance, as was contended for her, but a disciplinary investigation for issues that on the face of it justified such an investigation. That was further evidence supporting allegations that the performance of the claimant could at times be below an appropriate level.

148. There was also evidence however that for the majority of the time she was a good employee, who performed most of her duties well. Ms Russell accepted that that was the case.

149. It was entirely clear to the Tribunal that the claimant felt that she was being treated harshly by Ms Russell, more so than for other employees, that she was being discriminated against and harassed, and that the reason for that was her being a transgender woman. These were genuine concerns she sincerely held. The respondent argued that they were not, and that they had in a sense been manufactured for the purposes of this claim. The Tribunal rejected that argument.

150. The claimant argued that messages sent to her by Ms Russell in February 2019 were “an act”, in the sense of not being genuine. As addressed, we did not accept that argument. The claimant also argued that the grievance hearing and appeal thereafter were not properly held, as those concerned would always side with Ms Russell. That argument had not been raised before, was not pled nor within the witness statement, and not one we

accepted. There was a separate point as to the lack of investigation of the complaint she made that the making of what she described as an unfounded allegation of theft against her was itself discriminatory.

151. For reasons we address more fully below, we also accepted that the claimant had not in fact attempted to steal the perfume bottle which triggered the alarm. She had thought that it was empty, and intended to dispose of it, but forgot that it was on her person. There is however an issue about what exactly happened that day, and what the claimant told Ms Russell, or did not tell her.

152. The claimant's mother, sister and father **Mrs Angela Stewart, Miss Melissa Brindley and Mr Alan Brindley**, all gave evidence. They supported her in the evidence that they gave, and clearly have been very supportive to her throughout. That support was extensive, and genuine. The Tribunal however has to assess the evidence it heard. The evidence was generally that they had seen how the claimant presented when at home after being at work, what she had said to them about it, and similar matters. It was largely hearsay evidence, the source being the claimant. That does not mean that it is irrelevant, but it was very largely lacking in particular examples, or details of what the claimant said had happened, and when. They accepted in cross examination that in general they had not been in the store to witness almost all of the events founded on. The claimant's parents in particular were also unaware of some of the details that were relevant, such as the two warnings and the reasons for them. Their evidence was of limited assistance in light of that, although there was some evidence of the claimant reporting shortly after an event her perception of it, which confirmed that the claimant's evidence was genuinely given.

153. There was one specific matter raised by Miss Melissa Brindley, who gave evidence passionately in support of her sister, about an incident at the shop when she claimed that Ms Russell had spoken to the claimant in an unnecessarily abrupt manner. Ms Russell denied that that incident had happened, stating that Ms Brindley had only been in the store once to hand in a fit note, but Miss Brindley spoke to that incident clearly and convincingly and on balance we preferred that evidence to Ms Russell on

the fact that such an incident happened. What there was not however was evidence of Ms Russell speaking to someone in comparable circumstances less abruptly, in fact the evidence overall supported the view that Ms Russell had a style that could be abrupt, as we shall address below. Simply speaking abruptly in such circumstances therefore is not by itself sufficient evidence from which discrimination must be inferred.

154. **Ms Russell** was the principal witness for the respondent, and the person alleged to have discriminated against, and harassed, the claimant. She gave lengthy evidence as to what had happened and the circumstances of that. The Tribunal accepted much of her evidence, which was consistent in part with the contemporaneous documents, as noted more fully below, but there were some issues that caused the Tribunal concern. That included firstly a number of particular aspects of the evidence given in cross examination in particular where what was said orally was not consistent with the earlier documents, either or both of the witness statement or transcript of her interviews with Mr Serrano or Mr Orteiza, secondly an occasion when she in effect sought to give an impersonation of the claimant speaking, and thirdly some occasions where she gave answers that did not directly address the question. She had on occasion a style that was defensive rather than entirely candid. The Tribunal accordingly treated her evidence with care, given those matters.

155. That does however have to be set against the fact that some events were a number of years old, some had not been foreshadowed at all in pleadings or the witness statement of the claimant, there had been no grievance raised until August 2020, and in some important aspects her evidence was supported by contemporaneous records. That included the position in relation to the incident on 27 July 2020 which is dealt with below. It was also considered relevant that there had been grounds for considering the November 2019 incident, when the claimant called in and said she was drunk and not able to work, (evidenced in writing by the form for that absence the claimant signed at the time), that might have been considered to merit summary dismissal. This is because unauthorised absence was potentially gross misconduct. The outcome was not dismissal however but a final written warning. There was also evidence of

Ms Russell sending messages to the claimant which were we considered genuinely supportive of her, around the time of her surgery.

156. The inconsistencies in the evidence of Ms Russell were present, but they were not on what the Tribunal regarded as the most significant of the points. They were on what may generally be described as tangential issues. They were also points of detail. One example was in relation to evidence in the witness statement that she was "not sure if [the bottle] was full or not." In evidence her position was that it was half full, but she accepted that she did not remember the colour of the bottle, or the type of perfume, and that her ability to tell whether it was empty or not was by shaking it, and by pushing the button on it when spray came out. The Tribunal concluded that the bottle had something in it but it was probably very little, and most unlikely to have been half full. Another example is when the claimant was leaving the store initially on 27 July 2019. Ms Russell initially said that she had stopped the claimant after the alarm went off. She quickly retracted that and accepted that it had not happened that way.

157. Taking into account all of the evidence, including the way in which the claimant and Ms Russell respectively gave their evidence, we concluded that largely Ms Russell was a witness whose evidence on disputed matters, particularly those which were most significant, was to be preferred to that of the claimant.

158. **Mr Flood** was, the Tribunal considered, a generally reliable witness. He spoke in a measured and convincing manner on most of the points put to him. He did not recall any meeting with the claimant at which she alleged he had conducted a disciplinary hearing with her in September 2018 at the store, and had said something to the effect that the claimant did not see eye to eye with Ms Russell, as she had claimed in her evidence. There was no written evidence to that effect, no record of any disciplinary hearing having been held, although the notes of the meeting with Ms Russell indicated her view that there would be as there was a case to answer. The Tribunal considered that Mr Flood's evidence was to be preferred to that of the claimant on that matter. It was the kind of meeting that would be expected to be both arranged in writing in advance and minuted, with a

record of the outcome. The respondent did not have any such records, and Mr Flood had no recollection of such a meeting. The Tribunal considered that had it happened he would have both made and kept such records, and likely to have recalled it. Where the Tribunal did however have concerns over Mr Flood's evidence was in relation to the change of status of the claimant from someone suspended on full pay to someone who was not, and was on sick leave. Whilst his evidence was that that had happened he accepted that that was not confirmed in writing at all. An email he drafted to send to the claimant on 6 August 2020 also contradicted his position, stating in terms that the claimant was suspended. Neither Ms Russell nor Mr Orteiza thought that the claimant was other than suspended throughout the period to the end of her employment. On that issue we did not accept Mr Flood's evidence.

