EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103074/2022

Held in Glasgow on 12-15 June 2023 and via Cloud Video Platform (CVP) on 22-23, 28-30 November and 1 December 2023

Employment Judge Sangster
Tribunal Member Paton
Tribunal Member McCaig

Ms L Ricketts	**Claimant** **Represented by** **Mr C Mac -** **Lay Representative**
McCurrach UK Limited	**Respondent** **Represented by:** **Mr P Maratos** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of:

- direct discrimination because of age and/or sex;
- indirect age and sex discrimination; and
- harassment related to age and/or sex

do not succeed and are dismissed.

REASONS

Background

1. The claimant presented complaints of direct discrimination because of age and sex, indirect sex and age discrimination and harassment related to age and sex, all arising in relation to her employment with the respondent from 11 March 2020 to 6 January 2022. The respondent denied that the claimant had been discriminated against or harassed.

2. Preliminary hearings for case management were held on 1 August 2022 before Employment Judge Eccles (the **First Preliminary Hearing**), on 16 January 2023 before Employment Judge d'Inverno (the **Second Preliminary Hearing**) and on 6 February 2023 before Employment Judge Hoey (the **Third Preliminary Hearing**).

3. The final hearing was previously postponed on two occasions. The hearing which was scheduled to take place from 21-24 November 2022 was postponed at the request of the claimant (there being no objections from the respondent). The hearing which was due to commence on 6 February 2023 was postponed as neither party was in a position to proceed, and it was not in accordance with the overriding objective to do so.

4. The hearing was then listed to take place from 12-16 June 2023, in Glasgow, with two of the respondent's witnesses giving evidence remotely, by CVP. The hearing proceeded on 12-15 June 2023, but was then adjourned. The hearing continued, by CVP, on 22-23, 28-30 November and 1 December 2023.

Issues to be Determined

5. In the note issued to the parties following the First Preliminary Hearing, Employment Judge Eccles set out the issues to be determined at the final hearing, indicating that the claimant required to provide dates in relation to the asserted acts of direct discrimination and to provide details of further instances of harassment relied upon. At the Second Preliminary Hearing, it was noted that the issues to be determined at the final hearing remained as set out in the note of the First Preliminary Hearing. The respondent was directed to extract the list of issues from the note, intimate this to the claimant and lodge it with the Tribunal. The respondent did so on 23 January 2023, incorporating the dates and further acts of harassment asserted by the claimant in further particulars dated 11 August 2022. The claimant provided an adjusted version of the list of issues and both lists were discussed at the Third Preliminary Hearing, at which it was noted that the respondent objected to three of the amendments proposed by the claimant. These were discussed

in turn, and it was determined that two of the three amendments would not be permitted, the remaining one was permitted.

6. Following the discussion at the Third Preliminary Hearing, the list of issues stated as follows:

The Complaints

The claimant is making the following complaints:

1.1 S.13 Equality Act 2010 - Direct Age and Sex discrimination.

1.2 S.19 Equality Act 2010 - Indirect Age and Sex Discrimination.

1.3 S.26 Equality Act 201 0 - Sex and Age - Harassment

S.13 Equality Act 2010 - Direct Age and Sex Discrimination

2.1. Was the Claimant treated less favourably by the Respondent because of her sex and/or age because:

i. On 29th July 2021, the Claimant was late for Voluntary Team Meeting because she needed to go to the Toilet and subsequently got held up in traffic. Did Chris Brown chastise the Claimant in front of her work colleagues for being late and said to her "I don't care if you needed to go to the toilet, you will be in time for my meetings."

ii. On 11th May 2021, did Chris Browns attitude towards the Claimant change when she started a relationship. When she was single, would Chris Brown often discuss his personal circumstances with the Claimant. The friendliness stopped after the Claimant started a relationship and the acts of Discrimination started.

iii. On 11th August 2021, did Chris Brown send the Claimant a note asking why he "should have to chase her" to arrange a meeting.

iv. On 12th August 2021, did Chris Brown meet the Claimant at a supermarket did he angrily shout at her in front of customers.

v. On 12th August 2021, did Chris Brown comment on the Claimants weight loss but ignored her hand splint?

vi. On 19th August 2021, when the Claimant made a mistake when claiming her expenses, was she told "you've had enough out of us."

vii. Did Chris Brown tell the Claimant that it did not matter if she could not hear what another senior female employee was saying and said "just look on and pretend you can hear her."

2.2 If so, did the treatment amount to less favourable treatment and

2.3 If so, was the less favourable treatment because of the Claimants Sex/and or Age?

If the less favourable treatment was because of age, can the treatment be objectively justified by the Respondent?

S.19 Equality Act 2010 - Indirect Age and Sex Discrimination

Indirect Age Discrimination

1.1. Did the following PCR's put the Claimant at a particular disadvantage when compared to younger employees:

i. The requirement to work more than contracted hours in order to achieve business targets &

ii. The requirement to work a specific/minimum number of hours each working day while having to drive long distances between supermarkets.

Indirect Sex Discrimination

1.2. Did the following PCP's put the Claimant at a particular disadvantage when compared to men:

i. Not being allowed to end the working day early, especially on Fridays.

1.3. Did the Respondent apply some or all of the PCPs identified as above?

1.4. If so, did they cause the Claimant a particular disadvantage because of her Sex and/or Age?

1.5. If so, can the PCPs be objectively justified by the Respondent?

S.26 Equality Act 2010 - Sex and Age - Harassment

4. Did Chris Brown behave and engage in unwanted conduct as described below:

i. Deliberately delay the approval of a request for annual leave after the Claimant started a relationship.

ii. Lack of support and placing pressure on the Claimant when she had anxiety and was caring for her mother and by saying "do that in your own time."

iii. Being goaded during the investigation on 11th November 2021 and put under pressure to answer questions.

iv. Communicating in a "brash and bullish" manner and belittling the Claimant in meetings on 4th June 2021, 20th August 2021, 11th November 2021, 29th November 2021.

v. On 5th June 2021, 14th June 2021, 3rd September 2021, 16th November 2021, did the Claimant raise to Chris Brown the supermarkets allocated for her to visit were too far away from her home and it wasn't possible to visit them all within the recommended working hours? Did Chris Brown advise the Claimant this was planning issue and subsequently used this to support his claim that she wasn't performing?

vi. On 4th October 2021, did Chris Brown enforce a holiday for 7th October 2021. Had Chris Brown not considered the long drive

home after a compulsory meeting to be working hours and that she had a pre-booked holiday for 8th October 2021.

vii. *On 20th August 2021, during a PIP meeting, did Chris Brown request the Claimant attend 10 more stores and spend less time in each? Did Chris Brown disregard the issue the Claimant raised it wasn't possible to cover the ones already allocated and achieve her performance figures within the contracted working hours?*

viii. *On 24th December 2021, did Debra Gonsalves confirm during the Disciplinary process that HR had been consulted and were aware of all the issues being raised throughout the process and HR attendance in the Disciplinary meeting to ensure fair play was not required despite the Claimants repeated requests to ensure fair play.*

ix. *On 6th January 2022, did Debra Gonsalves and 15th February 2022 did Helen Sheridan both disregard claims of being selective and not support the Claimant to raise a Grievance against Chris Brown for Harassment and did they investigate appropriately concerns regarding inappropriate access to telematics tracking data and claims of physical tracking.*

x. *On 24th December 2022, 4th January 2022 - did Debra Gonsalves refer to a flexible working policy but it was a Smart Working guide which was only operational for a limited period?*

xi. *On 4th January 2022, was the tablet failing to arrive at the Claimants premises duly considered before dismissal of the Claimant?*

4.1 If so, was the conduct unwanted?

4.2 If so, did the conduct relate to the Claimants Sex and/or Age?

4.3 If so, did it have the purpose or effect of:

i. Violating the Claimants dignity or

ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Remedy

5. Has the claimant taken reasonable steps to replace lost earnings?

6. If not, for what period of loss should the claimant be compensated?

7. What injury to feelings has the Discrimination caused the Claimant and how much compensation should be awarded for that?

8. Is there a chance that the Claimants employment would have ended in any event? Should compensation be reduced as a result?

