



EMPLOYMENT TRIBUNALS

Claimant: Miss R Jedrzejewska

Respondent: Iceland Manufacturing Limited

HELD AT: Manchester

ON: 19-23 June 2017
and in chambers on
17 July 2017

BEFORE: Employment Judge Franey
Ms J K Williamson
Mrs S J Ensell

REPRESENTATION:

Claimant: Ms E Kaminska (Claimant's Partner)

Respondent: Mr R Hignett (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaints of harassment related to sexual orientation fail and are dismissed.
2. The complaints of direct sexual orientation discrimination fail and are dismissed.
3. The complaints of victimisation fail and are dismissed.

Employment Judge Franey
27 July 2017

JUDGMENT SENT TO THE PARTIES ON
4 August 2017

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. Having undertaken early conciliation via ACAS between 19 June and 8 July 2016, the claimant presented her claim form on 11 July 2016. At that time the claimant was still employed by the respondent as a production operative. She alleged that as a lesbian she had been subjected to almost 12 months of sexual orientation harassment and discrimination by her colleagues. The substantive details of the complaints were provided by attaching two grievance documents from March and April 2016.

2. By its response form of 19 August 2016 the respondent resisted the complaints on their merits. It said that some allegations made by the claimant in her grievances had been partly upheld but no allegations of discriminatory treatment were well-founded. It pointed out that since lodging her claim the claimant had been made redundant with effect from 18 August 2016.

3. At a preliminary hearing before Employment Judge Holmes on 20 September 2016 the claimant was given permission to amend her claim to allege that her dismissal had also been discriminatory. Further particulars of her allegations were required.

4. Those further particulars were provided by the claimant on 12 October 2016 and ran to 16 pages. The respondent amended its response form on 9 November 2016.

5. There was a further preliminary hearing on 4 January 2017 before Employment Judge Franey. The claimant did not attend but was represented by her partner Ms Kaminska. The Tribunal went through the further particulars and the two grievance complaints and ascertained from Ms Kaminska the 25 factual allegations for which the claimant sought a remedy, and how they were put in legal terms. They were recorded in the Case Management Order. The written Order invited the claimant to apply to amend those details if she did not consider them accurate. No application to amend was made.

6. Having seen the formulation of the claimant's case set out in the Case Management Order, the respondent supplied a further amended response form on 26 January 2017.

The Issues

7. At the outset of our hearing we confirmed with the parties that the List of Issues remained as identified in the January 2017 Case Management Order. No one suggested any change. During her evidence, however, the claimant withdrew allegation 1 which related to a training course. She accepted it had nothing to do with sexual orientation. After the evidence Mr Hignett abandoned the "reasonable steps" defence in section 109(4) Equality Act 2010. He accepted the grievance of 30 March 2016 was a "protected act". Judgment on liability was reserved.

8. The List of Issues to be determined was therefore as follows. Colleagues of the claimant against whom allegations of homophobic harassment were made will be identified only by their first name unless they had the opportunity to give evidence in person as witnesses.

Part 1 – The Factual Allegations

1. [withdrawn].
2. On almost every day since June 2015 Ewa made comments offensive to homosexuals, including:
 - (a) Referring to them as “shitty lesbians”;
 - (b) Referring to them as “shitty gays”;
 - (c) Saying that gays “have to be put in gas chambers to clean the world”;
 - (d) Saying that “the Gay Village should be burnt out – gays are not normal people”;
 - (e) Referring in the canteen to “all these gays”;
 - (f) Saying that people should avoid contact with gays because it can be transmitted like a sexual disease;
 - (g) Telling jokes about gay people such as a joke about how a request for a pen would result in a gay rape.
3. When oral complaints were made about the behaviour of Ewa the respondent did not deal properly with them. The claimant relies on the proper investigation of complaints made by her heterosexual comparator, Patson Mungaila.
4. On 18 March 2016 Ula referred to the claimant using the Polish word “debil”, which means an idiot or a person of low IQ, implying that only an idiot or someone with mental problems could be a gay person.
5. The respondent prevented the claimant from applying for the position of team leader as part of the redundancy consultation process.
6. Following an application for the position of machine minder in October 2015, the claimant was not informed of the results of her test. The only people not informed were the claimant and Ms Kaminska, the only homosexual candidates.
7. The claimant was given shorter breaks than allowed to her heterosexual colleagues, Monica, Dominika, Ruta, Agnieszka and Sarnowska.
8. Krystyna made almost every day in conversation with Ewa comments comparing lesbians to paedophiles, saying that:
 - (a) Children of gay couples should be illegal as the baby will be physically or emotionally harmed.
 - (b) The “disease” of being gay would transfer to the child.
 - (c) The world does not need more gay people.