159. **Mr Serrano** and **Mr Orteiza** gave evidence of their investigations into the allegations made, respectively the grievance hearing and appeal, not all of which were those before this Tribunal. It was striking that they did not investigate the most recent and direct allegation, in relation to the incident on 27 July 2020, the allegation of theft itself being said to be unfounded and evidence of discrimination. That meant that the evidence from those processes, albeit relevant, was less helpful than it might have been on that most recent issue, and the matter that triggered a formal grievance.

160. The Tribunal also noted that although the respondent had written evidence from some of its former staff as a part of those processes, they did not call those witnesses to give oral evidence. Whilst they were no longer employees, as with the comments made in respect of the claimant steps could have been taken to secure their attendance had that been thought appropriate by the respondent. That included witnesses to some background facts, such as Danielle Walker, where the evidence was disputed by the claimant, but also Carol Hammond who appears likely to have called Mr Flood, and told him what she understood had happened, and that the claimant should be suspended, as Mr Flood's statement refers to. It appears likely that the information Ms Hammond had came from Ms Russell, but that exchange of information was not referred to in

the witness statements of Ms Russell or Mr Flood, and Ms Hammond did not give evidence at all.

Discussion

161. The Tribunal considered in full all of the submissions made by the parties, both orally and in writing, together with the documentation provided, the witness statements, and all the oral evidence given over seven days.

Section 13 - direct discrimination

Had the claimant established a prima facie case?

162. Although the first issue for the Tribunal in the list of issues was that of jurisdiction, the Tribunal considers it appropriate to commence with consideration of whether the claimant had established a prima facie case of direct discrimination, such that the burden of proof moved to the respondent under section 136, as that matter is explained above. That is so as matters in evidence that may not found a claim separately for jurisdictional reasons may nevertheless be relevant evidence, and the principal matter relied on by the claimant which triggered the claim was the incident on 27 July 2020 and how that was then treated on which no jurisdiction argument arose.

163. The issue is this: has the claimant proved facts from which the tribunal can properly conclude from all the evidence before it that the claimant has established a prima facie case that the respondent directly discriminated against her because of her protected characteristic? In that regard, would the respondent have treated any of the comparators the same or differently?

164. The perception of the claimant is not sufficient. Nor is mere assertion that others would have been treated differently. It is not sufficient that the claimant is a transgender woman who honestly believes that there was discrimination and harassment against her on the ground of, or related to respectively, her status as a transgender woman. The Tribunal requires to consider whether there are primary facts established in the evidence

which we accept from which the inference of the cause of the conduct alleged in the claim of direct discrimination, or that it is related to the protected characteristic in the claim of harassment, can be made. The primary facts are adminicles of evidence which may reveal the reasons why a person acted as they did, from their acts or omissions, what they say and how they behave. Discrimination may either be conscious or unconscious. It is possible for someone to discriminate without knowing that they did so, and the motive for their actions is not in any sense determinative.

165. The Tribunal does so fully cognisant of the challenges that very many transgender people face. It is an issue referred to in the Equal Treatment Bench Book. It includes the following comments in Chapter 12:

> 15. "Awareness, knowledge and acceptance of gender-variant people such as those who are transgendered or gender-fluid has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour and many people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives – in schools and places of further education, in the workplace, and whilst being customers and service users. Some people experience rejection from families, work colleagues and friends. Some experience job or home loss, financial problems and difficulties in personal relationships.
>
> 16. Many trans people avoid being open about their gender identity for fear of a negative reaction from others. …..
>
> 17. A survey for the TUC of over 5,000 LGBT employees in the first half of 2017 found that almost half of transgender respondents had experienced bullying or harassment at work and that 30% had had their transgender status disclosed against their will."

166. These are matters that the Tribunal considered by way of background, but do not of themselves mean that the claimant as a transgender person succeeds in her claims. Similarly however the assertion by Ms Russell that she did not discriminate against or harass the claimant is not determinative

that the claimant fails in her claims. The determination of these issues is dependent on the assessment of the evidence heard in the case, against the law set out above.

167. Neither party led evidence from witnesses present at the material time other than the claimant and Ms Russell. None of the claimant's former colleagues therefore were called by either the claimant or the respondent. That meant that assessing the evidence was more difficult than it might have been with such evidence. The claimant argued that the responsibility to call witnesses lay with the respondent but the onus of proof, to establish a prima facie case, lies with the claimant. Initially at least the absence of supporting evidence prejudices the claimant's position.

168. There were a number of documents prepared by such potential witnesses, both emails and written statements, as well as the grievance itself prepared by the claimant, some but not all of which were reasonably contemporaneous, but there was a dispute over some of them, for example the evidence of Danielle Walker who was present on 27 July 2020. They are addressed further below.

169. The Tribunal did not consider that there was sufficient evidence to find some matters alleged by the claimant as established. One example of that is an allegation in relation to a handover said by the claimant to have been after 10 days of consecutive working in September 2018. The respondent had obtained the rotas for that month which established that the claimant had not worked 10 days consecutively as she had claimed. The claimant then said in evidence that it was in July 2018. That was a change of her position, and nothing had been said about the documents produced by the respondent to give them notice of such a change of position. Written evidence of the rota for July 2018 was not before the Tribunal. The dispute appeared however to focus around a later meeting in September 2018 about how the claimant had behaved in relation to that handover.

170. The Tribunal had reserved for consideration after hearing all the evidence whether it was appropriate to allow the late production of documents from 13 September 2018. It considered that it was in accordance with the overriding objective to do so. It had a limited value, but it was not irrelevant.

The respondent in any event accepted that it was appropriate to admit that evidence, and sought to found on it at least in part, as did the claimant.

171. The claimant also made some rather generalised allegations, such as that she was required to carry out more cleaning, general housekeeping or lifting of heavy boxes, than anyone else, but without specific details and without support from any witness who was in the store at the time. Similarly she claimed that other staff members gave discount to family and friends when working, but without details or supporting evidence from those concerned. The Tribunal did not consider such general evidence with nothing to support it to be sufficient

172. There were some differences of recollection, but the main difference was the perception held by each of the claimant and Ms Russell. Where there were differences as to fact the Tribunal had to assess which to prefer. It did so having regard to all of the evidence led before it, both documentary and oral.

