EMPLOYMENT TRIBUNALS

Claimants: (1) Ms T Cameron
(2) Mr V Zvyagintsev

Respondent: Estee Lauder Cosmetics Ltd

Heard at: Central London Employment Tribunal

On: 6, 7, 8, 9, 13, 14 and 16 March 2017

Before: Employment Judge JL Wade
Ms K Church
Mr J Noblemunn

Representation:
Claimant: Mr R Robison (FRU representative)
Respondent: Mr S Purnell (Counsel)

JUDGMENT

1. The first claimant's claim of direct pregnancy/maternity discrimination under section 18 of the Equality Act (Issue 2 on the list of issues) is dismissed on withdrawal.

2. All the remaining claims of both claimants fail and are dismissed.

3. The claimants are ordered to pay costs of £10,000 each to the respondent.

REASONS

1. Both claimants worked for the respondent on the counter of a concession in Selfridges. The first claimant has since resigned and the second now works at a different store. Each brought claims against the respondent, the first of constructive unfair dismissal, direct and indirect sex discrimination and racial harassment and the second of sexual orientation discrimination and harassment. Both also alleged victimisation and protected disclosure detriment. Their claims were consolidated at a preliminary hearing.

2. The lengthy list of issues changed over the course of the hearing and all the issues which remained are discussed in the Conclusions below.

THE EVIDENCE

3.1 We heard from the two claimants. For the respondent, we heard from Ms H Eyre, Ms J Sadler, Mr K Coe, Ms E Chittem and Ms K Billett.

3.2 We read the pages in the Bundles to which we were referred.

THE FACTS

4. We set out below our findings which are relevant to the remaining legal issues.

The first claimant and her maternity leave

5. The first claimant, Ms Tarnya Cameron, was first employed by the respondent in November 2011 as an Assistant Business Manager for its "Origins" brand. The contract was to work 37.5 hours. She was located at the Origins counter at Selfridges, one of the top selling stores for the brand. There was a fully flexible weekly rota of early, middle and late shifts: early was 8.30- 5.00, middle 11.30-8.00, and late 1.00-9 or 10.00 (depending on the time of year). The pattern differed monthly and the rota was issued around a month in advance.

6. Also working at the Origins counter was her direct line manager, the business manager. Ms Helen Eyre, Sales and Education Executive/ Area Manager for Origins, was her manager's manager. Ms Eyre looks after 16 locations or "doors" in total and visited the store about once a week.

7. The first claimant's maternity leave began in October 2012 and her son was born in November. Her maternity cover was acting manager Safiya Simmonds. The original list of issues contained some complaints about Ms Simmons but these have been withdrawn.

The second claimant

8. The second claimant started at Selfridges at on 15 April 2013 as a maternity cover business manager on a temporary contract. Ms Eyre was keen to recruit him and stood up for him when Selfridges was against the appointment. As the "landlords" of the respondent they had significant power in the relationship. Thereafter she had a motive to see him should succeed and no motive to see him fail or to humiliate him. They agree that, initially at least, they had a strong working relationship and Mr Zvyagintsev was able to raise concerns. He says that he was worried about being perceived as a troublemaker whilst he was still temporary but that worry would have diminished when he became permanent on 1 March 2014.

The first claimant's 2013 flexible working application

9. The first claimant returned to work on 30 September 2013. She then met the second claimant who was her new business manager. She did not work the full range of shifts as the second claimant helped her by ensuring she worked only earlies. She said in evidence that she *did* work fully flexibly for the first month after her return from maternity leave but the balance of the evidence was that she did not and after her son was born she never worked

beyond 4.30 or 5pm. This is significant in that she never tried to work a later shift and had no direct experience of what the implications might be.

10. On 30 October 2013 she made a flexible working request. She asked for fixed shifts of 8.30 to 4.30, five days a week, with no afternoon break.

11. There was a formal flexible working application meeting with Ms Eyre on 15 November. By that time, she had found that her targets were not being met as she was working the less busy shifts and she reported some resentment in the team caused by her new working pattern. The claimant did not portray herself as a single mother but said that her partner worked shifts of 90 hours. Her mum worked from home and was the carer whilst Ms Cameron was at work and her journey from work to her mum was shorter than it was to her own home.

12. She did not want to move stores even though a move to a different store might help because different stores had different needs. Ms Eyre reported that a single mother in another store was able always to finish at 7.30pm whilst this was not easy at Selfridges as the late shifts were often very busy and profitable and a manager was particularly needed to supervise.

13. Ms Eyre looked at everything and weighed it up against business need. She felt that given the claimant's mother's availability, one late night a week would be sustainable so on 26 November 2013 she agreed the request in part. The first claimant was offered two early, two middle and one late shift per week (no fixed days). The first claimant says that this was just the existing pattern worked by all but the respondent says that managers worked a fully flexible pattern which included *two* late shifts.

14. Ms Eyre says she does not recall the first claimant saying that the second claimant and Zita would cover the late shifts so she need not do them. Whether this was said or not is not important because even if it was, this did not lead to Ms Eyre sanctioning this shift pattern.

15. On 9 December the first claimant appealed the flexible working decision to Andrew Dale. She says her needs were not considered but Ms Eyre says that she did consider them which is why she agreed the request in part. Her appeal was not dealt with before Mr Dale left in August 2014, which was a significant oversight, but Ms Cameron never complained that the appeal had not been heard. She says she did complain to the second claimant, but there is no evidence in writing.

2014

16. In February and May 2014 the second claimant made complaints against two colleagues but these are not issues in this litigation. He did not complain in February that the first claimant had told him that Ashley Gayle, who had started working on the counter in November 2013, had referred to him as a "batty man". This is a Jamaican phrase for "gay" and is derogatory.

Safiya Simmonds' complaint against the second claimant

17. In June 2014, about three months after she had left the counter, Safiya Simmonds raised a grievance against the second claimant and this may have been the trigger for the claimants' grievances against her.

Alleged threat by Mr Gayle

18. The second claimant says that in July 2014 Mr Gayle threatened him when he made a joke about a male member of another team in Selfridges attempting to seduce Mr Gayle. He never complained about this and there is no supporting evidence although he says he told Ms Eyre on the phone in August 2014. He says he did not want to embarrass himself in front of management with this information in writing but cannot explain why he wrote down some allegations and not others in his subsequent grievance or why he was particularly embarrassed by a threatened punch.