9. From June 2015 onwards Agnieszka and Remigiusz made homophobic comments such as expressing views on whether it would be better for gays to be burned or lynched.
10. From June 2015 onwards Michal Wiekiera and Beata Wojtczak made fun of the claimant and her partner Ms Kaminska by making vulgar comments about their sexual relationship such as:
 - (a) "I wonder who is playing the male role?"
 - (b) "I wonder who has a dick?"
 - (c) "How often do they swap positions?"
11. On various dates after June 2015 Ewa took work tools off the claimant.
12. On numerous occasions after June 2015 Krystyna moved the claimant to a different area of the production line.
13. On a date prior to 30 March 2016 Nicola Branigan commented that the claimant was not suitable and worked too slowly, implying that lesbians were slow and lazy.
14. Upon receipt of the claimant's complaint of 30 March 2016 the respondent failed to keep it confidential. The claimant compares herself with her heterosexual former colleagues Patson Mungaila and Javed Akhtar, who made comparable complaints which were treated confidentially.
15. Following receipt of her complaint of 30 March 2016 the claimant was required by the respondent to work with the people about whom she had complained.
16. The respondent took two weeks to arrange a grievance meeting following the claimant's complaint of 30 March 2016. This showed the respondent was not taking her complaint seriously. A complaint by a heterosexual colleague was taken seriously and resulted in the dismissal of the box up manager. The claimant cannot presently recall the name of the person who brought that complaint.
17. The claimant was given only one day to prepare for the grievance meeting. This was particularly difficult because the claimant speaks little English. The claimant relies on a hypothetical heterosexual comparator who would have been given more time to prepare.
18. The respondent did not suspend the people against whom the claimant brought complaints on 30 March 2016. The claimant compares herself with a hypothetical heterosexual person from whom equivalent complaints would have resulted in suspension.
19. On 31 March 2016 Nicola Branigan threw a box that hit the claimant on her hand.
20. On 6 April 2016 Mark Artus tried three times to force the claimant to sign an application form for a new role. In the course of doing so he disclosed to Krystyna that the claimant had made a complaint.
21. On 11 April 2016 the claimant was repeatedly separated from the people with whom she was working because of concern about the "disease" of being gay being transferred.
22. On 11 April 2016 Andy Stott shouted at the claimant telling her to shut up.

23. Following the submission of her complaint of 30 March 2016 the claimant was called a lesbian by Nicola Branigan.
24. Janet Hackett declined to provide in a timely fashion a response to a request made by the claimant on 9 July for the selection criteria for a new role as part of the redundancy process. The information was not provided until 29 July, which was too late. Queries made by heterosexual members of staff during the redundancy process were answered promptly, in some cases with documents being delivered by hand to the employee at the production line.
25. The claimant was dismissed by the respondent with effect from 18 August 2016.

Part 2 – Legal Complaints and Issues

Harassment related to sexual orientation

1. In relation to allegations 1-24 inclusive, has the claimant proven facts from which the Tribunal could conclude that:
 - (a) The claimant was subjected to unwanted conduct;
 - (b) Related to her sexual orientation;
 - (c) Which had the purpose or effect of
 - (i) Violating her dignity, or
 - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
2. If so, has the respondent nevertheless shown that it did not contravene section 26?

Direct discrimination – sexual orientation

3. In relation to allegations 1-25 inclusive, in so far as they do not amount to harassment, has the claimant proven facts from which the Tribunal could conclude that the respondent treated her less favourably because of her sexual orientation than another person was or would have been treated?
4. If so, can the respondent nevertheless show that it did not contravene section 13?

Victimisation

5. In relation to allegations 15, 19, 20, 23, 24 and 25 has the claimant proven facts from which the Tribunal could conclude that the respondent subjected her to a detriment because of her protected act of 30 March 2016?
6. If so, can the respondent nevertheless show that it did not contravene section 27?

Time Limits

7. In so far as any of the matters about which the claimant complains occurred more than three months prior to the presentation of her complaint (allowing for the effect of early conciliation) can the claimant show that they formed part of conduct extending over a period which ended within that three month period?

Witness Evidence

9. The claimant gave evidence herself and had prepared a written witness statement. Unfortunately it did not comply with paragraph 4 of Annex C to the January 2017 Case Management Orders which required it to set out in chronological order (with as much detail as to dates as was possible) the factual evidence which the claimant wanted to give to the Tribunal. Instead it took the form of a handwritten document headed “Notes of Hearing” recording an interview of the claimant by Ms Kaminska on 27 May 2017. The terms of the interview were very general and there were no specific factual details. Having heard submissions from both parties the Tribunal decided against restricting the claimant's evidence in chief to what was in that document, as it seemed that there may have been a misunderstanding on her and her representative's part about what was required¹. We therefore allowed the claimant to affirm the factual content of her two grievance documents and her further particulars as well as her witness statement. She was cross examined on those documents.

10. The claimant had intended to call two former colleagues as witnesses, Zbyszek Rutecki and Emilia Szydelko. Typed notes of interviews of those witnesses conducted by Ms Kaminska were provided, each of which was signed by the witness. However, we were informed on the fourth day of the hearing that those witnesses were unable to attend from Poland due to family commitments and they were not called in person. The Tribunal took account of their statements as written documents but attached less weight to their evidence than if they had attended in person.

11. The respondent called evidence from five witnesses in person, each of whom had prepared a written statement. Those witnesses were Charlotte Ashdown, Human Resources (“HR”) Manager for a different company in the group who heard the claimant's grievance; Janet Hackett, the Head of HR for the respondent who had involvement in the grievance process and the management of the claimant's absence, and who dismissed the claimant; Matthew Loy, the respondent's Managing Director who heard the appeal against dismissal, and three former colleagues of the claimant on the production line: Nicola Branigan, Beata Wojtczak and Michal Wiekiera. The respondent also tendered a written statement from Jayne Putnam, an HR Manager at another company in the group who heard the claimant's grievance appeal. We attached less weight to Ms Putnam's evidence than if she had attended in person.