Initial matters

173. The claimant alleged that Ms Russell had from a very early stage shown a mindset against her, and that messages of support or similar in February 2019 that were sent were not genuine. The Tribunal did not accept that suggestion, although it was not in fact put to Ms Russell in cross examination. It appeared to the Tribunal, both from the messages sent, and the context at that time, together with the evidence of Ms Russell herself, that they were genuinely sent, supportive of the claimant, and not indicative at all of someone who held a prejudicial view towards transgender women, or the claimant in particular. What was put to Ms Russell that a message she had sent by Facebook messenger, a system which is only for viewing by the recipient, was that it was not appropriate to do so by that method when asking about the title by which the claimant wished to be known, and that that should have been more professionally done by letter or email. Ms Russell did not dispute that that

would have been more professional, but did not consider that there had been anything wrong with using the method she did. Given all the circumstances the Tribunal accepted Ms Russell's evidence, and the reply from the claimant at the time gives no hint of any concern as to the question or the manner of its asking, but was jocular in tone, as one would expect if two colleagues were getting on reasonably well.

Performance issues

174. The Tribunal also considered that there were examples in the claimant's evidence of her suggesting discrimination from matters where there was a ground for criticism of her. That was most obvious from the warnings issued. The first warning was in respect of a series of four latenesses within a week. That pattern of behaviour was the kind that one would expect to be addressed by such a process. It was not undertaken by Ms Russell herself, and there was no appeal. In her evidence the claimant argued in effect that she had given reason for the lateness as if that were sufficient. But the reasons given were not that, one being simply forgetting her lunch, and that was so particularly for four instances within a short period of time. But the fact that the claimant sought to make that argument, which was not a statable one, did affect the assessment of her reliability as a witness.

175. The final written warning was issued after the claimant had told her employers that she was drunk in the morning and could not attend for work. The claimant, in her evidence, appeared to consider that being honest about that meant that her fault was either negated or substantially reduced. The Tribunal did not accept that, and again the fact that such an argument was made negatively affected the assessment of her reliability. The claimant also alleged in her evidence that the manner in which Ms Russell had dealt with that issue was indicative of discrimination, but the Tribunal did not consider that the evidence demonstrated that at all. Unauthorised absence, which this was, was a potential ground for gross misconduct, which could have resulted in dismissal. The claimant had admitted the unauthorised absence less than a month after being given a first written warning, and the conduct of matters and outcome of a final written warning were entirely to be expected, and on one view lenient. The

claimant did not appeal that decision, nor make any complaint about it at that time.

176. In submission it was argued that these were not founded on by the claimant as examples of discrimination, and that is both not the case, and that was not how she addressed them in her evidence when raised in cross examination. She did not accept that they had been validly issued, but argued as above. In the pleadings that were then used for the list of issues she said in relation to the roadworks as the reason for being late that she "even took pics as proof", as if that was exculpatory. It is not. She also referred to an email sent to her sister commenting that Ms Russell said that she did not take her work or job seriously. Ms Russell did not recall such a comment, but even if it were made it followed four days of being late in a very short space of time, and was solely related to that. The claimant took it as being snide, and did not appear to appreciate that she, the claimant, was at fault in any way. She also argued that a manager Roslin Coats was late that day and not treated the same way, but the Tribunal accepted the evidence of Ms Russell that the two cases were not comparable and that Ms Coats was entitled to come in later. The argument for the claimant however was that the lateness for her was handled differently and in a discriminatory way. Similarly the pleadings were that another employee would not have been given a final written warning for the day she called in and said she could not attend work as she was still drunk. That is an argument that the giving of the final written warning was discriminatory.

177. What the claimant did seek to found on was in respect of matters in September 2018. The meeting held then was an investigatory meeting into two issues, an unauthorised absence, and unprofessional conduct and behaviour. The notes indicate firstly that the claimant did not dispute that she had shouted at Ms Russell or taken at least one and we consider two days off without following proper procedure. The claimant said in effect that she had a legitimate sense of grievance as that had followed her working nine days in a row, and having a handover meeting where she was accused by Ms Russell of gossiping. But that sense of grievance does not justify shouting at a line manager and taking two days off. The

evidence about that sequence of events was limited to the written record, signed by the claimant on each page. The claimant's position was again we considered one that was not statable, and that affected adversely our assessment of her reliability.

5 178. There was very little reliable recollection by either the claimant or Ms Russell. It had not been raised as an issue in the pleadings or list of issues, and was not directly addressed in the claimant's witness statement. There was no recollection by Mr Flood of a later meeting said to have been held with him as the claimant alleged at which he is said to 10 have remarked that the claimant and Ms Russell did not see eye to eye. Mr Flood denied that, or that he would have used such a phrase. Ms Russell indicated that a manager from Aberdeen had attended a meeting with the claimant, but there was no clear recollection on her part, and no written record that the respondent had, as spoken to by Mr Flood 15 who had carried out a search. The Tribunal concluded that there had been concerns over the claimant's conduct at that point, which were justified, but that no formal action had been taken against her, and no meeting held with Mr Flood. That was again a finding against the claimant, and affected adversely the assessment of her reliability..

20 *Lack of grievance or complaint until 5 August 2020*

179. The issue of a lack of complaint or grievance, or even seeking advice or assistance informally from HR, applied until 27 July 2020 and the allegation of theft that was made the following day. The claimant explained in her evidence that she did not wish to make matters worse by making a 25 formal complaint earlier. The Tribunal accepted that that could have been her view at the time. The lack of any step with the employer, such as an informal approach to HR, was a factor that the Tribunal considered in its assessment of the evidence. That was so even although there had been a return to work meeting in September 2019 with Ms Hamond at which the 30 claimant was told that she could raise any issue she had.

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180. The claimant challenged the manner in which that issue had been handled by Ms Russell in a number of respects, and claimed in her evidence that

others would not have been treated that way. She explained how the incident had occurred, that she was innocent of any wrongdoing, had no intent to steal, and had explained that to Ms Russell at the time. The Tribunal accepted that the claimant did not attempt to steal any item. That however is not the point.

181. The claimant's evidence is set against the fact that the alarm went off twice, a bottle of perfume was on her, and initially the claimant accepts that she did not explain what the circumstances were. The dispute is then over whether she did give an explanation at the time, when what happened came to her recollection, as she claimed in evidence. The claimant alleged that that explanation should have been accepted at the time and nothing by way of follow up including suspension and investigation undertaken. Ms Russell alleged that no explanation had been given to her.

182. The principal issue is whether or not the claimant told Ms Russell why she had the bottle on her, as she claimed, or said that she did not know, as Ms Russell claimed in her evidence, had said in her contemporaneous statement, and was stated in the contemporaneous statement of Ms Walker.