19. The second claimant says that in August 2014 he told Ms Eyre that he was being bullied in relation to sexual orientation and she told him he was paranoid about sexual orientation issues and he should get a thicker skin. He did not complain at the time but this was alleged to in his grievance of January 2015. See below.

The first claimant's first written grievance - against Safiya Simmonds - of 19 November 2014

20. Ms Cameron referred to her and the second claimant being bullied and alleged discrimination because of sexual orientation by homophobic comments such as "batty man". Ms Eyre says this was the first she had heard of it and this appears correct as the claimants have provided no evidence of it being raised earlier.

21. On 4 December 2014 there was a grievance hearing with Liz Chittem, Sales and Education Executive for a different area. The first claimant was accompanied by the second claimant.

The second claimant's first 1-month Performance Improvement Plan of 11 November 2014

22. On 11 November Ms Eyre initiated a PIP; the second claimant agrees he had had a good relationship with her up until then and he had not yet made any complaint against her. It arose as follows:

a. On 20 May 2014 at a performance review the second claimant was ranked "M" by Ms Eyre; this means "makes a contribution" and is the second to lowest grade.
b. In August 2014 Ms Eyre had been supportive but the team had fallen below target in June and July.
c. Things got better and it hit target in August and September and Ms Eyre was positive and encouraging. The team were about to move location in the store (the "counter move") and she was supportive for the future as they were worried that this would hit their profits. The targets were reduced by 20-25%. He agreed she had made him feel better with her support.
d. By the end of October the move had happened and she was still supportive BUT the counter had not hit its reduced target. The second claimant thought the target reduction should have been greater as it was unrealistic.
e. The month on month results showed that the counter had not hit target in October or November 2014 and had only hit target in three months out of 11 that year.

23. The second claimant requested a meeting with his managers because he felt that the PIP was quite unfair given that the counter had just been moved so it was hard to make a profit. He then complained that it was issued in the light of his decision to seek alternative employment in the corporation.

24. We find that the reason for the PIP was the inconsistent performance of the counter, and given Ms Eyre's earlier and subsequent efforts to support him her motive was to improve his performance rather than to punish him. They disagreed about the wisdom of the counter move although recent results have apparently shown that this was the right thing to do, but even if it was the wrong decision it was a commercial one not driven by resentment of the claimant's complaints.

The second claimant's first grievance - against S Simmonds - of 7 December 2014

25. The second claimant's grievance contained his first allegation of a range of behaviours by Ms Simmonds, and he also made allegations against Ashely Gayle going back to October 2013. He says the first claimant told him that Ashley had called him a "batty man" in February 2014 which he knew was bad but he looked it up to find out exactly what it meant. Neither he nor Ms Cameron conducted a "record of conversation" with Mr Gayle at the time (this was a minor sanction open to business managers). He also complained that in August 2014 he had been told (also hearsay) that Ashely was asking if he was going on the gay pride march.

26. The second claimant agrees that he had written nothing down before and says he was scared to raise problems because others who complained had been got rid of and he did not feel he could talk about it because it was so personal. Given his permanent position and the support of Ms Eyre we do not find this convincing.

27. Elizabeth Chittem investigated the grievance, including an allegation that Ms Eyre had told him on the phone in August that he was paranoid and needed a thicker skin. Ms Eyre said she loosely remembered a conversation when she said that as a manager he needed to become stronger against hearsay on the counter but the term "paranoid" had not been specifically recorded contemporaneously and it was not specifically connected to sexual orientation concerns even by the second claimant.

28. Ms Eyre was a thoughtful and consistent witness; she did not outright deny a "thick skin" conversation and her evidence was that he was pretty relaxed about sexual orientation matters so there would have been no need to tell him he was being paranoid. She says he mentioned the gay pride discussion when they were both at the counter in Selfridges, and not on the phone, which and she recalled that he said it was fine about it; what troubled him was that he felt his team did not respect him. She said she had advised that he should raise his concerns formally if he wanted to, which is what he eventually did, and the second claimant agrees she said this. Even the second claimant agrees that Ms Eyre did not *discourage* him from raising a grievance against anyone and told us in evidence that he does not assert that she was homophobic (allegation 7.1 f is withdrawn).

29. The second claimant says he is a gay man but did not want to personally confirm that and he was not "out" at work and wanted to avoid any conversations. In Russia, where he comes from, being gay is considered a sin and a mental illness. Ashely is not gay and Mr Zvyagintsev says he was raising questions which tested him, asking what sort of girls he liked etc. The second claimant says he asked Ashley to stop questioning him but he

continued. We sympathise with the second claimant's concerns of course but his complaints are not specific and Ms Eyre appears to us to have dealt with his requests for support helpfully.

30. Ms Chittem interviewed staff members from the counter. Yvonne Loong denied that she had heard homophobic comments although she said that Safiya was a trouble maker. Ms Chittem found that there had been a personality clash between them when Ms Simmonds had tried to manage her. Other staff members Claire, Ayisha, Ziva and Gayle also said that they had heard no homophobic comments. Naseema thought that Ashely was being bullied by the first and second claimants! The second claimant agreed that the balance of the evidence looks more as if *he* was bullying Mr Gayle.

31. The team were shocked at the sexual orientation questions from Ms Chittem and as she had not forewarned them she found their responses genuine. She says these were serious allegations and she needed to be sure so she investigated thoroughly.

32. The second claimant agrees that nobody said anything to support his allegations apart from the first claimant and that the evidence pointed both ways but says that this was because they did not want to risk their positon. He also told us that Mr Gayle was disrespectful/ horrible to *everyone*, including non-gay people. For example, he made Ziva cry on several occasions.

The second PIP

33. The PIP was renewed on 17 December. Targets and behaviours were discussed but the claimant did not suggest an alternative target. He says he had no idea how the target worked so could not suggest alternatives but he has a higher degree in economics and so this is surprising. The claimant had regular support meetings with Ms Eyre as he requested, and we conclude that she tried to make the PIP work but the second claimant was reluctant to engage with it.

Another complaint about Ashely Gayle

34. On 22 December 2014 the claimant complained to Ms Eyre that Mr Gayle was rude to him, disrespectful and aggressive; he did not say that this related to sexual orientation. This was also investigated by Ms Chittem and again the claimant did not link it to sexual orientation; he says he was embarrassed to do so BUT he had already spoken to Ms Chittem about sexual orientation discrimination so this was not a reasonable excuse.