9. Is there any Contributory Conduct by the Claimant? If so, by what proportion, should any compensation be reduced?

7. In correspondence from the Tribunal dated 18 April 2023, it was noted that the list of issues *'has been the subject of extensive correspondence. Employment Judge Hoey's Preliminary Hearing Note clearly sets out that the List of Issues was agreed during the last preliminary hearing. EJ Hoey's letter of 15 February then set out clearly the steps that the claimant would require to undertake if it was their intention to expand that list of issues by amending their claim. To date, the claimant has not made any application to amend in the way set out by EJ Hoey. Therefore, the list of issues stands exactly as was agreed at the last preliminary hearing.'* This was reiterated in further correspondence from the Tribunal dated 25 April 2023.

8. The Tribunal raised with the parties, at the commencement of the final hearing, that the list of issues contained in the bundle did not reflect the terms which had been agreed following considerable discussion, culminating in the discussion at the Third Preliminary Hearing, when the list of issues was finalised. The list of issues in the bundle was the list of issues which had been produced by the claimant prior to the Third Preliminary Hearing but, as set out above, two of the claimant's proposed changes were not permitted. Time

was taken, at the commencement of the final hearing, to ensure that everyone amended their list of issues in relation to these two points, so that everyone's list of issues reflected that agreed at the Third Preliminary Hearing, as set out in paragraph 6 above. The words to be added were read out, as well as those to be deleted. Time was allowed for everyone to make these amendments and the full sentences were then read out, so everyone could check their version was correctly recorded.

9. The claimant's representative then indicated that he had discussed, and agreed with the respondent's previous representative (Mr Maratos having taken over representative the Friday before the hearing, when his colleague became unwell), further changes to the list of issues following the Third Preliminary Hearing. It was agreed that the claimant would present evidence of that agreement, and the terms agreed, to the respondent's current representative during an adjournment, so that parties could ascertain whether agreement could be reached on this matter. It was not possible for them to do so during the adjournment, as the claimant's representative could not locate the emails he was relying on. He forwarded these to the respondent's representative at 09:18 the following morning and the matter was discussed at the start of the hearing on the second day. At that point the claimant's representative provided a copy of the list of issues which he asserted had been agreed. This differed in a number of respects to the version agreed at the Third Preliminary Hearing. It was clear there remained a dispute between the parties as to whether the respondent's former representative had agreed changes to the list of issues with the claimant. It was agreed therefore that the Tribunal would, over the course of the lunch break on the second day of the hearing, review the correspondence relied on by the claimant to indicate that agreement had been reached.

10. Having reviewed this the Tribunal confirmed to the parties, when they returned following lunch on the second day of the hearing, that the list of issues would remain as agreed at the Third Preliminary Hearing. It was explained that the Tribunal had reviewed the emails relied upon to assert that an agreement to change the list of issues had been reached with the

respondent's former representative and the Tribunal did not accept that there had been any such agreement: An email from the respondent to the claimant's representative on 2 March 2023 stated, in terms, *'the Amended LOI is not agreed',* and a further email, dated 10 March 2023, attached a list of issues and stated that *'it is my understanding that…the attached list is what was agreed'*. The list attached reflected the terms of the List of Issues agreed at the Third Preliminary Hearing, not the version handed to the Tribunal that morning. The Tribunal also noted the terms of the Tribunal's correspondence dated 18 and 25 April 2023, as set out above.

Other Preliminary Issues

11. A number of other Preliminary issues were discussed at the start of the hearing. The principal issues raised are summarised as follows:

11.1. **Joint Bundle of Documents.** The claimant's representative raised that he had not had sight of the final bundle until Friday 9 June 2023. Whilst a link had been sent the Monday 5 June 2023, he was not able to access the bundle through that link. The respondent indicated that there been a delay in finalising the bundle as transcripts of 5 hearings, which the claimant wished to rely on, were only provided to the respondent in the period from 26 May to around 1 June 2023. There was then ongoing discussion as to whether the full transcripts should be introduced into evidence and/or the hearing postponed. The parties had been informed, on 9 June 2023, that the respondent's application to postpone the final hearing was refused.

The claimant's representative indicated that the bundle produced by the respondent, which was in chronological order, did not follow the numbering of the documents which the claimant had disclosed, or use the same titles. The claimant's representative indicated that he and the claimant had required to spend a great deal of time cross referencing the claimant's bundle with the bundle provided by the respondent. The claimant did not have 5 copies of their disclosure bundle, utilising her numbering, with her. The claimant's representative was asked to

confirm whether he and the claimant were in a position to proceed with the final hearing, given that he had not had sight of the final bundle before the previous Friday. He confirmed that they were, but may require extra time to identify where documents were in the joint bundle. The Tribunal confirmed that there was no problem with the claimant and/or her representative having extra time for this purpose and that assistance would be provided by the Tribunal in locating documents, whenever it was requested by the claimant or her representative. The respondent's representative also indicated that, prior to the second day of the hearing, he would attempt to cross reference the claimant's disclosure bundle with the documents in the joint bundle and identify where they appear. He subsequently did so, identifying the claimant's disclosure reference in respect of approximately 50% of the documents in the joint bundle.

11.2. **Missing Documents.** The claimant's representative also indicated that their initial view was that 3 documents which the claimant had in their disclosure documents may be missing from the bundle, including what was referred to as 'a list of emails'. In relation to the documents which the claimant's representative was unable to locate in the bundle, it was agreed that parties would discuss this during a short adjournment, so it could be identified whether the documents were in fact in the bundle, or could/should be produced. Following that adjournment, in relation to the three documents the following was noted that:

11.2.1. One had been located in the bundle.

11.2.2. One was the Acas Code. It was agreed this did not require to be included in the bundle. The witnesses would not be referred to it and the Tribunal were familiar with it and had ready access to its terms.

11.2.3. The final document was stated to be a list of emails in response to a subject access request. It was agreed parties

would discuss this further, to agree whether it did in fact require to be produced. By the start of the second day, it was evident that it did require to be produced and that it was in fact the entire SAR response, which the claimant's representative wished to be produced. It was agreed that the respondent would arrange for this to be printed and copies provided for use during the hearing. They were provided for the commencement of the third day of the hearing, but did not include page numbers. Paginated copies were later provided.

Conduct of the hearing

12. A significant amount of time was spent, particularly in the June hearing, addressing issues/concerns raised by the claimant's representative. In the first three days alone, only 8 hours of evidence was heard – this consisted of the claimant's examination in chief, which concluded at 12:05 on the third day of the hearing.

13. On the conclusion of the claimant's evidence in chief, it was agreed that an early lunch would be taken and we would then move to cross examination, commencing at 13:05. It was indicated that it may be appropriate for the Employment Judge to ask some questions, prior to cross examination. This was done after lunch and covered matters contained in the list of issues, which were not addressed in evidence in chief. Those questions took approximately 15 minutes following the lunch break.

14. For the remainder of that day the claimant's representative raised a number of concerns relating to matters such as why the Judge would ask questions of the claimant and the respondent's representative coughing. The claimant's representative also re-raised issues which had been discussed and addressed at the commencement of the hearing, for example in relation to the bundle and list of issues. Each of these issues were addressed by the Tribunal orally at the time.

15. On several occasions during the course of that afternoon, the claimant's representative indicated that he would not continue to participate in the

hearing and/or that he would be recommending to the claimant that she should simply walk away and not continue to participate in the hearing. The Tribunal confirmed to the claimant and her representative that it was open to them to do so, but that if they did so they should be aware that it was likely consideration would be given to either dismissing the claim in their absence, or proceeding to hear the remainder of the evidence and making a Judgment based on that. Alternatively, the claimant could continue without her representative, if he alone wished to leave. The claimant and her representative were afforded two adjournments during the course of the afternoon to consider their position. One for 15 minutes (13:55-14:10) and one for 30 minutes (14:45-15:15). In the period between these two adjournments, the claimant's representative's tone became inappropriate and discourteous, and his voice was repeatedly raised, to the extent that the clerks, sitting at reception outside the Tribunal room, of their own volition, called for security guards to attend. The security guards waited outside the Tribunal room, watching proceedings, in case they were required. On return from the second adjournment, when the claimant's representative indicated that the claimant wished to continue with the hearing, and that he would continue as representative, the Tribunal indicated to the claimant's representative that his behaviour prior to the break had been inappropriate. The Tribunal indicated to the claimant's representative, at that point, that:

15.1. Security guards had been called by the clerks, prior to the adjournment, and that this was due to the claimant's representative's shouting having been heard by clerks outside the Tribunal room. The security guards were currently outside the Tribunal room and Judge could call the guards from the Tribunal, simply by pressing a button on the bench. The Judge would not hesitate to do so, if the claimant's representative repeated the behaviour he had prior to the adjournment.