Documentary Evidence

12. The Tribunal was provided with a bundle of documents running to approximately 400 pages, to which a few documents were added by agreement during the hearing. The documents that were added were allocated page numbers, save for a bundle of additional emails supplied by the claimant which was added to the back of the bundle but to which no reference was made save for one item which already appeared elsewhere in the bundle. Any reference to page numbers in these reasons is a reference to the hearing bundle unless otherwise indicated.

¹ Although by the time we reached our conclusions we found that there was another factor contributing to the lack of detail – see paragraph 153 below.

13. At the request of the claimant the Tribunal also viewed a still and a few seconds of CCTV footage which was said by the respondent to be the footage which the claimant had requested in relation to allegations 21 and 22 (11 April 2016). Sight of the CCTV footage helped the Tribunal get an impression of the working environment and the layout of the four production lines, but the footage did not provide any assistance in relation to the allegations themselves, not least because the claimant disputed that it was footage from the right date.

Interpreter

14. The Tribunal was assisted in ensuring a fair hearing by a Polish interpreter, who for four of the five days of hearing was Mr Kamil Szwarc. Communication with the claimant, with Ms Kaminska and with two of the respondent's witnesses was conducted in Polish with the interpreter's assistance.

Relevant Legal Principles

General

15. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

“An employer (A) must not discriminate against an employee of A's (B) –

- (a) as to B's terms of employment;**
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
- (c) by dismissing B;**
- (d) by subjecting B to any other detriment.”**

16. Harassment during employment is prohibited by section 40(1)(a). Conduct which constitutes harassment cannot also constitute a “detriment” (section 212(1)), meaning that it can only be pursued as a harassment complaint.

17. Victimisation is prohibited by section 39(3).

18. The protected characteristic of sexual orientation is defined by section 12 as including orientation towards persons of the same sex.

Direct Discrimination

19. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

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

20. The concept of treating someone “less favourably” inherently requires some form of comparison, and section 23(1) provides that:

“On a comparison of cases for the purposes of section 13 ... there must be no material differences between the circumstances relating to each case”.

21. It is well established that where the treatment of which the claimant complains is not overtly because of the relevant protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

Harassment

22. The definition of harassment appears in section 26 which so far as material reads as follows:

- “(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...
- (4) In deciding whether conduct has the effect referred to sub-section (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.
- (5) The relevant protected characteristics are ...sexual orientation”.

We took account of the Code of Practice on Employment issued by the Equality and Human Rights Commission which came into force on 6th April 2011, particularly chapter 7 which deals with harassment.

Victimisation

23. Victimisation in this context has a specific legal meaning defined by section 27:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act--
- (a) bringing proceedings under this Act;

- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

24. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the “reason why”.

25. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337** (House of Lords).

Burden of Proof

26. The burden of proof provision appears in section 136 and provides as follows:

- “(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
- (3) But sub-section (2) does not apply if A shows that A did not contravene the provision”.

27. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that “could conclude”, in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are generally not without more sufficient to amount to a prima facie case of unlawful discrimination. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee without that protected characteristic would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Time Limits

28. The time limit for Equality Act claims appears in section 123 as follows:

- “(1) Proceedings on a complaint within section 120 may not be brought after the end of –
- (a) the period of three months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the Employment Tribunal thinks just and equitable...
- (2) ...
- (3) For the purposes of this section –
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it”.

Vicarious Liability

29. Under section 109(1) an employer is treated as having done anything done by one of its employees in the course of his or her employment.

Relevant Findings of Fact

30. This section of our reasons sets out the broad chronology of events intended to put our decision into context. Any disputes about primary facts central to the particular allegations will be addressed in the discussion and conclusions section below.

The Respondent

31. The respondent is part of the Iceland group of companies. It manufactures chilled and ready meals, soups and sauces. Its response form indicated that it has approximately 226 employees. It has a number of sites including a production facility at Gorton in East Manchester.

32. The respondent has a dedicated HR department and also access to HR advice and assistance from other companies in the group.

33. Its grievance procedure appeared at pages 91-94. In accordance with the legal position it gave a person bringing a grievance the right to be accompanied by a colleague or trade union representative. There was a right of appeal.

34. The equal opportunities policy appeared at pages 103-106. It made clear that discrimination because of sexual orientation was prohibited. It summarised the concepts of direct discrimination and harassment. It also prohibited victimisation where someone had complained about discrimination or harassment. Clause 1.28 encouraged someone who believed that she had been the victim of discrimination to raise a grievance. There was also reference to an anti harassment and bullying policy but that did not appear in our bundle.

The Claimant

35. The claimant first worked for the respondent as an agency worker from December 2014 but was employed on a permanent basis with effect from 25 March 2015. The statement of terms and conditions and her contract of employment appeared between pages 95 and 102. She was employed as a production operative working on a production line.

36. The claimant's partner, Ms Kaminska, also worked for the respondent. In June or July 2015 Ms Kaminska submitted a formal written complaint about sexual orientation discrimination. The claimant's case was that following Ms Kaminska's complaint she was subjected to a number of comments by colleagues which amounted to harassment or discrimination because of sexual orientation. That accounted for **allegations 2, 8, 9 and 10**. We will return to those matters in our conclusions.

37. The claimant also alleged that oral complaints she made about these matters were not addressed. That formed **allegation 3** and we will return to it.

October 2015 Application

38. On 13 October 2015 the claimant underwent a test to see whether she was suited to a new role of machine minder. She later said (28 April 2016 page 255) that during the test the computer had crashed and the test could not be completed. Her complaint that she was never given the results of this test formed **allegation 6** and we will return to it in our conclusions.