183. Whilst the claimant raised a grievance on 5 August 2020 and set out an explanation for what occurred, she did not in that say what was the explanation she had given to Ms Russell. She just provided the explanation, which includes the background, her being distracted, and how the event unfolded. What she does say is that Ms Russell's witness statement was "missing out important key parts of the conversation that had been said at the incident." She also claims later in the statement that Ms Russell had deliberately not written the explanation and that Ms Walker had not heard that par, being the explanation given. That does not entirely fit with Ms Walker's evidence which is that the claimant said twice that she did not know why the bottle was there. The claimant accepts that she said that she said initially that she did not know why the bottle was there. On the claimant's evidence the next comment was an explanation. On the claimant's evidence Ms Walker only heard the first comment of not knowing, and cannot have heard a second comment to the same effect.

That statement from Ms Walker about the claimant saying she did not know twice is also the evidence of Ms Russell both written at the time and oral. The claimant in her witness statement makes a reference to clearing out the desk and pillar only. In cross examination, it was put to Ms Russell that the claimant had told her that she was "cleaning out the perfume pillar". That was put to her twice, and denied on each occasion. It is however only a small part of the explanation appearing in the email of grievance on 5 August 2020.

184. The inconsistency between what the claimant said and the Danielle Walker statement written at the time was significant. Together with the other reasonably contemporaneous statement which supported Ms Russell's oral evidence, and the lack of consistency in the claimant's position both in her evidence and questions put in cross examination, the Tribunal concluded that it was more likely that the claimant had not told Ms Russell of the reasons for her having the bottle at the time, and that the claimant's evidence on that important matter was not reliable. The Tribunal considered in that regard that the context was relevant. The grievance followed the intimation to the claimant of the allegation of attempted theft, her suspension, the disclosure of the two written statements, and the first investigation meeting that did not conclude. It is not perhaps surprising if someone in the claimant's position genuinely believes that an explanation was given at the time when they so vehemently deny attempted theft.

185. This issue is particularly important as it is the response to that incident, including the suspension, that led to the claimant making her formal complaint. She did so after she had been suspended, not for example on 28 July 2020 complaining about how Ms Russell had treated her on the previous day..

186. We concluded that the claimant had not told Ms Russell any more than that she did not know how the bottle got there, saying so twice. The question for us is whether what happened was evidence of Ms Russell treating the claimant differently because she was a transgender woman. We considered that it was not. All that Ms Russell did was ask questions at the time, and then seek guidance from HR. She did not suspend the

claimant, although if she had a mindset against the claimant because of her being transgender she could have done that, Mr Flood took that decision on the basis of his understanding of what had been thought to have happened. Ms Russell did not commence any disciplinary investigation herself. Her role was essentially as a witness. The allegation that Ms Russell had made an allegation of attempted theft against the claimant was not in fact true – that came from a report of matters from Ms Russell to her deputy, which was transmitted to Mr Flood, and Mr Flood decided to suspend and commence an investigation into the allegation.

187. The Tribunal was also clear that most employers would have undertaken an investigation to find out what had happened given the circumstances overall, including the lack of explanation at the time, and then decide what if anything to do. That did not happen partly as the claimant left the first investigation meeting before it ended, then raised a grievance, and the grievance was investigated whilst the disciplinary matter was put on hold. It is true that the respondent did not permit breaks for conferring with Ms Curran as they had said would be permitted, but the Tribunal did not regard that as discriminatory. There is a sense of matters not being conducted in practice as had been anticipated. There is no right to be accompanied at an investigation meeting, Arrangements for a new investigation meeting were made initially, with a different manager. There was no disciplinary outcome at all, but starting an investigation is also not, we concluded, evidence of discrimination. That would have been done whether the person involved was transgender, as the claimant was, or not.

188. There being the finding on that important issue against the claimant, it was a factor to consider when assessing the evidence on other disputed matters.

Grievance process

189. The Tribunal considered the manner in which the respondent dealt with the grievance, in effect not addressing at all the allegations made by the claimant in relation to the incident on 27 July 2020, both initially and in the appeal which took place after the store had closed and the claimant's

employment came to an end. Neither Mr Serrano nor Mr Orteiza checked as a part of their own investigations what if anything was to happen with that matter or the disciplinary investigation not concluded. The Tribunal did not consider their decisions not to address the grievance as evidence of direct discrimination. It was not the most sensible of decisions, but it was based on their understanding that their role was not to consider that aspect as it would form part of the disciplinary process to be conducted by others. In fact there was no such process, but we did not consider that to be evidence of direct discrimination by those witnesses, and although Mr Orteiza did not check the status of that matter during the proceedings before him, which were after the termination of employment, we did not consider that to be evidence of direct discrimination either.

190. In similar vein we considered whether the decision to deduct sums from the final payment for what was described as "undertime" was evidence of direct discrimination. We concluded that whilst it was badly handled, with the written record stating clearly that the suspension was in place and on full pay (and that was not changed), Mr Flood was genuine in his belief that the claimant was on sick pay latterly, such that the undertime deduction was made by payroll on such a basis. Even if such matters might be regarded as a basis for facts that might shift the onus the respondents had discharged the onus of proof that those decisions were not taken to any extent because of the claimant's protected characteristic.

191. It would have been possible, and in our view preferable as best practice, to investigate the grievance about the commencement of the investigation itself, that being alleged to be discriminatory, but that fact of itself is not one that the Tribunal considers sufficient as a basis to consider that there was a prima facie case of discrimination.

Exclusion

192. The Tribunal considered that the complaints made by the claimant of exclusion were not made out. That included the WhatsApp group messages sent to all participants including the claimant, which the claimant could have responded to had she wished but did not. That

included in turn messages about gifts from Lush. The claimant said that she did not use such products but raised the issue as it was one of principle. That is not less favourable treatment in the Tribunal's view. Reference to team meals at the point of the closure of the store was also made, with the complaint being that Ms Russell had not approached her specifically to say that she could come, or words to that effect. But Ms Russell was not the instigator of the messages, not the organiser of those meals, and they were social meetings not work ones being held in the store. The Tribunal concluded that those aspects were also not evidence of discrimination or harassment.

193. Ms Russell posted a message on social media about gifts for the staff she had left for all of them in the store. The claimant did not collect one of them. But the message was a general one, there was no specific gift for each of the staff members, and some others in the staff did not collect a gift. Against that background the Tribunal did not consider that this was evidence of Ms Russell excluding the claimant. It is true that Ms Russell might have thought to tell the claimant that she could attend the store, and that as the store was closing with termination of employment the suspension was either to end shortly in any event or that the likelihood of any penalty for attending in such circumstances was minimal at worst, but that is in circumstances of redundancy for Ms Russell as well something of a counsel of perfection. The claimant did not at any stage raise with anyone whether she could attend the store, if she did in fact wish to do so.