15.2. That he should be aware that Rule 37 permitted the Tribunal, of its own volition, to strike out a claim where the conduct of a claimant, *or their representative*, was unreasonable. It was highlighted to the claimant's representative that he ought to be aware that this was an option open

to the Tribunal, when determining how to conduct himself going forward.

16. The claimant's representative apologised for his behaviour, but continued to raise issues for the remainder of the afternoon, albeit in a more measured tone. At the end of the day, the claimant's representative asked for clarification of the claimant's options in relation to proceeding with the hearing. It was explained that their only options were to continue with the hearing or leave. The claimant's representative asked whether the hearing could be postponed. The Tribunal confirmed that there was no basis to do so and a further two days had been allocated for the hearing. The Tribunal confirmed that they expected parties to be in a position to proceed with cross examination, commencing at 09:30 the following morning.

17. At 08:56 the following morning, 15 June 2023, the claimant's representative sent an email to the Tribunal in the following terms:

'The best efforts of the Tribunal & Respondent Representatives to help the Claimant identify her evidence, the Claimant is requesting that we Abort the proceedings and re-start again on the basis that a fair outcome cannot be derived during these proceedings.

The reasons for requesting this are as follows:

1. The Claimant has had an emergency with her aging mother and needs to assist her.

2. I her representative has woken up and have lost my voice.

3. Issues with the Bundle, Bundle Index and the LOI.'

18. The claimant's representative attended the Tribunal, but the claimant did not. The case called at 09:45, at which point the claimant's representative was asked to provide an explanation as to why the claimant was not present and the further issues contained in his email. He passed short handwritten notes to the respondent's representative in response, with the indication that the respondent's representative should pass the notes to the Tribunal. He

obligingly did so. In the notes the claimant's representative indicated that he had entirely lost his voice and he had also had an accident, in that he had fallen down some stairs and had required to travel to the Tribunal, from his hotel, in a taxi. He was asked if he required medical attention. He indicated he did. A first aider was called at 09:54 and the proceedings adjourned. The Tribunal understands that paramedics were called by the first aider. They assessed the claimant's representative. Once they had done so, the claimant's representative then left the building, of his own volition, without informing the Tribunal, or providing any explanation. Given that it appeared that the claimant's representative would not return, and the claimant herself was not present, the remainder of the hearing was, at 11:00 on 15 June 2023, postponed.

19. It was identified that the earliest the hearing could resume was November 2023. Prior to the hearing resuming numerous case management issues were raised and addressed, including strike out applications by both parties, which were refused. The continued hearing took place by CVP and the claimant also produced her own bundle for that hearing. The continued hearing was carefully timetabled and parties were held to the times set out in that.

Evidence

20. The initial bundle of documents extended to 441 pages. During the course of the hearing, as set out above, the respondent lodged, at the claimant's request, a copy of the claimant's subject access request, extending to 685 pages, and the claimant also lodged her own bundle, extending to 1,457 pages.

21. The claimant gave evidence on her own behalf.

22. The respondent led evidence from 3 witnesses, namely:

    22.1. Chris Brown (**CB**), Regional Manager for the respondent;

    22.2. Deborah Gonsalves (**DG**), Account Controller for the respondent; and

22.3. Helen Sheridan (**HS**), Client Director and Executive Director for the respondent.

23. The other individuals referenced in this judgment are as follows:

23.1. Steve Potter (**SP**) Territory Manager for the respondent.

Findings in Fact

24. It should be noted that this Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.

25. The respondent is a field marketing provider. It has headquarters in Glasgow but operates throughout the UK.

26. The respondent has a disciplinary procedure, which is contained in their Colleague Handbook. This states that managers will conduct investigations, disciplinary hearings and appeal hearings, and another manager may be present to take notes at each of these meetings. The procedure states that employees have a right to be accompanied at any disciplinary or grievance hearings by a colleague or trade union representative.

27. The claimant lives in Plymouth. Her employment with the respondent commenced on 11 March 2020. She was 53 years old at that point. She was employed as a Territory Manager, with responsibility for Devon & Cornwall. Her role focused on field based marketing for particular brands, which required her to visit stores and supermarkets in her territory, to seek to improve return on investment for certain products stocked there, and troubleshooting if particular issues arose. The claimant reported directly to CB, who in turn reported to DG. CB managed a team of 10, 3 of whom were female. The claimant was in the middle of the age range of the team. CB is himself older than the claimant.

28. The claimant was provided with a tablet by the respondent to enable her to undertake her role.

29. The previous incumbent in the role Territory Manager, for Devon & Cornwall, was a woman. She was older than the claimant and retired from the role, aged 60/61. The individuals who undertook the role prior to that were both men, one of whom retired from the role aged 65. None of these individuals had any difficulty covering the territory, which remained unchanged when the claimant took up the role.

30. The claimant signed a Statement of Terms and Conditions of Employment, provided to her by the respondent, on 2 March 2020. That stated that *'Your working hours are 40 per week. You will be required to work 5 days out of 7 each week, normally Monday to Friday. Working hours will be that which is operationally required to fulfil job demand. A first call will be no later than 8.30am and you will not leave your last call before 5.30pm. An unpaid lunch break of 1 hour applies.'* The statement made reference to the respondent's Colleague Handbook, which was stated, with the Terms and Conditions of Employment, to form the Contract of Employment (the **Contract**). The statement referenced that the respondent's disciplinary and grievance procedures were included in the Colleague Handbook.

31. While the Contract stated that the first call required to be no later than 8.30am and that the claimant could not leave her last call before 5.30pm, this was not, in practice, adhered to. Instead, the requirement was actually that employees required to work core hours, arriving at their first store by 10am and not leaving their last store before 4pm. Beyond that, it was up to each individual Territory Manager when they completed the remainder of their contractual hours. On occasion, and provided the employees had already completed their contractual hours for the week, CB would also permit Territory Managers to finish prior to 4pm on a Friday. The claimant regularly requested that she finish early on a Friday and this was regularly authorised by CB, albeit not on every occasion it was requested.

32. Immediately following the commencement of the claimant's employment, lockdown was imposed. The claimant's team were furloughed, but she did not meet the criteria, as she had only recently commenced employment. She was initially transferred to another team, but was subsequently also furloughed for around 3 weeks.

33. In October 2020, the claimant's elderly mother and stepfather returned to the UK, from Portugal, to live with her. The claimant's mother was unwell and used a wheelchair. The claimant converted a room downstairs in her home to a bedroom for her mother and commenced arrangements for the installation of a downstairs bathroom. The claimant had significant caring responsibilities thereafter. Her mother fell, and was hospitalised for a period, in December 2020. The respondent was flexible in permitting the claimant to take time off, when required, as a result of her caring responsibilities.

34. During 2020, CB regularly visited stores with the claimant to support her in her role. They often had catch up meetings, with coffee, outside, due to covid restrictions. He was aware that she was going through a number of personal issues and was new to the role. He provided considerable support for her during that period.

35. In January 2021, the claimant was hospitalised having sustained dog bites to her hands while at home. She was absent from work as a result. In accordance with her contractual entitlement, taking into account that she had under one year's service, the claimant was paid one week's full pay, followed by statutory sick pay, during her absence. The claimant felt aggrieved at this. She thought she ought to have been paid in full throughout her absence or furloughed. Due to financial concerns, it was agreed that the claimant could take 8 days' holiday, and receive full pay, at the end of her period of absence.

36. The claimant returned to work in March 2021, but continued to wear bandages, covered with gloves, on her hands as a result of her injuries, as well as a brace on her left hand.

37. By the time the claimant returned to work she had been employed by the respondent for a year. Around that time, the respondent re-introduced the

requirement for employees to adhere to Key Performance Indicators (KPIs), which had not been required during the Covid-19 pandemic. Given the claimant's start date, her performance had not previously been measured against KPIs during her employment with the respondent. CB met with each of his team members, including the claimant, at least monthly, to discuss their performance against the KPIs.