Redundancy Announcement

39. On 25 January 2016 the respondent announced to the workforce that it was proposing to place the roles of operative and key operative at risk of redundancy. The text of the announcement appeared at page 107. It was a consequence of a significant capital investment in new machinery, enabling production to be further automated. It was proposed that the number of operatives would reduce from 159 to 67, that the number of key operatives would reduce from 23 to 20, and that there would be a new role of machine minder.

40. Employees were informed individually of the proposals. The letter to the claimant of 26 January 2016 appeared at page 108.

41. The respondent embarked on collective consultation with workforce representatives. Between 17 February and 22 March there were six meetings. The minutes appeared between pages 109 and 187. They were displayed on the notice board in the canteen for employees to view.

42. At the collective consultation meeting of 16 March 2016 there was a discussion about increased demand for Slimming World meals and a consequent increase in required production levels. The notes recorded that to meet that temporary demand the company was once again using agency staff. This would last until the automated production lines became available.

43. It was during this period that **allegation 4** arose. The claimant alleged that she was called a “debil” by Ula on 18 March 2016. We will return to that in our conclusions.

44. Following the collective consultation process the respondent wrote to individual employees to notify them of the position. The letter to the claimant of 24 March 2016 appeared at page 188. It advised her of the roles available within her selection pool. The roles included roles of operative, key operative and machine minder. Details of how suitability for those roles would be assessed were confirmed. For operative roles there would be a practical sleeving exercise and a weighing exercise. There would be a practical assessment for any key operative role. Copies of job descriptions were available and the claimant was invited to contact HR if she had any queries about the process. Attached was a form for the employee to express interest in any of the roles offered to her. The statement of interest form had to be returned by 1 April 2016 (page 189).

Grievance 30 March 2016

45. The claimant lodged a grievance by a letter of 30 March 2016 at pages 197-199. The document was written in English. We will deal with its terms in detail when considering the individual allegations but a broad summary is as follows.

46. It began by saying the claimant had experienced almost nine months of abuse and harassment because she was a lesbian. She said that the treatment was part of a “wave of hatred” that affected Ms Kaminska after she complained. She alleged that Ewa had repeatedly offended homosexuals and that nothing had been done about oral complaints about that behaviour (**allegation 2**). She referred to the “debil” insult from Ula (**allegation 4**).

47. She went on to say that it was discrimination that she could not apply for a team leader post (**allegation 5**). She had not received the results of the machine minder assessment in October (**allegation 6**). She was given shorter breaks than some colleagues who were allowed extra cigarette breaks (**allegation 7**). Krystyna had spoken negatively about homosexuals (**allegation 8**), as had Agnieszka and Remigiusz (**allegation 9**). She said that Mr Wiekiera and Ms Wojtczak had “made fun of me and my partner saying that my partner is cheeky because she came back to work” (**allegation 10**). She alleged that her work tools had been taken by Ewa (**allegation 11**), and that Krystyna had moved her to work on worse tasks (**allegation 12**). She said Ms Branigan had commented aloud that the claimant was not suitable and worked too slow (**allegation 13**). She said that all this treatment was because she was a lesbian and her partner had fought for equal treatment in the workplace.

Response to Grievance April 2016

48. The grievance was formally acknowledged by the HR adviser, Frances Marston-Mooney by a letter of 31 March at page 201. An investigating officer was to be assigned. By a letter of 5 April Ms Marston-Mooney advised the claimant that the department manager, Nia Davies, would deal but that she was on leave until 11 April (page 202).

49. Two of the factual allegations were said to have occurred during this period. The first was **allegation 19**, which was that Ms Branigan threw a box at the claimant on 31 March 2016. The second was **allegation 20**, which was that on 6 April 2016 the manager, Mr Artus, tried three times to force the claimant to sign the expression of interest form, and in the course of doing so disclosed to Krystyna that the claimant had made a complaint. We will return to these allegations in our conclusions.

50. Ms Davies returned from leave on 11 April and that same day issued a letter to the claimant inviting her to a grievance hearing on 13 April. The letter appeared at page 203. It said the claimant was entitled to be accompanied by a fellow employee or union official. **Allegation 16** was that it took two weeks to arrange this grievance meeting, and that this showed the grievance was not taken seriously. **Allegation 17** was that the claimant was given only one day to prepare for this grievance meeting. We will return to these allegations in our conclusions.

11 April 2016

51. On 11 April the factory manager wrote to the claimant about the statement of interest form asking her to return it as soon as possible. Her letter (page 204) said Mark Artus had verbally requested it as well. The deadline was extended to 15 April. It would not be extended again. The letter ended by saying:

“If you do not submit your preference form by the date above, you will be invited to the assessment centre for the role of operative. If you fail to attend you will score zero.”

52. The claimant made two other allegations about events on 11 April. **Allegation 21** was that she was repeatedly separated from people with whom she was working because of the concern about being gay being a “disease”. **Allegation 22** was that Andy Stott shouted at the claimant telling her to shut up. We will return to these allegations in our conclusions.

Second grievance 12 April 2016

53. On 12 April the claimant sent an email asking whether Ms Kaminska could accompany her to the grievance meeting. That was refused because she was no longer an employee of the respondent (page 206).