194. The claimant argued that she liked social media posts by Ms Russell but that her own were not reciprocated. The difficulty with that argument was that the claimant did not provide any evidence of the posts she had made which she said Ms Russell had not liked, as none of those posts were in the documentation before the Tribunal, and when that point was put to Ms Russell she said that she did not recall ever seeing a post by the claimant, and understood that the claimant used Instagram which Ms Russell did not. The Tribunal did not consider that there was anything in that evidence.

195. The claimant also argued that the way Ms Russell addressed that issue in the grievance process was "very immature and petty" was inappropriate.

It was not the best language to use but it was not, we considered, evidence of discrimination, and there was no basis for any form of comparison. In similar vein the words used by Ms Russell to describe the claimant in the grievance appeal, that there was a “good Robyn” and a” bad Robyn” were criticised. We considered that they were used to describe the difference between the times that the claimant performed her role well, and those occasions where there were performance issues, and were not discriminatory. Again there was no basis for any form of comparison.

196. Further there was an issue over how Ms Russell had handled the application for the claimant to work more hours. It was accepted that she had signed a form to do so, but there was an issue over whether that was for 40 hours per week or 30 hours per week. Although the claimant argued that it was to 40, and referred to a rota document with 40 hours for the claimant in one week in August 2020, the pleadings, and list of issues, referred to it as “Robyn finally got her hours put up to 30 hours in August 2020 from 20 hours”. That supports the evidence of Ms Russell that there was some change of hours requested from 40 to 30 which explained why the form was not immediately passed to Mr Flood. In fact the claimant did not work in August 2020, either because of suspension or as the respondent contends sickness or annual leave.

Overall assessment

197. The Tribunal did not doubt that the claimant genuinely believed that she was being treated less favourably, and that that was, she believed, because she was a transgender woman. She discussed that with others including her GP and close family. But that perception is not sufficient, as explained above. The Tribunal must consider the evidence led before it, including that from Ms Russell, in reaching its decision. It is not enough to believe the claimant, although we did consider her to be a witness seeking to be honest who genuinely believed what she said. That was exemplified by her open acceptance of being unable to work one day in November 2019 as she was drunk, the term she used both with the respondent at the time, including in writing, and in evidence before us. It was disarmingly honest to say that at the time. She was we thought right in saying that others may have called in sick, not being so candid, but that did mean that

they were not true comparators to her. No one else had done what she had in that regard.

198. On that basis the Tribunal concluded that there was, as a matter of fact, no intent by the claimant to steal the bottle of men's perfume. The event happened for the reasons she gave up to the point of the alarm being triggered. But that is not the issue before us. The case is not one of a criminal charge of theft, nor an allegation that led to dismissal and a claim of unfair dismissal. It is something very different.

199. The Tribunal has already noted that the claimant did not call as witnesses any of her former colleagues. Nor indeed did the respondent. The claimant explained that she had asked a number of her former colleagues to give evidence but they expressed a wish not to do so, and she felt that she should respect those wishes rather than seek witness orders for them. Whilst that is understandable on a personal level, it did mean on an evidential level that there was no evidence from a fellow employee of support for the allegations the claimant made.

200. Within the documentation before the Tribunal were a number of written statements from fellow employees, who were not called by the respondent. As they were not called to give evidence that written evidence is of limited assistance to us, but for such assistance as it does give it is supportive of the respondent, and contrary to the position of the claimant. The written evidence included the statement from Danielle Walker referred to above. It also included a statement from Mrs Webb, formerly Miss Berry, who the claimant had given a handover to in July 2018, and who remarked that Ms Russell was "abrupt", but accepted that her point about where and when to hold that meeting was a good one, to summarise what was said. In broad terms none of those statements provided the support to the claimant that she sought. When that issue was raised with the claimant in cross examination she said that she was "quite shocked that they didn't have my back more". That was, we considered, an acceptance that that written evidence did not support the claims she made.

201. Those who did give evidence, save the claimant and Ms Russell, generally reported therefore what they had been told by others, and did not give

much direct evidence of what had, or had not, happened, or precisely how what happened did so. That does mean that there is very limited support for the claimant's assertions beyond evidence from her directly, or indirectly from those she spoke to or otherwise communicated with, and as the Advocate General made clear in the quotation above assertions on their own may not be sufficient to found a claim.

202. The Tribunal concluded for the reasons given above that the allegation by the claimant in relation to the 27 July 2020 incident that she had explained why the incident had happened to Ms Russell, who nevertheless secured her suspension for unfounded reasons, was not established. The claimant argued that Ms Russell falsely accused her of theft. In fact Ms Russell did not accuse the claimant of theft. At the time of the incident Ms Russell simply told the claimant to go home. She then sought to take advice on what to do. She could not speak to Mr Flood that day, and spoke either that day or the following day to her deputy, relaying the basics of what she understood. Ms Russell did not say to the claimant on 27 July 2020 anything to the effect that she was accused of theft, or that she was suspended. The decision to suspend was not taken by her, but by Mr Flood. The key to the suspension is that the claimant had not, at the time, given an explanation for the bottle being in her possession, as noted above. What therefore triggered the grievance, and the accusation against Ms Russell, was not properly founded. It is possible to see why the claimant was upset at being suspended and told about an allegation of theft, and as we have stated we do not believe that she was guilty of that allegation, but it was not one made against her by Ms Russell at all.

203. That finding is important, in our assessment. This was the matter that led to the formal grievance being raised when the allegation of discrimination for the protected characteristic of being a transgender woman was first raised. Until that point no grievance, formal or informal, had been raised by the claimant.

204. The Tribunal required then to consider the various other examples of what were said to be acts of discrimination and harassment. Firstly the Tribunal accepted that the claimant was genuine in her belief that she was being treated unfairly, or being treated less favourably than her colleagues, and

that the reason for that was her transgender status. Secondly the Tribunal accepted that her family members did have such a perception reported to them at the time of several events. Thirdly the Tribunal accepted the evidence of Ms Melissa Brindley that she had been at the store on one occasion speaking to the claimant and Ms Russell and come to them, and asked the claimant abruptly what she was doing.

205. The Tribunal then noted the email by Mrs Webb, provided in the grievance appeal, about an incident where Ms Russell spoke to the claimant and Ms Berry (as she then was) over the handover being conducted when the claimant should have been elsewhere, and she says that Ms Russell was "abrupt" with them both. It also took into account that it did not accept the claimant's evidence in relation to a meeting with Mr Flood in September 2018 as addressed above, and that her evidence on what have been referred to as performance issues had not been accepted.

206. Our assessment of the evidence, including at times the manner in which Ms Russell gave her evidence, is that she can be very direct, such that others could well regard that as abrupt, to the point of being close to aggressive. Ms Russell in her witness statement accepted that she was "assertive". There are times when what she may consider assertive others consider brusque and close to being overbearing. We considered however that the evidence before us is that Ms Russell had that style of management with her staff generally, and that she was no more assertive, or abrupt, with the claimant than with others. We also considered that when she was abrupt in her dealings with staff that was because there was, she believed, either a form of performance which she considered below the appropriate standard, or an issue which she could bring to the claimant's attention as a form of constructive criticism.