38. At the start of May 2021, CB met with the claimant to discuss her performance against the KPI's. In relation to display KPIs, it was noted that the claimant had achieved 49.8% and 55.8% respectively over the previous 2 months. He noted that she had not achieved coverage of core stores in April and that SP and CB had provided support to ensuring full coverage going forward. In relation to TITO statistics (Time In, Time Out), CB noted that calls were not starting sometimes until 10.35 and days had finished early (the expectation was core hours of 10am to 4pm). He stated that, whilst he was aware this had been authorised, on occasion, to support personal issues, this was not always the case and the claimant required to ensure that she was working her full contracted hours and that she was present in stores for her core hours of 10am-4pm.

39. On 11 May 2021, the claimant requested 2 days' annual leave at the end of November 2021. CB did not approve this initially, as he was concerned that the claimant did not have any remaining entitlement, having taken all of her remaining entitlement in March 2021. He indicated that he would need to check the position with HR. The request was then overlooked and only approved in mid-August 2021, when HR noticed that it remained outstanding and questioned why. It was approved at that point.

40. In May 2021 the claimant mentioned in an email to CB that she was attending a stress control course and had been referred for counselling. CB responded by email stating that *'as discussed before any support you need with this let me know.'* She was given time off work for this purpose.

41. The claimant started a new relationship in April/May 2021. Her partner lived in Hemel Hempstead. CB became aware of this in around May/June 2021

and was happy for the claimant, particularly as she seemed to have experienced a number of difficult personal issues in the recent past.

42. On 4 June 2021, CB and the claimant met to discuss her performance during May 2021, against the KPI's. It was noted that, in relation to displays and visits to her core stores, her performance was improving. It was noted however that in respect of dynamic coverage, she had visited 5, 8 and 11 stores in March, April and May respectively, whereas the expectation was that she would visit 10 per week. CB sent a follow up email to the claimant after the meeting, highlighting these figures and stating that he had asked SP to assist the claimant with planning, using his local knowledge. In his email he also stated that *'Your starting and finishing times are yours to determine, but the ask is you're in store between 10 and 4…I would ask you let me know any time you are out of the business during normal hours.'* He went on to state *'My desired outcome from this plan is you feel you have the support around you to get yourself into a performance level that is required for the role, I would ask that if in any way you need support of any kind you ask as early as possible. We can review it fortnightly, either in person or on a Teams call, so we are both happy with where we are, so that come August we are moving from the performance plan and you continue to perform to the level expected.'* The Tribunal accepted that this reflected the tone of the meeting held on 4 June 2021 and that CB did not communicate in a 'brash and bullish' manner, or belittle the claimant during that meeting.

43. CB asked SP to meet with the claimant to assist her with planning. SP was familiar with the claimant's territory, which CB was not, and accordingly better placed to assist her than CB. The claimant sent an email to CB and SP on 14 June 2021, following her discussion with SP, setting out the stores she had visited that week and the previous week. She indicated that some tweaks to her core stores would be of benefit to her, so she could end her working days nearer to home. SP responded later that day requesting that the claimant provide details of all the stores she visited over the next 2 weeks, and the order she did so, so that he could review them with her. He also stated that, if the claimant wanted to swap stores, she would require to send like for like

swaps, with addresses, to CB. The claimant did not provide that to CB until 3 September 2021.

44. CB organised a quarterly team meeting for 29 July 2021. It was held in Bristol, which was central for the team, and commenced at 10am. This was the first in person team meeting since the commencement of the Covid-19 pandemic and the first in person team meeting which the claimant attended. The claimant was 45 minutes late for the meeting. She did not inform CB that she was going to be late. When she arrived the meeting had started. She apologised for being late to those assembled. Later, away from the group, CB asked why she had been late and why she hadn't texted him to say she was going to be late. The claimant stated that she had stopped to go to the toilet and then got delayed in traffic. CB stated that she should plan for bad traffic and he expected everyone to be at the meeting on time.

45. At the start of each week, CB would plan where he was going to be that week and inform his direct reports of this, where relevant. On 9 August 2021, CB told the claimant that he would be visiting her on Thursday 12 August 2021. He asked her to let him know where she would be that day, so that he could decide where to meet her. She did not however respond. On 11 August 2021 CB sent an email to the claimant at 20:18 – '*why am I emailing you at 8pm to find out where you are tomorrow. You've known all week I'm coming down. I shouldn't be chasing this up, I should know where I'm meeting you. It's not good enough'.* He was frustrated that he was requiring to chase up the claimant to find out where she would be as he had set out his plans for the week to his team at the start of the week and asked the claimant to let him know where she would be on Thursday. The claimant responded, confirming her plans for the day, the following morning. CB met the claimant in the store she indicated and they then had a catch up meeting.

46. On 19 August 2021, the claimant was asked to attend meeting the following day with CB, to discuss some areas of concerns in relation to her performance. That evening, at 18:59, the claimant sent an email to CB, responding to issues in relation to her performance and raising a number of concerns in relation to issues such as holidays, expenses and CB's attitude

towards her. She did not raise, or make reference to, the following in that email:

46.1. The comments she asserts were stated to her by CB when she was late for the meeting on 29 July 2021, or a complaint that those comments were made in front of colleagues, despite referencing being late for that meeting and CB's response to that;

46.2. Her assertion that CB angrily shouted at her in front of customers in a supermarket on 12 August 2021, and then commented on her weight loss but ignored her hands splints during their discussion that day, even though she raised concerns about the email CB sent to her the night before that meeting;

46.3. Her assertion that CB had stated to her earlier that day *'you've had enough out of us'* in relation to her expenses, even though she referred to the error she had made regarding those expenses in her email and also referenced a discussion with CB in relation to that error.

47. On 20 August 2021, the claimant attended a meeting, via Teams, with CB at which several areas of concern were discussed, particularly: reporting and admin completion; planning and working hours; meeting punctuality; and lack of focus during team meetings and commercial briefings. The meeting was recorded and another manager was present at the meeting to take notes. CB's aim during the meeting was to identify the issues which had been arising and work with the claimant to resolve them or stop them arising in the future. He did not seek to allocate blame in doing so: his focus was on resolving matters. He was not brash or bullish during the meeting. The issues he raised were reasonable and they were raised in a reasonable manner. During the meeting CB requested that the claimant attend more stores and spend less time in each. Whilst the claimant raised that she did not think this was possible, CB explained that he felt that it was, if the claimant conducted proper planning, and that the individuals who had covered the territory previously were able to do so without any difficulty. The points the claimant raised in her email of 19 August 2021 were also discussed in the meeting.

48. On 3 September 2021, in response to the discussions held with CB and SP at the start of June 2021, the claimant sent an email to CB stating, *'As instructed please find enclosed the post code of the swaps like for like, to bring me closer to home'.* She then provided a list of 10 addresses.

49. The claimant had annual leave booked for Friday 8 October 2021. She intended to spend her time off in London. After her annual leave had been booked, the respondent arranged a meeting for employees in Surrey on 5 & 6 October 2021, which the claimant was required to attend. She mentioned to CB that she did not wish to return to Plymouth after the meeting on 6 October 2021, to then travel to London for her holiday after working the following day. She asked if she could work in London on 7 October 2021 instead. CB highlighted that this would not be possible, as she required to be in stores to undertake work and her territory was Devon and Cornwall. CB considered the fact that the claimant had a long drive home, from Surrey to Plymouth, after the meeting, but that did not alter his position. He gave the option of taking annual leave or unpaid leave on 7 October 2021 instead. The claimant indicated that she wished to take a day's unpaid leave and this was authorised by CB.

50. On 23 September 2021, the claimant highlighted by text to CB that her tablet was not working correctly. He advised, by text, that she should contact IT and get them to sort it or send another. She responded, before 9am, stating that she had called IT and ordered a new tablet. The claimant did not visit any stores on 23 September 2021. The claimant then had pre-booked annual leave for Friday 24 and Monday 27 September 2021. The replacement tablet was due to be delivered to the claimant by 10am on 28 September 2021. She was not at home at the time, as she was returning from her weekend away, and had felt unwell the night before and that morning, so set off later than planned. She understood her mother was at home, so would be able to receive the tablet, when it arrived. The claimant arrived back at her home just after 13:00 that day. While she was travelling back home, a text message was sent to the claimant by the delivery company, at 09:59, stating that the delivery had failed and it had been redirected to her local collection point, for

collection the following day. She did not undertake any work that day. She did not advise CB, her manager, that she was unwell that day, that she was not undertaking any work, or that the tablet had not arrived as expected.