54. On 12 April 2016 the claimant lodged a further complaint which was treated as part of her grievance. Her letter appeared at pages 207-209. It addressed events since the first complaint was lodged on 30 March. She complained that she had had to work with the people about whom she had complained (**allegation 15**), and about the delay in arranging a grievance meeting (**allegation 16**). She complained that no-one had been suspended (**allegation 18**).

55. She alleged that on 31 March Nicola Branigan had thrown a box which hit her on the hand (**allegation 19**). She referred to Mark Artus trying to get her to sign the statement of interest form three times on 6 April (**allegation 20**) and that he had mentioned her complaint in the presence of Krystyna. She said she had been repeatedly separated from people who were talking about her on 11 April (**allegation 21**) and that Andy Stott had yelled at her and told her to shut up (**allegation 22**). She said it was all due to a breach of confidentiality by the company (**allegation 14**) and all because she was a lesbian and her partner had the courage to speak up. She

said that employees like Nicola Branigan had no fear because they had family members in management and stigmatised the claimant by calling her “lesbian” as normal practice (**allegation 23**).

Meetings 13 April 2016

56. There were two brief meetings on 13 April recorded at pages 210 and 211. The respondent provided an interpreter. The claimant said that without Ms Kaminska to represent her she was not willing to discuss anything. However, it was discussed whether the claimant could remain at work or be moved to a different production line or should be put on leave. She was worried about moving to a different production line because the people she complained about had friends there. According to the note at page 211 she agreed it would be fair to be sent home on paid leave whilst her grievance was heard.

57. That was the claimant’s last day in work. She did not return. Nor did she attend any further meetings.

58. The arrangements were confirmed in a letter from Ms Marston-Mooney of 13 April 2016 at pages 212-213. The claimant was required to make herself available during her normal working hours for any further meetings. She was invited to a meeting with Charlotte Ashdown to hear the grievance on 21 April 2016. She was invited to provide any further information by email before the meeting. The letter said that if the claimant did not attend there would be no option other than to investigate the grievance without full disclosure of the details from the claimant.

59. The same day the claimant complained about the approach taken by Ms Davies on 13 April (page 214). She said that Ms Davies was not a competent person. Her concern was the decision that she could not be represented by Ms Kaminska. She did not accept that decision. This led to considerable correspondence and emails about this point. The company held to the legal position and its own policy, which was that Ms Kaminska could not represent the claimant as she was not a work colleague.

Assessment for Operative Role

60. The claimant did not return the statement of interest form by the final deadline of 15 April. She believed that she was entitled to a response to the queries raised in her grievance before she returned that form.

61. On 20 April 2016 the factory manager invited her to the assessment for the operative role. It would be on 29 April. The letter and further details appeared at pages 221-222.

62. On 28 April at page 255 the claimant responded to the letter. She had not received the criteria for selecting employees, she had never had a result from her October machine minder test results, and she did not understand why she was only being assessed for the production operative position. She said she was ready to attend the assessment as long as she had clear selection criteria. The claimant did not attend that assessment and as a consequence scored zero.

Grievance hearing 21 April 2016

63. Mrs Ashdown convened the grievance hearing on 21 April. The claimant did not attend. She had provided no further information about the allegations in her two written grievances. The note of the brief discussion appeared at page 224.

64. As Mrs Ashdown was at Gorton that day she took the opportunity of interviewing as many of the people named in the grievances as possible. Interviews of ten individuals appeared between pages 225 and 246. Each note was signed by the witness. The allegations in the grievance about each witness were put and the response recorded. The notes recorded that a number of the witnesses were told not to discuss matters with anyone else.

65. One of the persons named in the grievances, Chris Lea, had finished his shift by the time Mrs Ashdown came to interview him. She therefore arranged for Ms Marston-Mooney to interview him on 25 April. The note of that discussion appeared at page 249.

Grievance outcome letter 5 May 2016

66. Mrs Ashdown set out her conclusions in an outcome letter of 5 May 2016 at pages 256-268. She confirmed who had been interviewed. She divided the allegations made by the claimant into 48 individual matters and set out her findings on each individual matter.

67. The majority of the allegations were rejected. They had been denied by the individuals when interviewed and Mrs Ashdown did not consider there was sufficient evidence to uphold them. Explanations were given for why the claimant had not been able to apply for the position of team leader (because it had been ring fenced for existing team leaders) and why there was no outcome from the October 2015 test (because the vacancy had been put on hold).

68. She acknowledged, however, that there had been limited control over extra cigarette breaks and action would be taken; that Ewa had taken a scoop off the claimant but that was normal practice dependent on business need, and that she had been moved by Krystyna to a different workstation but again as part of normal practice. She acknowledged that the claimant should have been offered a move or paid leave after her first grievance, not the second, and said that it had not been commercially viable to suspend everyone named in the two grievance letters. The allegations of sexual orientation discrimination and harassment were rejected.

69. The claimant appealed on 9 May 2016. Her covering email at page 269 said she was at the disposal of the company at any time. She asked about returning to work and how the company would protect her against revenge. The appeal letter itself appeared at pages 270-273. It said the conclusions were nonsense and a lot of lies. It asserted there was no legal basis to stop her being represented by Ms Kaminska. It reiterated some of the initial allegations. The allegation about Ula had been misunderstood: the word used was not the English word "devil" but the Polish word "debil" meaning a moron, idiot or "dork." She pointed out that a person who was not a team leader, Piotr, had been working as a team leader and said this was discrimination. She asked for letters to be sent by email.