The second claimant's second grievance - against Ms Eyre - of 23 January 2015

35. This was to be investigated by Ms Billett. The second claimant says he did not know how to interpret the thick skin comments but he did *not* say that they related to his sexual orientation. He does not accuse Ms Eyre of homophobia, just that she did not support him and his allegation of sexual orientation discrimination against her has been withdrawn.

Ms Chittem rejects the claimants' first grievances

36. On 1 April 2015 Ms Chittem rejected the second claimant's first grievance and she specifically rejected the sexual orientation allegations. She did a very thorough job. She says that the second claimant was very upset about disrespect but not much about any sexual orientation comments. Her comments are very similar to Ms Eyre's. Ms Chittem concluded that the team was extraordinarily disjointed, with a number of conflicts going on,

but that the difficult relationships were not anyone's fault. She did not uphold any of the grievances which she investigated.

37. On 7 April 2015 she did not uphold the first claimant's first grievance. Our observations about her approach are the same for both investigations.

The second claimant's move to Peter Jones

38. On 27 March the second claimant was given four weeks' notice of moving to Peter Jones in Sloane Square. He objected, but was told that his contract allows the respondent to move him to different stores. The terms of employment were the same. Ms Eyre provided her reasons for the move which were the counter's drop in profitability and Mr Zvyagintsev thanked her for the information: "all understood". Ms Eyre says that it is quite common for business managers to move for a variety of reasons, especially in London but she would only move someone if they thought they would thrive in the new role.

39. The claimant agrees that the counter had been underperforming in the last 12 months and as a "top two" counter this was concern to the Brand as a whole. He agrees that a move was not an unreasonable reaction but still says that the move was unfair. The respondent says that Peter Jones is the third top store in London. He disagrees and says that it was probably fourth and had been underperforming for four years so that this was effectively a demotion.

40. There were plenty of reasons to move him because, as Liz Chittem had observed, the counter was not a happy ship. The second claimant had made five complaints and two formal grievances in the last 12 months and there had also been a grievance by the first claimant. Also, he agrees that there were a number of different alliances and plenty of talking behind backs (if not in-fighting) in the team.

41. He protested to Ms Khetani on 28 March and said that the counter move was a bad decision and that was why things were not going well and why he was moved. Ms Eyre says that it was the right decision and now growth is in double digits for the last fiscal year.

42. Just before the second claimant left Selfridges, on 29 April, Ms Billett wrote to him telling that his second grievance was not upheld. The grievance had been thoroughly researched and the rejection letter was 12 pages long.

43. The second claimant had fully accommodated the first claimant' wish not to work late until his move to Peter Jones. She says that only one staff member did two lates a week but others say that the managers each had to do two lates. She does accept that Selfridges had recently changed policy so that a manager was required on shift at busy times, which included the evenings.

The first claimant alleges she was overlooked for promotion to business manager

44. The first claimant says she was overlooked for promotion because of her protected act and protected disclosure in the grievance of 19 November 2014 but she did not check the intranet so did not know that the role had been advertised. Rather fundamentally, she did not apply to replace Mr Zyagintsev in the business manager role at Selfridges or make her interest known. She says this was because she had been told by Ms Eyre that the new business manager would be joining soon which is denied. Ms Eyre says she has not

achieved the necessary performance standard in her recent reviews to get the job but she would have been interviewed.

45. Capable as she was of raising a grievance, she did not object and particularly did not allege that she was being overlooked because of her discrimination allegations. From May and up to July the role was still vacant and the claimant says that the team was in disarray but still she did not ask to be given a chance and did not check the intranet.

46. Stacey Holley eventually took up the business manager role in July.

Global visit

47. The claimant says she was overlooked for a global visit on 5 May. The evidence does not support an allegation that she was overlooked but instead suggests that she was simply not there on the day. The first claimant was not on the rota to work on the days of the visit and had taken one of the days off as holiday because she had no childcare. At the time she did not protest and just noted the fact that she was missing the visit. Her absence was not critical because the temporary business manager was available on the day.

Flexible working

48. By the end of April 2015, after the second claimant had left, Ms Eyre discovered that the claimant was working no late shifts and that the flexible working appeal had not been heard. She had been told by the first claimant at a performance review that she *was* working the arrangement set in November 2013, but she was not.

49. The rotas for Selfridges were set by the business manager and copied to Ms Eyre who told us she did not check them as she expected the staff to know their rotas; we had no reason to doubt her or infer that she did check them. The first claimant says that Ms Eyre had been told that the second claimant had covered the late shifts but this was not in writing and we do not find this to be the case. Of course, this arrangement ended when he moved to Peter Jones.

50. Because of the delay in hearing the appeal Ms Eyre offered Ms Cameron the chance to re-apply for flexible working and meanwhile said she did not have to work lates. This was a sensible suggestion but the claimant objected.

The first claimant second grievance – against Helen Eyre- of 19 May 2015

51. On 19 May 2015 the claimant made a second grievance complaint, this time against Helen Eyre, for trying to impose the shift pattern agreed by her in November 2013 and overlooking her for promotion. At the time, she did NOT say that she was being victimised because of support for the second claimant, in fact she says she is at a loss as to the reason why she has been overlooked for promotion.

52. Also on 19 May Ms Eyre went on maternity leave, returning in November 2015. She was covered by Kevin Coe. Therefore, the grievance could not be investigated but Ms Billett, National Sales and Education Manager asked for more information. The recorded delivery the letter was not delivered and the claimant explained that to us by the fact that she had been away from home staying with her mum on and off for a few months. Ms Billett confirmed that she would investigate the grievance once Ms Eyre was back which makes sense but the claimant complained about the delay in the list of issues until that complaint was withdrawn during the hearing.

ET claims

53. On 23 June 2015 the second claimant filed his first ET1 and on 11 July 2015 the first claimant filed hers.

The second claimant's blacklisting allegation

54. Ms Eyre was influential in recruiting the second claimant and supported him to move to new roles. Ms Chittam investigated whether she had had a negative influence on his applications to Harvey Nichols/ Tom Ford but found that the problem was not connected to her.