51. CB called the claimant on 29 September 2021, at around 11:00. She stated to CB that the tablet had only just arrived. She did not explain that the delivery had failed the previous day, or that she had felt unwell and had not arrived home until after 13:00. CB contacted the delivery company to seek an explanation regarding why the tablet had not arrived by 10am on 28 September 2021, as expected. They informed him that they had tried to deliver the tablet, but no one was home. This led him to request tracking details from the claimant's vehicle for that day. This was provided a few days later and demonstrated that the claimant had not been at home that morning to receive the tablet and did not arrive home until 13:10 that day.

52. CB was then unexpectedly absent from work for 4 weeks, due to illness, from around 11 October 2021. He arranged a meeting with the claimant on his return to work. That meeting took place on 11 November 2021, via Teams. The amount of time the claimant generally spent travelling was discussed at the meeting, versus time in store, to ascertain if improvements could be made to this ratio with, for example, improvements in planning. During the meeting CB also asked the claimant about what had happened on 23 & 28 September 2021, what work she had conducted on those dates and why she had not informed him that her tablet had not arrived on 28 September 2021. The claimant stated that she had not conducted any work on either date, as she did not have a working tablet. CB's view, which he informed her of, was that she could have conducted work and then inputted details of what she had done, once the tablet arrived. She did not explain why she did not contact CB to inform him that the tablet had not arrived on 28 September 2021, or that she not working as a result. During the meeting the claimant repeatedly suggested to CB that she was at home on the morning of 28 September 2021, stating that she would have heard the door, or the dogs barking because someone was at the door, if someone had tried to deliver the tablet, but did not. CB then indicated to her that the telematics from her car indicated that

she had not left Hemel Hempstead until 07:48 that morning and had not arrived home until 13:10. She was not able to provide a satisfactory explanation as to why she was not available to work that morning, or why she had not contacted CB to inform him of this. She did not state that it was due to being unwell.

53. CB did not communicate in a 'brash or bullish' manner during the meeting. He did not belittle the claimant. The claimant was not goaded by CB during the meeting. She was however put under pressure to answer questions. This was entirely appropriate in the circumstances. CB reasonably required answers to the questions he was posing.

54. The following day, at 15:09 on 12 November 2021, the claimant sent an email to CB stating that *'I have reflected on our conversation and I now recall that not feeling well that morning.'* She asked him to send on the recording of the meeting the previous day and the proof of attempted delivery provided by the delivery company.

55. On 16 November 2021, the claimant sent an email to CB, referring to their conversation on 11 November 2021 and highlighting her view that it was not possible to cover all her stores without a significant amount of driving. She referred to her email of 4 September 2021, where she had suggested some stores which could be swapped, so that she could end on stores nearer to her home, indicating that no action had been taken in relation to this.

56. The claimant was absent from work from 1 -17 December 2021, due to illness. She returned to work on 20 December 2021.

57. By letter dated 22 December 2021 the claimant was invited to disciplinary hearing regarding *'alleged failure to comply with company rules and procedure, namely absence notification procedures as outlined in the employee handbook. Further details being that on 23rd & 28th September you were absent from work and failed to report this.'*

58. DG conducted a disciplinary hearing with the claimant on 24 December 2021. DG confirmed to the claimant that the respondent's process was for

managers to conduct disciplinary hearings, but that HR had been consulted and were aware of all the issues being raised throughout the process. At one point during the hearing DG referred to the Smart Working Guide as the Flexible Working Policy, by mistake. It was common for the terms to be used interchangeably, albeit incorrectly. Both were operational within the respondent's business and had been for some time.

59. On 3 January 2022, the claimant sent an email to DG, which DG received the following day, on her return to work. In the email, the claimant raised that she felt CB was using telematics details inappropriately, to question the claimant's whereabouts. She provided further information relevant to the disciplinary allegations and concluded by stating *'I also feel that you may be disappointed if you look closer into CB's management style/skills'*. DG contacted the claimant on receipt of the email and arranged to have a further meeting with her that afternoon. In relation to the claimant's concerns regarding CB's access to telematics data, DG undertook to investigate this further. During the meeting, when the claimant attempted to raise additional, unrelated, issues in relation to CB's management style, DG indicated that she was open to hearing about those additional points, but those points required to be raised and addressed separately, under a separate procedure. She informed the claimant of the grievance procedure. The claimant did not subsequently raise a grievance.

60. DG conducted an interview with CB, with a note taker present, to investigate the points raised by the claimant about CB accessing telematics data. He stated telematics data is available for all managers to conduct audits to confirm that the telematics match the information inputted by employees on their tablets. It can also be requested for particular purposes. He stated that the claimant had informed him on 29 September 2021 that the tablet had only just arrived. He was concerned about that, as it was meant to arrive the previous day. He had contacted DPD to ascertain why the tablet had not been delivered the previous day and was informed there had been a failed delivery on the morning of 28 September 2021. That led him to question where the claimant was and why she was not at home to receive the tablet. He had

requested telematics data for 28 September 2021, as a result. The telematics data which he received a few days later, demonstrated that the claimant was not at home on the morning of 28 September 2021. DG asked CB if he had ever personally physically tracked the claimant. He stated that he had not.

61. DG determined that the claimant's employment should be terminated as a result of serious misconduct, for failing to follow the respondent's absence procedures on 28 September 2021. DG considered the fact that the claimant's tablet had not arrived on 28 September 2021, before reaching that decision. By that stage, it was clear that delivery had been attempted to the wrong address, and that was the reason why the tablet did not arrive on 28 September 2021. DG concluded however that that was not relevant to the matters to be determined, as set out in the invitation to the disciplinary hearing. DG noted that the claimant did not arrive home until around 13:10 that day, having stated that she felt unwell the night before and that morning. The claimant had delayed her drive back home from Hemmel Hempstead, where she had spent the long weekend, as a result. DG concluded that, despite being aware of the correct procedure, the claimant did not follow the absence reporting procedure to report the fact that she was absent from work due to illness. By letter dated 6 January 2022, the claimant was informed of the termination of her employment, with notice, as a result of serious misconduct.

62. By email dated 14 January 2022, the claimant appealed decision to dismiss her. Her grounds of appeal were stated to be that there was a premeditated and inappropriate outcome, a biased investigation, crucial evidence was ignored and there were incorrect references to and inaccurate interpretation of company policy.

63. HS was appointed to consider the claimant's appeal. She met with the claimant on 15 February 2022. During the appeal hearing, HS asked the claimant whether she had raised a formal grievance in relation to CB. The claimant stated that she hadn't had the chance to do so yet. HS confirmed to her that any issues in relation to CB would require to be raised separately,

under the respondent's grievance procedure. The claimant did not seek or request assistance or support from HS to do so.

64. The claimant's appeal was not upheld.

Respondent's submissions

65. Mr Maratos, for the respondent, gave an oral submission. In summary he stated:

65.1. While the claimant appeared to focus on issues which would normally fall to be determined in an unfair dismissal complaint, there is no such complaint before the Tribunal. This was made clear prior to, at the outset and at numerous points during the hearing, particularly when referring to the list of issues.

65.2. The burden of proof has not shifted in relation to the complaints of discrimination and harassment. Insufficient evidence has been led to do so. In particular, no evidence has been led to suggest that conduct could be because of, or related to, sex or age.

Claimant's submissions

66. Mr Mac, for the claimant, also gave an oral submission. In summary he stated:

66.1. The claimant was not provided with appropriate training or supported in her role and was not shown compassion – for example by not continuing her pay when she was absent. She was bullied by CB. He would not have treated a man in the same way.

66.2. The claimant was sacked for being late, but she was not provided with the tools she needed to do her job that day. The disciplinary procedure was not followed, from the point of the meeting on 11 November 2021, which the claimant was not informed was an investigation meeting, onwards. The fact that the disciplinary hearing took place on Christmas Eve was atrocious. The tablet and correspondence to the claimant were sent to the wrong address. This wasn't properly considered.