Discussion of return to work May 2016

70. On the morning of 9 May Mrs Hackett emailed the claimant asking her to get in touch to discuss her return to work. The email that evening at page 269 which enclosed the appeal letter also said that the claimant was at the disposal of the company at any time. On 10 May at just after noon Mrs Hackett emailed the claimant (page 275) to invite her to a meeting on 11 May. She was asked to confirm her attendance.

71. The claimant did not attend that meeting on 11 May. At 11.00am Mrs Hackett emailed her to say that her absence would now be treated as unpaid (page 277). She was asked to contact Mrs Hackett as a matter of urgency to explain the position.

72. The grievance appeal was acknowledged by an email later that same day at page 278, and Mrs Hackett said she would hear the grievance on Friday 13 May.

73. The claimant responded on 12 May at page 279. She wanted the grievance meeting to be in working hours not at 2.00pm (the claimant worked 6.00am-2.00pm). She appeared not to have received the email inviting her to a meeting on 11 May.

74. On Friday 13 May the claimant reported that she was off work due to illness. A fit note was issued by her GP that day at page 281 which said she was unfit for work for four weeks due to stress at work.

75. By email that afternoon (page 282) she was invited to a grievance appeal meeting on 17 May. She was asked to contact Mrs Hackett before the meeting if she had any additional information to add to her appeal. Upon receipt of the fit note it became apparent, however, that the grievance appeal meeting could not take place.

June – July 2016

76. On a date in early June the claimant moved to Belfast to be with her partner. She did not formally notify the respondent of this but all subsequent fit notes were issued by a GP there.

77. On 6 June 2016 Mrs Hackett emailed her (page 283) to say that they still needed to meet about the grievance appeal and individual redundancy consultation. In her response the same day the claimant said that there were still agency workers being used so it could not be a genuine redundancy.

78. The claimant was certified unfit for work for a further four weeks on 14 June 2016 (page 285). Mrs Hackett tried to arrange a meeting for 1 July (page 288) as part of the consultation process, but the claimant said she was too ill to attend (page 289). By email of 30 June 2016 Mrs Hackett suggested that they meet to discuss the sickness absence and return to work, and also to discuss how to proceed with the redundancy consultation and the grievance appeal. As this was to be an informal meeting she was happy for the claimant to be accompanied by Ms Kaminska, and Mrs Hackett offered to do the meeting at home or at an external venue.

79. The reply from the claimant of 4 July appeared at pages 292-293. She took issue with the proposition there had been consultation or that there was a genuine redundancy situation. She was unhappy with the communication. She said she

would not agree to an appointment at her home address. In response Mrs Hackett arranged a meeting at an external venue on 7 July (page 294). The claimant queried the need for a meeting and said she was too ill (page 295) so it was postponed. Mrs Hackett emailed the claimant on 7 July to explain that the issues to be addressed were the sick leave, the grievance appeal and the restructuring.

80. On 8 July 2016 Mrs Hackett emailed the claimant (page 298) to say that the restructuring had been completed and there were still a number of vacancies which had not been filled during the restructuring process. They were vacancies for operatives, key operatives and team leaders. There were five team leader posts available on the 2.00pm-10.00pm shift. The vacancies were to be advertised with a closing date of 22 July and the claimant was invited to contact Mrs Hackett if she needed any further information.

81. That same day the claimant was certified unfit for work until 9 August (page 303).

82. The claimant responded on 9 July. She sent an appendix to an email which appeared at pages 299-302. She raised again the question of being accompanied by Ms Kaminska and complained that she had not been allowed to apply for a team leader position. She asked again about the selection criteria. She said she did not know why her presence was indispensable for the grievance appeal. She raised a query about sick pay.

83. **Allegation 24** was that Mrs Hackett delayed responding to this enquiry. We will return to that in our conclusions. She eventually replied on 21 July at pages 319-322, addressing the points made by the claimant and inviting her to a meeting on 28 July 2016.

Grievance Appeal

84. In the meantime Mrs Putnam had been appointed to deal with the grievance appeal. She queried with HR the position in relation to the team leader role. In internal emails at pages 311-312 she was informed that Piotr had been working temporarily as a team leader to provide cover, had applied for the team leader position and would be interviewed on 22 July.

85. Mrs Putnam emailed the claimant on 21 July at pages 314-315 to put a list of questions to her. The claimant provided a response the same day at pages 315-317. She was unhappy about the length of time it had taken and what she considered to be breaches of procedure.

86. Mrs Putnam reviewed that response and in the absence of a meeting made a decision on the grievance appeal. Her decision was set out in a letter of 22 July at pages 323-330. She identified 14 different points raised by the claimant in her appeal and addressed each one in turn. The appeal was unsuccessful.

87. The outcome letter made clear it was a final decision with no further right of appeal. The claimant nevertheless sought to lodge a second appeal at pages 331-338. She took issue with the conclusion on each of the 14 matters. That matter was not progressed because the process was at an end.

12 August 2016 – First Consultation Meeting

88. On 2 August the claimant was invited to a consultation meeting on 12 August. The invitation appeared at pages 341-342. It recorded the background and that the claimant had failed to attend the meeting on 28 July. She was given a number of questions to answer in writing if she was not able to attend on 12 August. The claimant responded at page 343. She asked for the file attached to the email to be provided in a different format.

89. The claimant did not attend on 12 August. Pages 347-354 recorded a meeting in her absence where Mrs Hackett and Ms Marston-Mooney went through the written documents. A brief typed summary appeared at pages 346bb-346cc.