55. The second claimant had an application in to Crème de la Mer after Ms Eyre went on maternity leave and there were discussions with her locum, Mr Coe. The written evidence shows that they wanted someone who had experience of a £5 million turnover but his was limited to £1 million so this was short of what was needed and he did not get the job. In the face of the evidence even Mr Zyagintsev agreed that perhaps that was the reason he did not get the role and he had no other evidence.

Return to work meeting 15 September

56. The claimant had a return to work meeting on 15 September, she had been off sick for 21 days with stress, certified as a work-related illness. She provided no medical evidence of a need for the adjustments which were recorded in the meeting notes as a suggested store move, which she subsequently said she did not want, and more flexibility which was then discussed at the appeal.

57. She never raised a complaint about the return to work meeting, took no more sick leave and pursued her flexible working appeal and two grievances whilst remaining at work so there was no sign of lack of fitness.

The first claimant's flexible working appeal/ second application

58. The management response to the first claimant's second grievance about flexible working was that she was offered the chance to re-apply for flexible working and asked how she wanted to proceed given that Ms Eyre was on maternity leave.

59. The claimant however insisted that she wanted her original appeal to be heard. Meanwhile Mr Coe said she need do no late shifts in July BUT from August she must work two lates a week and he repeated that Ms Cameron could make a new flexible working request. Ms Cameron never challenged this instruction, which was contrary to what Ms Eyre had offered her in November 2013, and Mr Coe says no one had told him what had been offered then.

60. An appeal hearing was rescheduled several times at the first claimant's request so there was no issue of the respondent delaying. In this time the claimant was still not required to work a late shift and this moratorium was extended to the end of October.

61. Her appeal was heard by Jennie Sadler, National Field Sales and Education Manager (Ms Eyre's direct line manager) on 29 September 2015 and at that stage the claimant said she now wanted five days on shifts between 8.30 and 8pm and was not restricted to leaving at 4.30.

62. The claimant did discuss her personal needs. She said her partner worked shifts, her mother still did the childcare and a babysitter was mentioned and so Ms Sadler thought that it was not too bad for her to do lates. She portrayed herself as a single parent to us but that was not what she said to either Ms Eyre or Ms Sadler.

63. Ms Cameron said that Ms Holley, the business manager, was fine with her not doing lates and therefore doing more herself. Mr Coe was not so sure and told us that after a few months Ms Holley broke down in tears about working late so often because she was trying to deal with her own caring needs for her mother. Ms Sadler discussed a possible move from Selfridges but the claimant even refused a move to John Lewis which she was offered; she said it was only maternity cover but that was not clear to Ms Sadler and Ms Cameron did not make any further enquiries.

64. The appeal was refused on 8 October 2015 with the first claimant being required to work a "fully flexible rota", including working late, up to 9pm from the start of November 2015 for "two days a week". Ms Sadler says this was a typo and she meant to say that she should work the pattern set out by Ms Eyre, indeed that is the sense of the rest of the letter. The first claimant says she was expected to work one or two lates, indeed any number. Ms Cameron did not challenge the obvious confusion in Ms Sadler's letter which is odd given how important this was to her and her proven ability to complain. The reality was that she was not prepared to work any late shifts so it did not matter to her how many were planned.

65. Ms Sadler also said she was still free to put in another flexible working request even though it was not in the policy. She also said that Selfridges required maximum management cover on lates and that this rule had become stricter which Ms Cameron did not disagree with. Finally, she said that the new business manager Ms Holley was struggling with the number of late shifts.

66. A rota was issued for November, see page 504, which does not comply with the pattern prescribed by Ms Eyre in 2013 because there are no lates in the first two weeks and then two in the final two weeks of the month, although this is an average or one late a week. Again, and for the same reason, the claimant did not specifically challenge this.

Joint grievance by the first and second claimants of 4 October 2015

67. We note that this did not include a complaint by the first claimant about the return to work meeting.

68. The claimants did not ask for a joint grievance meeting. The first claimant says she was told that she could not attend the grievance investigation with the second claimant although he could come as a note taker. She says she complained by email but it is not in the bundle. This was even though she was using her personal email for work to which she still has access for disclosure purposes. She did not complain in her next grievance of 31 October.

69. The first claimant resigned before the grievance meeting took place and the process had been derailed by the fact that Ms Sadler was due to investigate it but then was complained about so she had to stop.

The first claimant's next application for flexible working

70. The claimant made another application for flexible working on 28 October. She said that she was at a disadvantage "because of my sex and disability" and referred to "violent debilitating migraines" for the first time which she said required a "slight reasonable adjustment". She says her current pattern is that she works between 9 and 8pm although we had understood that she only worked until 4.30. She mentioned her return to work interview of 15 September but did not complain about it.

71. The claimant was then on holiday from 30 October to 13 November.

Alleged harassment by Mr Coe

72. Mr Coe acknowledged the flexible working application and repeated Ms Sadler's finding that the claimant must be fully flexible pending consideration of the application. The claimant was on holiday and says this was harassment. Mr Coe said he responded as fast as he could to her because it was important and in his experience this was the best thing to do, but he would not require a reply as she was on annual leave. Ms Cameron did respond and in a confrontational way and did not object to the correspondence whilst on holiday at the time.

73. We asked the first claimant why she said it was ludicrous that the respondent was trying to make her work beyond 8pm when she is unable to and why she had not least tried to fit in with her employer's requirements. We could not easily see why she did not stay at her mother's home because when she got there at 9pm after the middle shift or 10pm after the late shift her son would be asleep she could stay at her mother's house with him. When he was asleep he was probably less trouble to her mother than he was during the day when she was trying to work from home. The claimant told us that she could not stay with her mother because she had allergies to her mother's dogs but this was in direct contradiction to an earlier comment when she had said that she had been staying with her mother on and off for months during the summer of 2015, see paragraph 52.

74. She also said that she had tried working lates two years earlier and found that it did not work but we have concluded that she did not in fact work lates on her return from maternity leave and, anyway, her son was now two years older. She also commented that she wanted to go to her own home and not stay with her mother because that was where she and her son lived. This is of course true, and we all like to be in our own homes when we can, but everyone who works must make arrangements and sacrifices to meet the minimum standards of the job.

The first claimant's fifth complaint - against Ms Billett and Ms Sadler - of 31 October 2015

75. On 31 October the first claimant filed her fifth grievance. She understood that this meant that Ms Billett could not progress the grievance against Ms Eyre, just as Ms Eyre was returning from maternity leave.