Relevant Law

Direct Discrimination

67. Section 13(1) EqA states that:

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

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

69. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (***Nagarajan***). The Tribunal should draw appropriate inferences as to the reason for the treatment from the primary facts with the assistance, where necessary, of the burden of proof provisions, as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377. *"Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts"* (***Madarassy v Nomura International Plc*** [2007] IRLR 246).

70. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may

wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

71. The ***EHRC: Code of Practice on Employment (2011)*** states, at paragraph 3.5 that *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have be treated differently from the way the employer treated – or would have treated – another person.'*

72. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause' (*paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does however require to have a '*significant influence on the outcome'* (***Nagarajan***).

Indirect Discrimination

73. Section 19 of the Equality Act 2010 (**EqA**) states:

> *(1) 'A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *a. A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *b. it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

c. it puts, or would put, B at that disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.'

74. S23 EqA states:

'On a comparison of cases for the purposes of section…19 there must be no material difference between the circumstances relating to each case.'

75. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS*** [2010] IRLR 136:

'Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.'

76. In the case of ***Essop v Home Office; Naeem v Secretary of State for Justice*** [2017] IRLR 558 SC, at [25] Lady Hale stated:

'Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'

77. The Equality and Human Rights Commission Code of Practice on Employment (the **EHRC Code**) at paragraph 4. 5 states as follows:

'The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future

- such as a policy or criterion that has not yet been applied - as well as a 'one-off' or discretionary decision.'

Harassment

78. Section 26(1) EqA states that:

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

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

(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.'

79. Section 26(4) EqA states that:

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

80. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) that has the proscribed purpose or effect and (iii) which relates to a relevant protected characteristic.

81. The Equality and Human Rights Commission: Code of Practice on Employment (2011) explains, at paragraphs 7.9-7.11, that 'related to' has a broad meaning. It occurs where there is a connection with the protected characteristic. Conduct does not have to be 'because of' the protected characteristic.

82. Not all unwanted conduct will be deemed to have the proscribed effect. In ***Richmond Pharmacology v Dhaliwal*** 2009 ICR 724, EAT, Mr Justice Underhill stated '*not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'*

83. Mr Justice Langstaff affirmed this view in ***Betsi Cadwaladr University Health Board v Hughes and ors*** EAT 0179/13, stating *'The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'*

84. An 'environment' means a state of affairs. A one-off incident may amount to harassment, if it is sufficiently serious to have a continuing effect (***Weeks v Newham College of Further Education*** EAT 0630/11).

Burden of proof

85. Section 136 EqA states that:

'*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 shows that A did not contravene the provision.'*

86. The burden of proof provisions are not relevant where the facts are not disputed or the Tribunal is in a position to make positive findings on the evidence (***Hewage v Grampian Health Board*** *[2012] UKSC 37, SC*).

87. There is a two-stage process in applying the burden of proof provisions in discrimination cases, 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 the first stage or a prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached the Tribunal is obliged to uphold the claim unless the respondent can show that it did not discriminate.

88. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. Something more is required, but that need not be a great deal (***Deman v Commission for Equality and Human Rights and ors*** 2010 EWCA Civ 1279, CA). The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Discussion & Decision

Direct Discrimination

89. The Tribunal considered the allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less

favourable treatment and, if so, what the reason for that treatment was: was it because of sex or age?

90. The Tribunal reached the following conclusions in relation to each asserted act of direct discrimination:

90.1. **On 29th July 2021, the claimant was late for Voluntary Team Meeting because she needed to go to the Toilet and subsequently got held up in traffic. Did CB chastise the claimant in front of her work colleagues for being late and said to her "I don't care if you needed to go to the toilet, you will be in time for my meetings."** The Tribunal's findings in fact in relation to this are set out at paragraph 44 above. The Tribunal found that the meeting was not voluntary. The Tribunal also found that CB did not chastise the claimant in front of colleagues, or say the words asserted. In reaching this conclusion the Tribunal took into account that the claimant's evidence regarding what CB had stated to her differed from that stated above: In evidence, her position was that he stated, *'I don't care if you need to wet yourself, you will be on time'.* The Tribunal also placed particular significance on the fact that the claimant made no mention of being publicly chastised, or the words *'I don't care if you needed to go to the toilet'* in the email which she sent to CB, raising a number of concerns, on 19 August 2021. The Tribunal concluded that, had this occurred, the claimant would have done so. The Tribunal accordingly did not accept that the conduct alleged was established. The Tribunal concluded that CB did however privately state that the claimant should plan for bad traffic and that he expected everyone to be on time for meetings. The Tribunal concluded that he would have said this to anyone who was late for a meeting. The claimant was accordingly not treated less favourably than others would be treated in the same, or not materially different, circumstances as the claimant. As she has not established less favourable treatment, the burden of proof did not shift to the respondent. Even if it had however, the Tribunal was satisfied that CB's comments were made to try to ensure that the claimant was not late

for meetings in the future. They were in no sense whatsoever because of age or sex. For these reasons, the claimant's complaint of direct discrimination in relation to his does not succeed.

90.2. **On 11th May 2021, did CB's attitude towards the claimant change when she started a relationship. When she was single, would CB often discuss his personal circumstances with the claimant. The friendliness stopped after the claimant started a relationship and the acts of discrimination started.** The Tribunal accepted that there had been a change in CB's attitude towards the claimant, or that the claimant may have perceived this to be the case. There was no suggestion however that others in the same circumstances, namely where their performance is being managed by CB, would be treated differently. The Tribunal concluded that this was the reason for any change in attitude, and CB would have treated any individual in the same circumstances as the claimant in the same way. The claimant accordingly did not demonstrate that she was treated less favourably than others would be treated in the same, or not materially different, circumstances. As she has not established less favourable treatment, the burden of proof did not shift to the respondent. Even if the burden of proof had shifted to the respondent, the Tribunal was satisfied that any change in attitude was solely due to the requirement for all employees to be managed against KPI's, and the fact that other issues arose in relation to the claimant's performance from March 2021 onwards, which resulted in CB requiring to raise these issues with the claimant and the relationship becoming strained as a result. It was not due to the fact that the claimant had started a relationship, or related to this in any way. The Tribunal were also satisfied, for the avoidance of doubt, that it was in no sense whatsoever because of age or sex. For these reasons, the claimant's complaint of direct discrimination in relation to his does not succeed.

90.3. **On 11th August 2021, did CB send the claimant a note asking why he "should have to chase her" to arrange a meeting.** This conduct

was established, as set out in paragraph 45 above. The Tribunal concluded however that CB would have made the same comments to anyone who had not informed him where they would be when he had indicated that he would be visiting and had requested that they do so. The claimant was accordingly not treated less favourably than others would be treated in the same, or not materially different, circumstances as the claimant. As she has not established less favourable treatment, the burden of proof did not shift to the respondent. Even if the burden of proof had shifted to the respondent however, the Tribunal was satisfied that the reason why CB sent the email was because he was frustrated that he had not received a response and he required to take further action to establish where the claimant would be. His email was sent solely as a result of that. It was in no sense whatsoever because of age or sex. For these reasons, the claimant's complaint of direct discrimination in relation to his does not succeed.

90.4. **On 12th August 2021, did CB meet the claimant at a supermarket did he angrily shout at her in front of customers.** The Tribunal concluded that this was not established, accepting CB's evidence that he does not shout generally and would certainly not do so in this setting, as he would be removed from the supermarket for doing so and would risk losing the client account. Also, had this occurred, the Tribunal concluded that the claimant would have mentioned this in the email she sent to CB, raising a number of other concerns, a week later. She did not however do so. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment, or whether the asserted treatment was because of sex or age. For these reasons, the claimant's complaint of direct discrimination in relation to his does not succeed.

90.5. **On 12th August 2021, did CB comment on the claimant's weight loss but ignored her hand splint?** The Tribunal concluded that this was not established. Had this occurred, the Tribunal concluded that

the claimant would have mentioned this in the email she sent to CB, raising a number of other concerns, a week later. She did not however do so. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment, or whether the asserted treatment was because of sex or age. For these reasons, the claimant's complaint of direct discrimination in relation to his does not succeed.

90.6. **On 19th August 2021, when the claimant made a mistake when claiming her expenses, was she told "you've had enough out of us."** The Tribunal concluded that this conduct was not established. Had CB made this comment, the Tribunal concluded that the claimant would have mentioned this in the email she sent to CB, raising a number of other concerns, including a mistake which she had made in the submission of her expenses, at 18:59 that evening. She did not however do so. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment, or whether the asserted treatment was because of sex or age. For these reasons, the claimant's complaint of direct discrimination in relation to his does not succeed.