90. The claimant was invited to a second consultation meeting on 18 August (page 355). The notes of the meeting, the invitation and a list of current vacancies at page 346aa were emailed to the claimant (page 346).

18 August 2016 – Second Consultation Meeting and Dismissal

91. On 18 August the claimant responded by email at just before 10.30am (page 346a). She said she was not well enough to attend meetings. She said the company was employing agency workers and proposing overtime so the redundancies were a farce. Whilst the claimant sent that email the second consultation meeting was in progress between 10.15am and 10.45am. Only Mrs Hackett and Ms Marston-Mooney attended. The handwritten notes appeared at pages 359a-359c and a typed summary at page 359.

92. The outcome was dismissal which was confirmed in a letter of the same date at page 360. The letter said that the claimant was dismissed with effect from 18 August by reason of redundancy. She was paid one week in lieu of notice. She was given the right of appeal to a manager to be appointed by the Managing Director, Mr Loy. Dismissal formed the subject of **allegation 25** and the unfair dismissal complaint and we will return to it in our conclusions.

93. Two days earlier Mrs Hackett had sent a similar letter to another employee who had failed to attend either consultation meeting. The dismissal letter appeared at page 356. That person was heterosexual and had not lodged a grievance.

Appeal against Dismissal

94. The claimant appealed by a letter of 23 August at pages 364-368. She said there had not been a sufficiently long period of consultation, and that the real reason for her dismissal was discrimination. She had not had answers to her questions about the criteria for selecting employees. The company was employing agency workers and offering overtime so there was no genuine redundancy. Her dismissal was victimisation because of her complaints made in March and April.

95. Attached to her appeal letter was a copy of the email of 8 July 2016 informing her of vacancies for which she could apply, a table of vacancies from August (the form said 2012 but it meant 2016), and some job adverts at pages 368c and 368d. They were adverts placed by an employment agency, Assist. The respondent was not named but was the employer in question.

96. On 23 August 2016 the company advertised for jobs as team leader and as production operative. These were on the 2.00pm-10.00pm shift.

97. The appeal was acknowledged by Mr Loy's PA on 24 August. Her email at page 369 said he was away on holiday until 5 September. However, by a letter of 8 September at page 372 Mr Loy invited the claimant to meet him about the appeal on 8 September. The claimant was concerned that this letter was not signed by him and had been sent whilst he was away. In his oral evidence Mr Loy could not remember whether he had seen the appeal letter and given instructions for this letter to be issued whilst he was on holiday, or whether it had simply been done in his absence by his PA. Either way the effect was that he was hearing the appeal against dismissal.

98. On 1 September 2016 the claimant complained about the dismissal appeal. She said that the letter from Mr Loy must be a falsification because he was away on leave. Debbie Hiton responded on 1 September at page 379 explaining that it was normal process for the HR department to arrange meetings for managers in this situation.

99. The claimant wanted to contact Mr Loy directly. Ms Marston-Mooney gave her his email address in an email of 31 August at pages 373-374. The email address was incorrectly typed. The claimant used it but her email bounced back (page 375). On 5 September, however, Debbie Hiton gave her the correct email address (page 380).

100. The claimant did not attend the appeal meeting with Mr Loy on 8 September. The notes appeared at pages 389-390. Mr Loy read the appeal documents and discussed matters with Ms Hiton. He rejected the appeal and confirmed his reasons for doing so in a letter of 13 September 2016 (pages 392-395). He addressed each of nine points which he identified the claimant as having raised.

101. On 7 October 2016 there were further job adverts placed by the respondent. They appeared at page 402c. Included was an advert for the job of machine minder.

Submissions

102. At the conclusion of the evidence each representative made an oral submission to the Tribunal.

Respondent's Submission

103. Mr Hignett began by addressing the allegations of homophobic abuse (allegations 2, 8, 9 and 10). He identified eleven reasons why those allegations should be dismissed. Those reasons included the absence of any specific details in the grievance, the appeal or the pleadings, it being inherently unlikely that the remarks were made as frequently as the claimant alleged, and occasions on which the claimant struggled to give details in cross examination or changed her account. There was no evidence to support these allegations but evidence that the comments were not made.

104. He then addressed the other allegations one by one. For a number of them he submitted that there was an explanation unrelated to sexual orientation. This

included the team leader point (allegation 5), the lack of results of the machine minder application (allegation 6), the extra breaks given to cigarette smokers by team leaders who were their friends (allegation 7), the removal of the scoop and moving the claimant from one role to another (allegations 11 and 12), and the different respects in which the claimant was critical of the handling of her grievance (allegations 16 and 17). Although with hindsight the claimant should have been relieved of having to work with the people about whom she had complained after her first complaint, there was no sexual orientation discrimination in the fact that she was not offered paid leave until the second complaint had been made. It was not practicable to suspend so many people against whom allegations were brought.

105. Mr Hignett also invited us to accept the evidence of Nicola Branigan in relation to allegations 13, 19 and 23, relying on a number of points in support of that core proposition. Similarly he submitted that the events of 11 April 2016 (allegations 21 and 22) had nothing to do with sexual orientation and on the claimant's own case she had been talking with colleagues on that occasion explaining why she was moved and why Mr Stott may have told her to be quiet.