76. In this complaint she raised her race harassment allegation, mentioned her fourth, joint, grievance with the second claimant but did not complain that she had been prevented from having it heard jointly and did not complain about the return to work meeting with Mr Coe in September.

Alleged racial harassment

77. The allegation was of Stacey Holley doing monkey impressions with the purpose of upsetting the claimant on 30 October. She also referred back to the same behaviour in July and 5 August that year. The claimant says that she found Stacey Holley's behaviour "a little odd" and only when prompted by the Tribunal did she say she found it degrading. The language of the grievance of 31 October is mild and does not suggest that the behavior was directed at her or that she felt personally humiliated or degraded; the main thrust was that this was generally inappropriate behaviour.

78. The claimant did not pull Stacey Holley up in July as she said she did not want to appear rude and did not raise the July or August incident with management. She says that there was no point because the respondent takes a long time to investigate grievances and the relationship with Stacey Holley was not that great, but she had felt able to raise a theft allegation, which is now not pursued in these proceedings, in her fourth grievance 11 September.

79. The claimant agreed with Ms Sadler and Mr Coe that Stacey Holley is a performing arts student and a big character with a vivid imagination so such actions are in character. The claimant agrees that in July she also imitated a bird. Stacey Holley said she did it on 30 October to cheer up her colleague (who is of Indian origin). Ms Sadler discussed this with her and found her motive credible and that it was not done to upset the first claimant or to be racist.

80. Ms Khetani of HR was allocated to investigate the grievance of 31 October but when the claimant resigned the investigation was ongoing and the outcome therefore uncertain.

The first claimant's resignation

81. On 3 November Mr Coe told the first claimant that she might be disciplined unless she worked late shifts as rostered. The claimant did not challenge the rota, which showed that she would work no late shifts in the first two weeks of November (when in fact she was on annual leave anyway) and two in each of the last two weeks, or complain that it was inconsistent with Ms Eyre's decision of 2013. She remained on holiday until she resigned.

82. The first claimant resigned on 16 November 2015. She says she wrote the resignation letter herself. She refers to fundamental breach, breach of mutual trust and confidence and also anticipatory breach, terms which she says she googled.

83. The reasons for resignation given in her letter were:

1. Failure to investigate her allegation. This was odd because Liz Chittam investigated this and rejected the grievance as was thoroughly demonstrated by Mr Purnell in cross-examination. The claimant no longer relies on this allegation as part of the breach of contract, but not before considerable effort had to be made by the respondent to rebut it. She may have meant to say that she objected to her allegations not being upheld.

2. The original request for flexible working of 2013 was refused, see the conclusions below but this in not specifically relied on in the list of issues and is out of time.

3. Sex discrimination in regards to the flexible working appeal, this is allegation 4.1(f) and see our conclusions on indirect discrimination.

4. Failure to follow policy with regards to gross misconduct by Stacey Holley. Ms Sadler was investigating but before she provided an outcome the claimant complained about Ms Sadler on 31 October and so the investigation had to pass to Ms Khetani so there was no outcome when the claimant resigned. It was of course possible that the grievance would have been upheld so resignation was premature. The claimant no longer relies on this allegation as part of the breach of contract, but again not before considerable effort had to be made by the respondent.

5. This was a reiteration of allegation 4.

6. Failure to consider her request for flexible working of 28 October, this is allegation 4.1(h) in the list of issues.

7. Failure to address stress at work following her return to work meeting with Kevin Coe, this is issue 4.1(e).

8. Failure to allow joint process. This is issue 4.1(i).

9. Harassment by Kevin Coe when on annual leave. p495 This is issue 4.1(j).

10. Failure to investigate the grievance against Ms Eyre of May 2015. It could not be investigated before the first claimant resigned because between May and October she was on maternity leave and also her grievance against this Billett meant it could not be progressed. The claimant no longer relies on this allegation as part of the breach of contract, but again not before considerable effort had to be made by the respondent. Again, it was of course possible that the grievance would have been upheld so resignation was premature.

84. The When asked by the Tribunal she said that the last straw was the flexible working rota plus she felt her grievance was not dealt with. It is striking that she does not cite what she now alleges to be intentional racial harassment on 30th October, her last working day, as a reason for her resignation.

The claimants' second ET1s

85. The first claimant filed her second ET1 on 30 December 2015 and the second claimant on 6 January 2016.

Outcomes to the first claimant's outstanding grievances

86. On 6 January 2016 Chris Lees, Brand Manager, wrote to the first claimant with outcomes to her grievances, including the Ms Eyre grievance of 19 May 2015. The claimant accepts that the respondent was not obliged to give her an outcome after she had left.

CONCLUSIONS

The first claimant

Issue 1

Indirect sex discrimination

The PCP

87. Taking an approach which is as fair as possible to the claimant we have identified the provision, criterion or practice as being that managers should work the full range of shifts, including working after 8pm.

88. The respondent argued that the pleaded PCP was not appropriate to the claim and we agreed that there have been some confusions on this point. However, this issue was by far the most important and difficult and since the claimant was not legally represented (although we and she were very grateful for the help of Mr Robison from FRU) we thought it only fair to configure a PCP to conform to what we understood she meant.

Applied to men as well as women

89. Mr Purnell argues that the pool consists of only those who want the benefit sought, in this case the business managers who wanted flexible working. This follows Lady Smith's reasoning in *Hacking & Paterson v Wilson* UKEATS/0054/09. Whilst we are course bound by the decisions of the EAT, we are also bound by the decisions of the Supreme Court and cannot reconcile what Lady Smith says in *Hacking* with what Lady Hale says in *Homer* v *Chief Constable of West Yorkshire Police* [2012] IRLR 601. Again taking an approach which may err towards the claimant we think that the test for indirect discrimination requires a comparison between men and women in the pool, some of whom can comply with the PCP and some of whom are not. So the comparison is the managers to whom this PCP is applied.

Disadvantage

90. We do however agree with the respondent that the assessment of disadvantage is only between managers as the effect of the PCP on managers will be different from other staff members.