207. Whilst the claimant perceived that as bullying, singling her out for unfavourable treatment in a way that was she believed greater than for colleagues, the Tribunal did not consider that that was likely to have been the case. The Tribunal considered that a comparator, either actual or hypothetical, for the various incidents that the claimant sought to rely on, would not have been treated by Ms Russell any differently. As Ms Russell said in her evidence, the claimant did not see most of Ms Russell's

interactions with other staff members. We accepted that that was so. The claimant herself also alleged that some other members of staff had left because of the way Ms Russell treated them. That confirmed the impression we formed from the evidence that Ms Russell could be rather direct and challenging in the way she managed staff.

208. This is supported by assessment of the evidence of the events related to a handover in July 2018 which was the subject of an investigation meeting in September 2018. As we have explained Ms Russell did have proper cause to raise such issues. The claimant's conduct in shouting at her, and taking unauthorised absence, had been inadequate. That there was no formal action taken against the claimant thereafter tends to suggest that there was no attempt to treat her differently, or less favourably. An opportunity to give some form of warning was not taken.

209. Similarly an opportunity to dismiss for gross misconduct in November 2019 was not taken. That pattern is repeated on 27 July 2020 when Ms Russell did not take immediate action at all, but sought to take advice first. If Ms Russell had the kind of mindset against the claimant as the claimant alleged it is very surprising that none of these opportunities to take steps to prejudice the claimant in some way were taken.

210. In her written submission Ms Curran referred to the case of ***Lewicka v Hartwell plc 33142194.2019***, an Employment Tribunal decision. That was a case on very different facts, and another Tribunal decision is at best only of persuasive authority. That case was one of victimisation under section 27 of the Equality Act 2010 on the basis of exclusion from a lunch held monthly when the claimant had been included at a previous site, from where she had moved after a grievance. Those facts are so different from the facts of the present case, based on different statutory provisions, that it is not of assistance to us in our determination of the present claim.

211. We considered that Ms Russell could have handled matters better, with the benefit of hindsight. She might have been less abrupt with her staff. She did not think about contacting the claimant in relation to posts on the WhatsApp group about Lush gifts, or the meal out being planned, but that must be set in the context that the claimant did have those messages sent

to her as a group member, she did not raise any issue at the time by way of reply or message about them, and the postings were not made by Ms Russell. Similarly for the gifts Ms Russell left, she might have approached the claimant directly in light of the suspension, but in the circumstances her not doing so is understandable. Against that background we did not consider that the failure to be more proactive on that matter was evidence of discrimination. The argument that it was that is more a form of counsel of perfection.

212. This is all set against a background of some concerns over particular aspects of Ms Russell's evidence. There were a number of occasions on which she changed her evidence from that in her witness statement, or as given in the grievance or appeal hearings, to that given orally. Some of the changes were not simple inconsistencies but directly contradictory. But overall they were not so numerous and significant that the Tribunal concluded that they rendered her evidence unreliable. There was one answer given by Ms Russell in which she in effect sought to impersonate the claimant. That was not at all appropriate, but we concluded that it was a single incident and not one that indicated a mindset against those who are transgender, held either consciously or unconsciously. There were some other occasions where there was a tendency not to answer a question directly, and candidly, but in a manner that can be described as defensively. Again however those instances were not so numerous as caused the Tribunal to render her evidence unreliable. That she was defensive requires to be seen in the context of the claims being made against her, which she did not accept. A degree of defensiveness is not a great surprise.

213. In the claimant's submission there were a number of instances of what were said to be "gaslighting" of the claimant by Ms Russell. Different explanations for that term were provided in the submission, including questioning one's identity or reality or leading to distress to summarise very briefly, but it is not a term found in sections 13 or 26 of the Act. It is not a term of law. What the Tribunal requires to do is to assess the evidence it heard against the statutory test, as that is explained in the case law. It took the submissions made in this respect as criticisms of the

evidence of Ms Russell, relevant to both of those sections, arguing that her evidence should not be accepted, that the claimant was treated less favourably than others and that that was because of her protected characteristic, or was harassed for a reason related to her protected characteristic. That argument included the allegation of excluding the claimant as well as treating her less favourable generally.

214. We did not however accept such an argument. Ms Russell did not act as the claimant's submission argued she did, in our assessment. Although some of the criticism is justified in relation to inconsistency at times, and lack of candour at times, we must assess all of the evidence in the round. Putting it very simply, Ms Russell was managing an employee who was generally a good employee, doing a good job, but who could on occasion cause a difficulty by what she did, not being where she should be when she should be, or not acting in an appropriate manner such as by shouting at her manager or using her mobile telephone too near the TGT terminal, in all of which circumstances Ms Russell sought to correct the behaviours. Ms Russell may well have done so on occasion somewhat abruptly and without showing a high level of empathy, but we did not have before us adequate evidence that she did that to a greater extent with the claimant than other employees.

215. There was much cross examination on the use by Ms Russell of the descriptors of "good Robyn" and "bad Robyn". The latter term was described as discriminatory and a nickname not given to other staff. We do not consider that it is either of those. The use of those terms was to distinguish between the times when the claimant performed well, which was the majority of the time, and those when she did not, or otherwise "misbehaved" to use the terms Ms Russell provided in evidence. We do not consider that those words are indicative of discrimination on grounds of the protected characteristic. Mr Flood stated in his evidence that he could not recall such phrases being used. We accepted that he genuinely did not recall that. Whilst such terms are not the most felicitous to use, they are not ones that bear the implication the claimant urged on us.

216. In summary, the Tribunal did not consider that the claimant had provided sufficient evidence of primary facts from which the inference of direct

discrimination because of the protected characteristic of being a transgender woman could properly be made.

Has the onus been discharged?

217. The Tribunal then considered whether the respondent had discharged the onus of proof if the claimant had discharged that onus, lest it be wrong on that point. The question that this issue asks is - has the respondent proved that on the balance of probabilities the acts or decisions were not taken to any extent whatsoever because of the protected characteristic of the claimant as a transgender woman? The Tribunal considered that the respondent had established that. It did so as the evidence the Tribunal accepted was that there was a good cause for the occasions when Ms Russell spoke to the claimant, either formally or informally. The good cause was the conduct or behaviour of the claimant. In various respects that was not as it should have been. The more obvious example is the day she did not attend work saying that she was too drunk to do so. The other instances are when the claimant did not act appropriately, such as in September 2018 shouting at her line manager and taking two days off work without following procedure. However unjustified she felt it was for Ms Russell to claim she was gossiping when there was a handover, that does not justify such behaviour. It was not material to our assessment of matters that Ms Russell was both line manager, witness and investigator of the matter, as the issue for us is not of fairness but of discrimination. Such matters are not infrequently managed in that way as the expectation is that they will not lead to dismissal. It is not best practice, but that being done is not we consider evidence of discrimination. Whilst the Tribunal has commented above on the failure by either party to call other staff members it did consider the written evidence obtained in the grievance process, the appeal, and the disciplinary investigation such as it was. Cognisant of the limitations of that evidence, without any cross examination of the assessment of a witness by the Tribunal, it is relevant to note that it does not support the claimant's evidence.