90.7. **Did CB tell the claimant that it did not matter if she could not hear what another senior female employee was saying and said, "just look on and pretend you can hear her."** CB stated that he could not recall anything of this nature and did not know what it referred to. There was however no requirement for the Tribunal to resolve any dispute between the parties in relation to this as the claimant's evidence was that no one could hear what was being said, and that CB stated this to everyone at the table. It was accordingly, even on the claimant's evidence, not less favourable treatment of the claimant. Everyone else, in the same circumstances, was treated in precisely the same way. Any complaint of direct discrimination in relation to this must accordingly fail.

91. For these reasons, the claimant's complaints of direct discrimination, because of age and/or sex, do not succeed and are dismissed.

Indirect Discrimination

92. The Tribunal considered the complaints of indirect discrimination asserted. The first stage was to consider whether the respondent had any of the PCPs relied upon the claimant. The Tribunal reached the following conclusions in relation to each PCP asserted:

92.1. **The requirement to work more than contracted hours in order to achieve business targets.** The Tribunal concluded that the respondent did not have such a PCP. The evidence led was that the respondent's Territory Managers required to work core hours, whereby they were in stores between the hours of 10am and 4pm. Provided they did so, it was up to them when they worked the remainder of their contracted hours. Whenever the claimant worked in excess of her contracted hours she sought to finish early on a Friday of that week, or take the time back in some other way. The Tribunal accepted that the other Territory Managers also did so. The evidence was that the previous incumbents in the claimant's role were able to achieve the requirements of the role without difficulty. There was no suggestion that other former or current Territory Managers worked more than their contracted hours, and no evidence was led in relation to the hours worked by other individuals employed by the respondent. There was accordingly no evidence to suggest that the respondent required employees to work more than their contracted hours to achieve business targets. As the asserted PCP has not been established, the complaint of indirect discrimination in relation to this does not succeed and is dismissed.

92.2. **The requirement to work a specific/minimum number of hours each working day while having to drive long distances between supermarkets.** The Tribunal concluded that the respondent did require employees to do so. Territory Managers required to work a

minimum of 6 hours per day (the core hours of 10am to 4pm) and required to travel long distances between supermarkets. This accordingly constituted a PCP. This PCP was applied to all Territory Managers employed by the respondent.

92.3. **Not being allowed to end the working day early, especially on Fridays.** The Tribunal concluded that the respondent did not have such a PCP. The evidence before the Tribunal was that employees were permitted to finish earlier than the time stated in their contracts any day of the week, provided that they were working during the core hours of 10am-4pm. In addition, CB regularly authorised requests, for the claimant and other Territory Managers, to finish prior to 4pm on a Friday, provided they had otherwise completed their contractual hours during the course of that week. As the asserted PCP has not been established, the complaint of indirect discrimination in relation to this does not succeed and is dismissed.

93. In relation to the PCP established, the Tribunal considered whether the claimant had established group disadvantage, the onus being upon her to do so (***Nelson v Carillion Services Limited*** [2003] IRLR 428). The Tribunal concluded that the claimant did not demonstrate the group disadvantage asserted, namely that the PCP put older workers at a particular disadvantage, when compared to younger workers because, as the claimant asserted in her evidence, older workers get tired more quickly. The evidence before the Tribunal was that two of the three individuals who had undertaken the role of Territory Manager for Devon and Cornwall before the claimant were older than her and were able to undertake the role with no difficulties. No evidence was led in relation to the age of the other Territory Managers, or their ability, or otherwise, to comply with the PCP. As a result, the Tribunal did not accept that group disadvantage was established. The claimant's complaint of indirect discrimination in relation to this accordingly does not succeed and is dismissed.

Harassment related to sex and/or age

94. The Tribunal considered each allegation of harassment, noting that there is no requirement to identify an actual or hypothetical comparator in complaints of harassment, but the burden is initially on the claimant show, on the balance of probabilities, that there was unwanted conduct, that the conduct had the proscribed purpose or effect and some evidence to suggest that the conduct *could* be related to age or sex. A prima facie case in respect of all three aspects must be demonstrated to shift the burden of proof to the respondent.

95. The Tribunal reached the following findings in relation to each alleged act of harassment.

95.1. **Deliberately delay the approval of a request for annual leave after the claimant started a relationship.** While the Tribunal did not accept that it was deliberate, the Tribunal did accept that there was a delay in approving the claimant's annual leave request for two days' holiday in November 2021, submitted on 11 May 2021. It was not approved until mid-August 2021. The Tribunal accepted that this conduct was unwanted. No evidence was led however to suggest that this delay could be related to the claimant's age or sex. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that age or sex played a part in the treatment complained of. In addition, the delay did not have the proscribed purpose and did not meet the high test of 'violating' dignity or the threshold of creating an intimidating etc. environment. As the claimant has not demonstrated a prima facie case of harassment in relation to the established conduct, the burden of proof does not pass to the respondent and the complaint cannot succeed. Even if the Tribunal had not reached that conclusion however, the Tribunal was satisfied that the delay was solely due to an oversight and that was entirely unrelated to age or sex. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

95.2. **Lack of support and placing pressure on the claimant when she had anxiety and was caring for her mother and by saying "do that in your own time."** The Tribunal did not accept that there was a lack of support for the claimant when she sought to attend a stress control course in May 2021, at a time when she was caring for her mother. CB in fact stated, *'as discussed before any support you need with this let me know'* and she was given time off work to attend this. The asserted conduct was accordingly not established and the complaint under s26 EqA in relation to this does not succeed.

95.3. **Being goaded during the investigation on 11th November 2021 and put under pressure to answer questions.** The Tribunal had the benefit of reading transcripts of the meeting held on 11 November 2021. Having done so, the Tribunal did not accept that the claimant was 'goaded' during the meeting on 11 November 2021, but accepted that she was put under pressure to answer questions during that meeting and that conduct may have been unwanted. No evidence was led however to suggest that the claimant being put under pressure to answer questions could be related to the claimant's age or sex. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that age or sex played any part in the treatment complained of. In addition, the Tribunal was satisfied that requiring the claimant to answer certain questions, which the respondent reasonably required answers to, did not have the proscribed purpose and did not meet the high test of 'violating' dignity or the threshold of creating an intimidating etc. environment. As the claimant has not demonstrated a prima facie case of harassment in relation to the established conduct, the burden of proof does not pass to the respondent and the complaint cannot succeed. Even if the Tribunal had not reached that conclusion however, the Tribunal was satisfied that the requirement for the claimant to answer questions was solely due to the fact that the respondent was, reasonably, investigating the claimant's conduct. It

was entirely unrelated to age or sex. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

95.4. **Communicating in a "brash and bullish" manner and belittling the Claimant in meetings on 4th June 2021, 20th August 2021, 11th November 2021, 29th November 2021.** No evidence was led in relation to a meeting held on 29 November 2021. Having read the transcripts of the meetings held on 20 August and 11 November 2021, as well as the email sent by CB immediately after the meeting on 4 June 2021, the Tribunal did not accept that CB communicated with the claimant in a 'brash' or 'bullish' manner during the meetings on 4 June, 20 August or 11 November 2021. The findings in relation to CB's conduct during these meetings are set out in paragraphs 42, 47 and 52 above. The asserted conduct was accordingly not established and the complaint under s26 EqA in relation to this does not succeed.