91. The claimant asks us to use our general knowledge, supported by general workforce statistics, to conclude that the PCP was indirectly discriminatory. Whilst in principle we could do this, there is some difficulty in this case because the dispute was not about full-time/part-time work where it is well-established that women find it more difficult to work full-time (although this is increasingly less clear as Lady Smith said), but about shift work. Women who have access to informal childcare from mothers and partners can often find such work helpful because they do not have to pay for childcare but can rely upon family members who are not at work instead. Indeed, some parents avoid the cost of childcare altogether by arranging that they work opposing shifts. Therefore, we are uncomfortable about using our general knowledge to say that this PCP was indirectly discriminatory.

92. We are even more uncomfortable about concluding that this claimant suffered the particular disadvantage imposed by this PCP. The disadvantage that the claimant argues for in the list of issues is that Kevin Coe refused her flexible working appeal in July 2015. Of course, he did not refuse her appeal because he did not hear it, this was Ms Sadler, and surely what the claimant means is that she was unable to work the shifts required and ultimately felt obliged to resign.

93. Whether the first claimant suffered a disadvantage is the same question as whether the discriminatory effect of the PCP outweighs the reasonable needs of the employer and so whether the PCP is a proportionate means of achieving a legitimate aim, see below.

Justification

94. Following *Hardys & Hansons v Lax* [2005], the balancing exercise comes out against the claimant in this case as her personal circumstances meant that the effect of the PCP was potentially not very grave:

a. The claimant was given plenty of notice in the rota which was provided up to a month in advance to enable her to plan.
b. She had her mother, who works from home, to provide child care with no fixed hours.
c. Her mother lived within a reasonable travel distance from Selfridges.
d. Her mother could accommodate both the claimant and her child overnight and did this regularly. Her excuse that she could not do this because she suffered from allergies to her mother's dogs was, we are sorry to say, opportunistic and not credible.
e. At that time at least, if not now, the claimant had a partner who conveniently worked shifts also, she was not a single parent and could have some expectation that he would assist. She deliberately confused us when she said that she was a single parent.

95. In terms of the reasonable needs of the employer, as a manager in one of the flagship stores the claimant had to be available on a regular basis when it was busy. She agreed that Selfridges required this as a term of the arrangement with Origins and as their "landlord" Selfridges was in a powerful position.

96. Further, the informal arrangement with the second claimant which enabled the claimant to work in the early shifts was fine whilst it lasted but the business manager could not be expected to cover all the late antisocial shifts. Indeed, Stacey Holley found it very hard as *she* had caring responsibilities for her sick mother.

97. In essence, whilst the employer had given some thought to what arrangements it could expect of the claimant as the mother of a young child, she had not taken into account her responsibilities as a manager. She had also not thought that she should at least try to work according to the rota because she had never in fact done so and seemed to think that it was her absolute right to work the hours which she wanted. Of course, if she had tried to fit in with the rota she might have been pleasantly surprised or, alternatively, she would have had very good ammunition to prove that it was not possible. The other point to make is that the claimant had a fresh application pending and the chance to re-apply every year.

98. On balance we find that the application of the PCP was therefore a proportionate means of achieving a legitimate aim.

99. To the extent that the claimant was including a claim in relation to her application for flexible working of 2013, that was out of time. In terms of the discussion about flexible working in 2015 we think the claim is probably in time but the claim fails for the reasons given above.

[Issue 2 was withdrawn]

Issue 3
Harassment related to race

100. This allegation relates to the monkey impressions by Stacey Holley in July, August and October 2015 which the first claimant says were delivered with the purpose of harassing her.

101. Harassment is unwanted conduct related to race which has the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The test is objective because if the claimant has experienced those feelings we must decide whether it was reasonable for her to do so.

102. You are A monkey impression is not inherently an act of harassment; it all depends on the context. Here the context was that:

a. As the claimant states that the monkey impressions were delivered to a variety of colleagues, but not to her although she was present, an intent to target her is not obvious.
b. The impressions were repeated three times and Stacey Holley was not told by anyone that they were unwanted.
c. Even the claimant agrees that Stacey Holley is a big character who did performing arts so such behaviour would not be surprising; she imitated other creatures as well as monkeys.
d. She had a reason for doing it in October which was to cheer up a colleague and she said this at the time.
e. The claimant did not complain at the time of the August incident which was the same as the October incident and if it was intentional harassment as she now suggests, and given that she was well able to complain, this is surprising
f. The language of the complaint does not show that the claimant was upset, rather that she thought the behaviour inappropriate and found it a “little odd”. We think she probably thought that monkey impressions were unlawful (as opposed to unwise) irrespective of context.
g. She only said she felt degraded when asked by the Tribunal
h. This incident was not raised in the resignation letter some two weeks later and was not given as a last straw which is not credible given that the allegation is of intentional harassment

The first claimant’s claim that this behaviour had the purpose (or indeed effect) of harassing her fails.

Issue 4
Constructive unfair dismissal

103. The list of issues sets out the ten acts or omissions by the respondent which the claimant says caused her to resign in response to a fundamental breach of the implied term of mutual trust and confidence. We find them not to have been breaches of contract individually or cumulatively and provide reasons below. The letters detailing sub-issues below refer to the remaining claims in the list of issues.

a.-d. are not relied upon.

e. Kevin Coe's failure to address stress at work following the return to work meeting with him on 15 September 2015.
The claimant did not complain about him in her subsequent correspondence or grievance nor did she manifest a problem in that she was able to work and run an appeal and two grievances. Her doctor thought she was fit because her sick note had expired and there was no referral to occupational health. We also know she did not want to move stores when offered a move by Ms Sadler. Her other requests for changes in hours were dealt with in the flexible working process.

f. *Failure to consider properly or at all the July 2015 appeal for flexible working.*
See issue 1 above. The appeal was considered and concluded by Ms Sadler. They did not give the first claimant what she wanted but the process was fair and the claimant was offered the chance to apply with a fresh flexible working application once the appeal failed.

h. *Failure to consider properly, or at all, the October 2015 request for flexible working.*
Again, see issue 1. However, Ms Cameron had resigned well before it could be considered and there was no unreasonable delay so this cannot possibly have been a breach of contract.

i. *Failure to allow the joint grievance of 4 October 2015 to be heard together with the second claimant.*
The first claimant resigned before the grievance meeting took place and she never raised this issue as a complaint. She told us she did raise it by email but was unconvincing as her emails were available to her after resignation as she used her personal email for work and she has not provided it. The second claimant was allowed to attend as companion and vice versa. In our experience meetings are always better, clearer and more credible if conducted separately,

j. *Allowing Kevin Coe to harass her whilst she was on leave.*
He responded politely to her emails. This was a critical time and the return to work had to be discussed. Also, there is no indication that she would have been punished if she had not replied. We think it very likely she would have complained if the respondent had not corresponded with her; she had a habit of giving deadlines and at least one respondent witness said that they had the impression that it was best to deal promptly with things that she raised.

k. *is not relied upon.*

104. Taken together, none of these allegations amount to breaches of contract, and certainly not breaches which would be a fundamental breach. The claimant has not cited some of the other issues, notably race discrimination of 30th October as being incidents which led her to resign. This may have been an oversight but even if these allegations are taken into account, given our findings they do not assist her case.