218. The claimant's evidence on what happened on 27 July 2020 in relation to what was said by way of explanation to Ms Russell was not accepted, as set out above. That was an important matter, where the evidence as a

whole clearly supported Ms Russell and not the claimant. That was an evidential basis to conclude, as the Tribunal did, that Ms Russell's evidence on the several other incidents said to be examples of harassment were not that, but were simply Ms Russell managing such behaviours and conduct as Ms Russell explained in her evidence. It was only the behaviour and conduct that led to her acting as Ms Russell did, not at all related to the claimant's protected characteristic.

219. For all these reasons the Tribunal considered that the respondent had proved that none of its actions or decisions were affected to any extent by the claimant's protected characteristic, and it therefore rejected the claim of direct discrimination.

Section 26 – harassment

220. The Tribunal did not accept that there had been harassment of the claimant contrary to section 26 of the Act, which requires the act having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, that it was reasonable to consider that the conduct had that effect, and that that was related to the claimant's protected characteristic, as explained more fully in the case law referred to above. There were reasons for the conduct complained of that were solely because of the claimant's performance or conduct as that was perceived by Ms Russell. She did, and would have, treated all employees in the same situation the same. She was at times somewhat abrupt, assertive as she put it, even brusque or abrasive, but that is not sufficient to establish the claim. Nor is that fact that matters could have been handled rather more sympathetically. Mr Orteiza in effect found that it could have been, in his part upholding of the appeal, but that does not translate into a claim for harassment succeeding.

221. The actions must, at the least, relate to the protected characteristic. The Tribunal did not consider that it did. Ms Russell acted as she did to manage her team, including the claimant. There was clear evidence that in some respects the claimant did require performance management. Issues on that were raised as far back as September 2018, but no formal action then

taken. Formal action was taken for a series of latenesses, and a day of unauthorised absence, in October and November 2019. The other issues alleged were steps taken by a manager to correct what she thought was not appropriate action, such as not being where the claimant should have been, using her mobile telephone in places where that was not allowed, speaking to family members when the shop was otherwise busy, and so on. They were low level issues, and nothing formally was said at the time by the claimant to the respondent, nor was anything raised informally with HR. The final matter was the alleged theft. That allegation was made after an alarm was sounded. It was Mr Flood who decided to suspend on the basis of what he knew, and that did not include all that the claimant was saying in reply. Ms Russell might have accepted the claimant's explanation at the time and done nothing had an explanation been given to her at the time, but there no such explanation and those circumstances were a basis for her to seek advice, and her acts were not we consider related to the protected characteristic at all, but solely given the circumstance of an alarm going off, the discovery of a tagged item and the lack of an immediate explanation from the claimant. It may or may not have been empty – the Tribunal considers that it was to all intents and purposes empty, but again that is not the point. There was enough that was unclear and had an air of suspicion about it for Ms Russell to think that advice should be taken, and she would have done the same regardless of any protected characteristic, in our view. When matters were reported to Mr Flood he did have a basis to suspend. That was not indicative of guilt, but an investigation was warranted.

222. The Tribunal concluded that what happened did not fall within the statutory definition of harassment as although the claimant did honestly consider that the conduct was unwanted and created what she perceived to be an hostile and intimidating environment within section 26 it was not reasonable for her to have that perception given the circumstances, which in essential were when she herself acted in an inappropriate manner or could have acted in a more appropriate manner such that either some form of informal discipline or constructive criticism was warranted. That was so also in relation to the two warnings which were issued, for good cause. Separately, and more significantly, the steps taken by Ms Russell were

not related to the protected characteristic to any extent. They were taken only because of the claimant's behaviour or conduct. The matters that led to the suspension and investigation were because of the events of 27 July 2020 which the claimant did not provide an explanation for at the time. That was also not to any extent related to the claimant's protected characteristic.

223. The claim for harassment is therefore dismissed.

Jurisdiction – conduct extending over a period

224. The matter does not now fall for determination but the Tribunal considered that there was no sufficient evidence of conduct extending over a period in the actings of the respondent, such that unless it was just and equitable to extend jurisdiction claims for acts prior to 21 July 2020 were outwith the jurisdiction of the Tribunal. That was firstly as there was insufficient evidence of acts in that context, but separately there were material periods of time between acts which could be said to be discriminatory, not least the period from around December 2019 to the incident on 27 July 2020. If there was a specific incident during that period the detail and date of that was not given in evidence, or was a part of the generalised allegations which the Tribunal did not consider to have been established.

Jurisdiction – just and equitable

225. This matter similarly does not now fall for determination, but if it had the Tribunal would have concluded that it was just and equitable to extend the primary time limit. The hardship the respondents relied upon was the loss of a time bar defence, and the difficulty in recollection of some points of detail, but the evidence was heard on such matters, the evidential difficulties were limited, they applied to both parties, the incident on 27 July 2020 and later matters was admitted to be within the jurisdiction, and it was accepted that earlier events were evidence to consider for it in any event, such that the prejudice to the respondent was not considered to be material. It would have been just and equitable to hold that the claims, if they succeeded, were within the jurisdiction of the Tribunal under section 123 of the 2010 Act..

Notice pay and holiday pay

226. The claim against the respondent was not clear, and the claimant did not give much evidence about it either in her witness statement or when asked by the Judge to do so. Her evidence was generally that she thought that notice covered sums due at termination. She thought that she had not been paid the sums she was entitled to. She had prepared a Schedule of Loss through her representative but that was not addressed in any detail.

227. There is no basis for a claim in relation to holiday pay. So far as notice is concerned, that appeared to be pursued by the claimant in her evidence on the basis that not all sums that she expected to receive were paid. So far as notice itself is concerned, being a claim in respect of the notice she was entitled to, the Tribunal noted that a payment for that was made in the final payslip and did not consider that there was evidence of an incorrect sum for notice being paid, particularly as the evidence included a form of ex gratia payment of £1,500. The other aspects of the Schedule of Loss were not addressed in the evidence in any detail, and do not form a basis on which the Tribunal can make any finding of either breach of contract or unlawful deduction from wages.