95.5. **On 5th June 2021, 14th June 2021, 3rd September 2021, 16th November 2021, did the claimant raise to CB the supermarkets allocated for her to visit were too far away from her home and it wasn't possible to visit them all within the recommended working hours? Did CB advise the claimant this was planning issue and subsequently used this to support his claim that she wasn't performing?** The Tribunal accepted that the claimant raised this issue with CB and that CB's response was that this was a planning issue and he subsequently raised this in performance management discussions. To that extent the conduct is established. The Tribunal accepted that it was unwanted from the claimant's perspective. No evidence was led however to suggest that CB doing so could be related to the claimant's age or sex. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that age or sex played any part in the treatment complained of. In addition, the Tribunal concluded that CB did not have the proscribed purpose and his conduct did not meet the high test of 'violating' dignity or the threshold of creating an intimidating etc.

environment. As the claimant has not demonstrated a prima facie case of harassment in relation to the established conduct, the burden of proof does not pass to the respondent and the complaint cannot succeed. Even if the Tribunal had not reached that conclusion however, the Tribunal was satisfied that the reason CB stated that it was a planning issue and subsequently used this to support his view that the claimant was not performing was that he believed this to be the case. That was entirely unrelated to the claimant's age and sex. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

95.6. **On 4th October 2021, did Chris Brown enforce a holiday for 7th October 2021. Had Chris Brown not considered the long drive home after a compulsory meeting to be working hours and that she had a pre-booked holiday for 8th October 2021.** CB did not 'enforce' a holiday for the claimant on Thursday 7 October 2021. To that extent the conduct complained of has not been established. The claimant had the option to work on 7 October 2021, by returning to her territory for the day, after the meeting on 6 October 2021. She did not wish to do so, as she had annual leave booked, commencing on Friday 8 October 2021, and planned to spend this in London. She did not wish to return home from Surrey on Wednesday 6 October 2021, to then return to London for her holiday weekend. She asked to be permitted to work in London for the day on 7 October 2021, but this was refused as there was no work for her to do in London: her territory was Devon and Cornwall. CB considered the claimant's drive home after the meeting on 6 October 2021, before stating this ,and gave the claimant the option of taking a day's holiday or unpaid leave instead, which she took up. Given the above, the asserted conduct was accordingly not established and the complaint under s26 EqA in relation to this does not succeed. Even if the Tribunal had not reached this conclusion, it would have held that CB's refusal, and the option of a holiday/unpaid leave, was entirely unrelated to the claimant's age and sex.

95.7. **On 20th August 2021, during a PIP meeting, did CB request the claimant attend 10 more stores and spend less time in each? Did CB disregard the issue the claimant raised it wasn't possible to cover the ones already allocated and achieve her performance figures within the contracted working hours?** The Tribunal accepted that CB stated to the claimant, on 20 August 2021, that she required to attend more stores and spend less time in each, despite her assertions that this was not possible. The asserted conduct was accordingly established and the Tribunal accepted that this was unwanted. No evidence was led however to suggest that CB doing so could be related to the claimant's age or sex. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that age or sex played any part in the treatment complained of. In addition, the Tribunal concluded that CB did not have the proscribed purpose and his conduct did not meet the high test of 'violating' dignity or the threshold of creating an intimidating etc. environment. As the claimant has not demonstrated a prima facie case of harassment in relation to the established conduct, the burden of proof does not pass to the respondent and the complaint cannot succeed. Even if the Tribunal had not reached that conclusion however, the Tribunal was satisfied that the reason CB stated this, despite the claimant's assertions, was that CB felt that it was possible for the claimant to do so, if the claimant conducted proper planning. His view was based on the fact that the three individuals who had covered the territory previously were able to do so without any difficulty. CB stating this and reaching this conclusion was entirely unrelated to the claimant's age and sex. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

95.8. **On 24th December 2021, did DG confirm during the disciplinary process that HR had been consulted and were aware of all the issues being raised throughout the process and HR attendance in the disciplinary meeting to ensure fair play was not required, despite the claimant's repeated requests to ensure fair play.** The

Tribunal concluded that DG did state to the claimant that the presence of HR was not required at any stage of the disciplinary process and that HR/Peninsula are simply consulted about any issues that arise. The Tribunal accepted that this may have been unwanted from the claimant's perspective. No evidence was led however to suggest that DG stating this could be related to the claimant's age or sex. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that age or sex played any part in the treatment complained of. In addition, DG's statements did not have the proscribed purpose and did not meet the high test of 'violating' dignity or the threshold of creating an intimidating etc. environment. As the claimant has not demonstrated a prima facie case of harassment in relation to the established conduct, the burden of proof does not pass to the respondent and the complaint cannot succeed. Even if the Tribunal had not reached that conclusion however, the Tribunal was satisfied that DG's statement was in accordance with the respondent's practice that managers conduct all stages of the disciplinary process, as stated in the respondent's disciplinary procedure. It was entirely unrelated to the claimant's sex and age. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

95.9. **On 6th January 2022, did DG and 15th February 2022 did HS both disregard claims of being selective and not support the claimant to raise a Grievance against CB for Harassment and did they investigate appropriately concerns regarding inappropriate access to telematics tracking data and claims of physical tracking.** The Tribunal reached the following conclusions in relation to the various elements of this asserted act of harassment:

95.9.1. The claimant did not intimate to DG, during the disciplinary process, that she wished to raise a grievance in relation to CB. The claimant did allude to some concerns in relation to CB in her email to DG dated 3 January 2022. DG met with the

claimant the following day, when DG returned to work, to discuss the content of that email. During the meeting, when the claimant attempted to raise additional, unrelated, issues in relation to CB's management style, DG indicated that those points required to be addressed separately, and informed the claimant of the grievance procedure. In these circumstances, it cannot be said that DG failed to support the claimant to raise a grievance against CB for harassment. That element of the asserted conduct has accordingly not been established.

95.9.2. DG did investigate the claimant's concerns that CB had inappropriately accessed telematics data in relation to the claimant's vehicle, and her assertion that he had physically tracked her. She met with CB to discuss these concerns and documented that meeting. She was satisfied with the responses he provided. In these circumstances, it cannot be said that DG failed to investigate appropriately concerns regarding inappropriate access to telematics tracking data and claims of physical tracking. That element of the asserted conduct has accordingly not been established. While the claimant may have felt that DG ought to have taken further steps, her failure to do so was due to the fact that she was satisfied with the responses which CB provided to her. This was entirely unrelated to the claimant's age and sex.

95.9.3. During the appeal hearing, HS asked the claimant whether she had raised a formal grievance in relation to CB. The claimant stated that she had not had the chance to do so yet. HS confirmed to her that any issues in relation to CB would require to be raised separately, under the respondent's grievance procedure. The claimant did not seek or request assistance or support from HS to do so. In these circumstances, it cannot be said that HS failed to support the claimant to raise a grievance

against CB for harassment. That element of the asserted conduct has accordingly not been established.

95.9.4. The claimant did not raise with HS, as part of her appeal, that she felt that CB had inappropriately accessed telematics data in relation to the claimant's vehicle and her assertion that he had physically tracked her. She did not raise any concerns about DG's investigation of this matter. There was accordingly no reason for HS to investigate this further: it had already been investigated and the claimant was not raising concerns in relation to that investigation as part of her appeal. It is for those reasons that HS did not take any further action. This was entirely unrelated to the claimant's age and sex.

The claimant's complaints of harassment in relation to these points accordingly do not succeed.

95.10. **On 24th December 2022, 4th January 2022 - did DG refer to a flexible working policy but it was a Smart Working guide which was only operational for a limited period?** The Tribunal accepted that this conduct was established and that it may have been unwanted. No evidence was led however to suggest that DG stating this could be related to the claimant's age or sex. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that age or sex played any part in the treatment complained of. In addition, the Tribunal concluded that DG's statements did not have the proscribed purpose and did not meet the high test of 'violating' dignity or the threshold of creating an intimidating etc. environment. As the claimant has not demonstrated a prima facie case of harassment in relation to the established conduct, the burden of proof does not pass to the respondent and the complaint cannot succeed. Even if the Tribunal had not reached that conclusion however, the Tribunal was satisfied that DG simply made a common mistake in referencing the flexible working policy, rather than the smart working guide: the two were often referenced incorrectly, but both were

operational and had been for some time. DG doing so was in no way related to the claimant's sex or age. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

95.11. **On 4th January 2022, was the tablet failing to arrive at the claimant's premises duly considered before dismissal of the claimant?** The claimant's tablet failing to arrive was duly considered before the claimant's dismissal. The Tribunal's findings in fact in relation to this are set out at paragraph 61 above. To the extent that the claimant asserts that it was not, and this constituted an act of harassment, the unwanted conduct asserted has not been established. The claimant's complaint of harassment in relation to this accordingly does not succeed.

96. For the reasons set out above, the claimant's complaints of harassment do not succeed and are dismissed.

Employment Judge Sangster

Employment Judge

29 December 2023

Date of Judgment

Date sent to parties _____