105. Looking at the overview of the employment relationship we were struck by the fact that the respondents generally handled what can only be described as an onslaught of complaints and demands in a thorough and measured way. It cannot be said that their behaviour breached any term of the contract of employment.

Issue 5
Protected disclosure detriment
Protected disclosure
106. The alleged disclosure is first claimant's first written grievance against Safiya Simmonds of 19 November 2014. Given our findings below we have not spent time deciding whether this was a protected disclosure. Also, this claim is out of time.

Detriment
107. We conclude that there were no detriments. The claimant says she was overlooked for promotion and excluded from a global visit by senior managers to the counter on 5 May. In terms of promotion to the business manager role after the second claimant had moved at the time she said she was at a loss to understand the motive so attributing it to a protected disclosure is an afterthought. Further, since she did not apply or raise her wish to be considered this is hardly surprising. Also, her work was not up to the standard needed.

108. The global visit was missed due to rota and childcare, the claimant did not complain at the time.

Issue 6
Victimisation
Protected act
109. The alleged protected act is first claimant's first written grievance against Safiya Simmonds of 19 November 2014. Given our findings below we have not spent time deciding whether this was a protected act.

Detriment
110. We conclude that there were no detriments. The claimant says she was overlooked for promotion and a global visit on 5 May but see the conclusions to issue 5 above.

111. These claims may be out of time because although they are referred to in the first ET1 no causal link is made with protected disclosure or protected act but given the conclusions above we have not invested time in determining this.

The second claimant

Issue 7
Direct sexual orientation discrimination
112. None of these claims are upheld. We find no detriment individually or cumulatively and provide reasons below.

a. *In November 2013 Ashely Gayle joked about the second claimant's sexuality and private life.*
There was no evidence despite a very thorough investigation by Ms Chittam and the second claimant admitted that AG was disrespectful/ horrible to *everyone*, including non-gay people so there is no evidence to support the claim.

b. *Mr Gayle made derogatory comments in front of the second claimant's team and in February 2014 called him a "batty man".*

The second claimant did not complain at the time and did not raise it informally with Mr Gayle, neither did the first claimant. It was first raised by the first claimant in November in her grievance against Ms Simmonds and she did not complain against Mr Gayle. The allegation was nonetheless investigated by Ms Chittem who found no evidence of homophobic or distasteful comments. We agree with her.

c. *In July 2014 Mr Gayle threatened him when he made a joke about a male member of another team in Selfridges attempting to seduce Mr Gayle.*
He never complained about this and there is no supporting evidence. If this incident was a detriment or harassment why did he not mention it in his grievances when other sexual orientation issues were raised?

d. *Mr Gayle joked about him attending the gay pride march in August 2014.*
There is no evidence of this causing offence at the time and Ms Eyre specifically recalls him brushing that aside because he was more concerned about the disrespect issue. Anyway, there is nothing inherently bad about such an enquiry, it depends on the context.

e. f. and g. are not pursued. They were withdrawn during the hearing. Of particular significance is f. which was an accusation that Ms Eyre was homophobic, an accusation which must have caused her concern.

Issue 8
Harassment related to sexual orientation

113. The direct sexual orientation discrimination allegations above are not upheld as harassment either. There are additional allegations of harassment which we reject:

a. On 22 December 2014 AG was rude to him and disrespectful
The second claimant did not say that this related to his sexual orientation and he had no reason at that stage not to raise specifically sexual orientation discrimination. It was also investigated by LC who found nothing.

b. Is not pursued

c. and d. are that *Mr Gayle asked the claimant if he was gay on a monthly basis and that he treated him in a disrespectful manner between October 2013 and April 2014.* These are too vague to allow us to make findings. Disrespect is a regular theme but it is not synonymous with sexual orientation harassment. Also, it is notable the none of the grievances or complaints were said to be directly against Mr Gayle.

Issue 9
Victimisation

Protected act

114. This is said to be the second claimant's first grievance of 7 December 2014 against S Simmonds and, he says, also against Ashely Gayle. Given our findings below we have not spent time deciding whether this was a protected act.

Detriments

115. We have found no detriment and give our reasons below.

a. *Moving the second claimant to Peter Jones in March 2015 when he thought he was attending a meeting to discuss rotas.*
The second claimant's own case is actually that he was moved because the counter was failing but this was not his fault as it was caused by the relocation of the counter within Selfridges. Therefore, he has not made the link between a protected act and the move. In any event, there were plenty of reasons to move him, including the poor performance of the counter. The Selfridges counter is now doing well.

b. *Blacklisting*

We found no evidence to support this allegation and the claimant agreed that there was none but did not withdraw this claim.

c. *Placing the second claimant on two consecutive PIPs between December 2014 and April 2015*
The first 1-month PIP of 11 November 2014 could not have been victimisation because there was not yet a possible protected act. The second was fully justified and followed the first. The context was that Ms Eyre had every reason to want him to succeed as she had stuck her neck out to recruit him.

Issue 10
Protected disclosure detriment

Protected disclosure
116. This was the call to Ms Eyre in August 2014 alleging bullying in relation to his sexuality. Given our findings below we have not spent time deciding whether this was a protected disclosure.

Detriments
117. We have found no detriment and give our reasons below.

a. In August 2014 Ms Eyre told him he was paranoid and should get a thicker skin
"Thick skin" may have been said and it may well have been good advice; the second claimant ran the counter and he needed to be able to manage his staff himself. What is clear is that this was not said in relation to problems he was experiencing regarding sexual orientation or because he a made a protected disclosure. We conclude that the word "paranoid" was not used by Ms Eyre and was his interpretation of her advice.

b. Placing the second claimant on two consecutive PIPs between December 2014 and April 2015
The PIPs were fully justified and not vengeful.