228. Where there was an issue at least potentially was in relation to a deduction from the final payslip for "undertime", which was made as she had not worked after she had provided a sick note. Mr Flood said that she was then not on suspension but sick leave, and that that was addressed in arrears. The claimant was treated by the respondent, on Mr Flood's evidence, as being not on suspension but sick leave after she provided a fit note with effect from 31 July 2020. The suspension was on pay initially as she was told that by Ms Coats at a meeting on 28 July 2020, and recorded in the note of that meeting. She was not at any stage told that she was not suspended, including in writing. The documents that were sent to her included a letter of 31 July 2020 referring to sickness and sick pay that were not clear in telling the reader that someone suspended who was then on sick would always be treated as not then suspended, but absent through sickness. When the fit note was received on or around 31 July 2020 the claimant was not informed in writing that she was now not suspended, and not on full pay but sick pay. The letter was followed

by an email from the respondent sent on 6 August 2020, drafted by Mr Flood, which specifically stated that she was on suspension. The letter emailed on 31 July 2020 had said that he would inform her of any changes to her suspension, but he did not.

229. There is a potential issue in these circumstances as to whether or not the undertime deduction was properly made. It is not an issue of notice as a matter of law, however. It is a different claim at least as to the facts supporting it, albeit that it can be both a claim of breach of contract and of unlawful deduction from wages, and the issue becomes firstly whether or not to allow the claimant to amend to include it, and secondly if so whether that claim succeeds on the merits or not, if it can be dealt with at this stage.

230. The Tribunal considered the ***Selkent*** factors initially. They are not exhaustive but a framework to consider matters. Firstly the amendment seeks to add new details of an existing claim, one of breach of contract or unlawful deduction from wages. Whilst the umbrella is an existing claim the underlying rationale for it is different to that for damages for breach of contract in relation to notice of termination. There is some causative link, as the issue relates to sums paid on termination, but it is limited as it is not for sums in lieu of notice, but wages during employment. It is for “undertime” however, as stated on the wage slip, without that term being explained at that time. Secondly, however, the respondent did not appear to inform the claimant that it was doing so at the time, which is in very early August 2020. The claimant was not told that the respondent proposed to treat her as not suspended but on sick leave. Indeed an email dated 6 August 2020 stated that she was on suspension. Neither Mr Orteiza nor Ms Russell understood that the claimant was anything other than suspended.

231. The Tribunal secondly considered the issue of timebar. The legal claim of breach of contract and of unlawful deduction from wages was made timeously, it is the underlying circumstance for it that has changed, and changed to a material extent. That claim if made of new now would be outwith the timebar provisions of section 23 of the 1996 Act, or Regulation 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 which confers jurisdiction on the Tribunal for some breach of

contract claims, where in each case the first stage of the test is reasonable practicability, the second stage if the first stage is applicable is a reasonable time, and there is no just and equitable extension. There was no suggestion that it was not reasonably practicable to have raised the issue at the time of the Claim. The new factual basis for a claim pled in the Claim Form is considered by the Tribunal to be one that is subject to the timebar provisions, but that is not determinative. It is one of the factors, albeit an important factor, to consider, and in doing so the Tribunal takes into account that the claim of breach of contract, or unlawful deduction from wages, was discernible in the Claim Form as one of the claims made, even if for different reasons.

232. The Tribunal considered the issue of the timing and manner of the amendment. It was made very late indeed. But the claimant is not represented by a legally qualified representative. She did set out some of the challenges to what was paid in the Schedule of Loss. Whilst there is some indication of the response to that in the Counter Schedule of Loss it is not as clear as it might be, such that the Tribunal was only aware of what the respondent was seeking to argue fully when Mr Flood gave his evidence. That evidence was not entirely consistent, however, including with the email on 6 August 2020 that he drafted which is not consistent with the claimant having been on sick leave, not suspension, from on or around 31 July 2020.

233. The Tribunal then considered matters in the round, with the relative hardship or injustice to the parties if the application were to be allowed or refused. It concluded that the amendment should be allowed in all the circumstances, but that the respondent should have the ability, if it wishes, to lead further evidence on whether or not there was a breach of contract or unlawful deduction from wages, as well as (for both parties) on the issue of remedy. It appeared to the Tribunal on the information before it that the claimant has a reasonably strong claim in relation to the undertime deduction, although no final decision on that claim on its merits has been made. The amendment was allowed principally as the respondent had not, at the time, explained that the claimant would be on sick pay rather than full pay, or that she had been considered to move from suspension to

sickness absence, the claimant was not legally represented at any stage, the claim is a discrete one for a particular aspect with a finite and limited quantification, it relates to a suspension for an allegation never concluded, and the sickness followed that suspension in circumstances where the claimant was genuinely feeling especially stressed because of the events on and after 27 July 2020 but in circumstances where, although there was a basis to suspend, the claimant was in fact not guilty of attempted theft and the respondent did not make any finding that she was. It could have investigated that issue before the termination of employment but did not do so. Although there is the issue of timebar as referred to above the Tribunal noted that a claim for breach of contract in the Sheriff Court remained possible as the timebar provisions for such a claim there is of five years, and such a court action would involve new proceedings and involve additional delay and expense, repeating much of the evidence already given before us. We concluded that in all the circumstances the prejudice and hardship to the claimant if it were refused would be greater than that to the respondent if it were to be granted. The respondent will be able to lead evidence on the merits if it wishes to. If the claim succeeds on the merits the evidence as to remedy can be considered.

234. The Tribunal accordingly allowed the amendment, and a hearing shall be fixed to determine whether either or both of the claims of breach of contract or unlawful deduction from wages succeed (although arising out of the same issue they are legally distinct claims on which the claimant need succeed on one) and if so what the remedy should be.

235. The Tribunal shall consider whether or not either of those claims succeed at that further hearing, after considering any further evidence the respondent tenders and evidence on remedy from both parties. That hearing shall again be heard remotely, for one day before the same Tribunal, and shall be on a date to be afterwards fixed. Notice of that hearing shall be issued separately. There was some evidence from Mr Flood of further sums paid to the claimant in May 2021, although the amount and detail of it was not given in evidence. Parties are encouraged to seek to agree as much of the facts of the issues for that matter as they can, but no order to do so is made.

Conclusion

236. In light of the findings made above, the Tribunal unanimously concluded that the claims under the Equality Act 2010 did not succeed and the Tribunal must dismiss them.

5 237. The Tribunal grants the amendment sought by the claimant, and a hearing to determine those claims shall be fixed, on the basis set out above. The remaining claims for breach of contract and unlawful deduction from wages in relation to holiday pay are dismissed.

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Employment Judge:	**A Kemp**
Date of Judgment:	**04 November 2021**
Date sent to parties:	**05 November 2021**