118. Our comments about the onslaught of complaints made in relation to the first claimant above apply also to the second claimant.

General conclusions
119. In general the claimants' delay in complaining, their not complaining at all and their inability to provide corroboration is explained by them by:

a. crucial exchanges being oral or
b. in lost emails or
c. their being afraid to raise complaints or
d. thinking at the time that the complaints would not be taken seriously.

We have not found these explanations convincing and they have led us to conclude that the impact of these events at the time was far less than is now alleged. We think that the claimants have refashioned small events into legal issues suitable for litigation. The first claimant's overwhelming concern was that she should escape late night shifts and we must say that her other allegations have proved to be very thin.

120. Her indirect discrimination claim looked quite strong at first but she has muddied those waters by claiming she was a single parent and that she could not stay at her mother's house due to allergic reaction when earlier she had volunteered, when it suited her, that she had been staying with her mother for months.

121. The second claimant was, as Ms Eyre and Ms Chittam observed, most concerned about lack of respect from his team which he has now translated into allegations about sexual orientation. In his evidence, he did not seem to understand that general lack of respect and alleged bad management does not equate to sexual orientation discrimination. Also after March 2014 when he was made permanent he had no particular reason to fear reprisal.

122. It is in fact disrespectful to those who suffer serious discrimination to label issues race or sexual orientation discrimination after the event.

123. We do not understand why these two claimants have pursued a fairly identical path of complaints and litigation when actually their concerns were quite different and it is particularly odd given that the second claimant left Selfridges in April 2015. We wonder whether in supporting each other they lost the ability to be objective about their claims. Ultimately, however, all that matters is that we have thoroughly and painstakingly considered the claims brought, as did the many respondent managers who were involved in these issues, and we have found them to be without substance.

COSTS

124. The respondent applied for a costs order against the claimants. Their total costs, including VAT, are £146,231.04. We have considered whether to make an order for costs and have decided to order each claimant to pay the respondent £10,000.

125. We have a discretion to make a costs order under rule 76(1)(a) where we consider that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings or in the way that the proceedings have been conducted.

126. We find that the behaviour was unreasonable for four main reasons:

1. The abandonment of a considerable number of claims by both claimants at the door the court, or indeed during the hearing, led to wasted time in preparation for the hearing. The lengthy witness statements which the respondent produced could have

been considerably shorter had the issues been narrowed at the appropriate time. Also in terms of counsel's fee we might have saved at least a day's hearing if the issues have been narrowed appropriately.

2. The claimants were also unreasonable in not engaging in offers to settle. A formal offer was first was made in April 2015 just as the final preparations for the hearing, which was listed for June but then adjourned because of Ms Eyre's pregnancy, were beginning to be made. The first claimant was offered £18,000 which with sizeable proportion of her schedule of loss of around £25,000 and the second claimant was offered £2,500. This was considerably less but he was still employed by the respondent and so his claim was for injury to feelings only. They did not engage and rejected both the offer and subsequently mediation.

3. Eventually, in October 2016, the first claimant was actually offered £30,00 more than her Schedule of Loss, but she still refused it. We appreciate that both claimants said that they did not want to be "divided and ruled" and that they may have been concerned that if they settled individually they could not give evidence for one another at a hearing, but such loyalty was misplaced in that it is an individual's responsibility to run their own litigation reasonably. Perhaps if they had given some more thought to the offers they would have been able to help one another to recognise that their positions in relation to the litigation were not tenable.

4. We know that they wanted their day in court, we have seen the correspondence saying this, and they have explained to us that they thought that when their version of the truth was heard we would believe them, but they should have taken more notice of the evidence. It is obvious from the evidence that their version of the truth was very subjective, particularly when it came to marrying up their experiences to the law. It is obvious to reasonable people that you do not litigate lightly and the claimants should have known from the point of disclosure that the vast weight of the evidence was against them. One of them mentioned to us today that they knew that the sheer number of witnesses was against them and rather than seeing themselves as Davids fighting Goliath this alone should have made them think.

127. We also consider that under rule 76(1)(b) most the claims had no reasonable prospect of success. The documents alone should have confirmed this but if they were in any doubt the respondent's letters of 29 April 2016 and 15 March 2017 made it very clear why the respondent believed that they would lose, and indeed the respondent's reasoning was very similar to the reasons in our judgement. Even after the majority of the respondent's costs had been incurred several offers were made to allow the claimants to walk away from the litigation without the risk of costs but they were refused.

128. There is quite a discussion to be had on what "reasonableness" is in the face of a pair of claimants who unreasonably but firmly believe in their case but ultimately this is an objective test and we cannot take their level of self-belief into account. We need only look at the example of Ms Cameron alleging failure to investigate her October 2015 flexible working application when it was clear that she resigned before it could reasonably have concluded and then Mr Zvyagintsev's criticising after the event Ms Eyre's helpful attempts to support him.

129. There were some points which were more arguable than others and although we found against the first claimant the indirect discrimination claim was at least arguable and some of the respondent's evidence was confusing, particularly for the October 2015 period.

130. Also, it may be that some of the unreasonableness in the claimants' approach arose because in the early period at least they were litigants in person, but then they did have advice from Mr Robison from April 2016. They told us that her he had advised them that they might fail and that they should seriously consider the offers which they rejected.

131. We would not, were we live in a position to do, award the full costs to the respondent but we have not looked in detail at the cost schedule because the respondent has told us that it wishes to limit the award to what is within our power, which is up to £20,000 from each claimant. It is therefore irrelevant to decide what proportion of costs we would award because the award would have been at least 25% of the costs.

132. We award £10,000 to the respondent in respect of each claimant. That is less than the respondent has asked for because we have decided that we should take into account the claimants' means and the effect on relatively low earners of a costs order of this magnitude. An award of £10,000 in respect of each claimant is a hefty sum equivalent to 6 months' pay and it signifies, at least we wish it to signify, that they should never have allowed the case to get to trial in the shape that it was in. It should have been considerably scaled down and they should seriously have considered settlement offers, particularly Ms Cameron. It also signifies that they put the respondent to considerable cost, and the respondent's many witnesses to considerable worry and that they have brought discrimination claims in general into disrepute. On the other hand, we consider that it is a manageable figure if paid over a period of time.

Employment Judge Wade
22 March 2017