106. As to the allegation about dismissal, Mr Hignett submitted that there was a redundancy situation resulting from the investment in automation and fewer staff were needed. The attempt to fill all the vacancies in the new structure did not succeed and therefore it was necessary to advertise them. There was no inconsistency and no link with sexual orientation. The fact that agency workers were being used because of a temporary spike in demand was not inconsistent with redundancy being the reason for dismissal. He reminded us that a heterosexual person in the same position as the claimant had been dismissed at about the same time in the same way (page 356). Overall, he submitted that the claimant's case was a complaint about fairness which was dressed up as a complaint of sexual orientation discrimination.

107. In the course of his submissions Mr Hignett confirmed that the respondent accepted that the grievance of 30 March 2016 was a protected act, and that it no longer relied on the "reasonable steps" defence in section 104.

Claimant's Submission

108. On behalf of the claimant Ms Kaminska began by explaining how the claimant came to find herself working in Manchester, having previously lived in Poland and then moved to Northern Ireland. She had expected protection against homophobia which the company had failed to ensure.

109. She then addressed each of the allegations one by one, summarising the claimant's case and why it was said to be an instance of sexual orientation discrimination.

110. On a number of individual matters Ms Kaminska relied on the proposition that the claimant was the only person treated in that way and the only homosexual person amongst her colleagues. In relation to the allegations of homophobic comments she invited the Tribunal to accept what the claimant said, and to bear in mind that the claimant was not a lawyer and had no experience of court proceedings. The company had not investigated these allegations properly because it failed to ask other employees if they had heard anything, and the people alleged to have made

those comments were bound to deny them in any event. This was a situation where the investigation at the grievance stage was not fair and the word of the heterosexual employees had been taken in preference to the word of the homosexual employee. There had been mistakes in investigating the “debil” comment (allegation 4), and in relation to allegation 5 the claimant had simply not been treated equally to Piotr who had been given team leader experience making him better placed to obtain the position in question. The criteria had changed but when the claimant asked for them she was not given the information. Effectively she was denied the opportunity of applying for that post.

111. In relation to allegation 6 the claimant was the only homosexual but the only person who did not get her results, and on allegation 7 it was clear the claimant had not enjoyed the longer breaks which her colleagues had enjoyed. In relation to allegation 10 the Tribunal was invited to disregard the denials of Mr Wiekiera and Ms Wojtczak: they were not able to give dates for the matters they put in their witness statements and their evidence was not credible.

112. Allegations 11 and 12 were not ordinary business practices. There was no need to take a scoop off the claimant when she was using it. Ewa had been a different team leader on a different line when she did that. Similarly when Krystyna moved the claimant on occasions when she came into work it was not to balance the workforce because the shift had not started. These were instances of treatment where the true reason was the claimant's sexual orientation.

113. In relation to the allegations against Nicola Branigan (allegations 13, 19 and 23), Ms Kaminska submitted that Ms Branigan's explanations did not add up. She was not engaged in any training of the claimant when comments were made about how slowly the claimant worked. They were designed to show lesbians were not as efficient as heterosexuals. In relation to the box allegation Ms Branigan had not explained why she approached the claimant at all. She had used the word “lesbian” as alleged.

114. In relation to allegation 14, Ms Kaminska maintained that there had been a breach of confidentiality because a number of people knew about the complaint prior to the interviews on 21 April. This included Mr Artus and Krystyna. The explanation given by Mr Artus for getting Krystyna to the discussion on 6 April (allegation 20) did not add up. She could not have been there to interpret Polish for him because she herself needed an interpreter when interviewed on 21 April. In reality she was there to be a witness for him because he knew about the complaint.

115. Allegations 15 and 24 concerned delay by HR in arranging a grievance meeting and then in responding to a query from the claimant. Ms Kaminska submitted that these were both instances of deliberate delay because the claimant was a lesbian. No heterosexual person had been treated in the same way.

116. There was no explanation for the fact that the claimant was forced to work with the people about whom she had complained (allegations 15 and 18) other than sexual orientation. In previous cases people had been suspended (e.g. when Ms Kaminska made her own complaint).

117. In relation to allegations 21 and 22 concerning the events of 11 April 2016, Ms Kaminska submitted that the CCTV disclosed was not actually from that date. In any

event it had deliberately been reduced in resolution to prevent identification of what had happened, and that was why it had been watched on fast forward by Mrs Ashdown. This was all done on purpose to protect Andy Stott from the allegation the claimant was making.

118. In relation to allegation 25 concerning dismissal, Ms Kaminska relied on the need for team leaders evident in July, the reliance on agency workers and suggested that the claimant in truth was made redundant because of sexual orientation. It was a convenient way to get rid of her because of that and because she had demanded equal treatment in her grievance. It was part of a plan from the beginning to get rid of the homosexual employee. At each stage the word of heterosexuals had been preferred to that of the claimant. Allowances had to be made for the fact that English was not the claimant's first language and she was not familiar with law or legal terminology.

Discussion and Conclusions

Self-Direction

119. The Tribunal decided to approach the allegations in numerical order in our deliberations (save for allegation 1 which had been withdrawn). In relation to each matter we had first to make findings of fact as to what happened. The burden was on the claimant to prove the facts on which her complaints were based. If those facts were proven we then had to apply the law to them. If they were facts from which the Tribunal could conclude that there had been a contravention of the relevant provision of the Equality Act, the burden would shift to the respondent to prove otherwise. In some cases, however, the Tribunal could dispense with a two stage analysis and make a finding as to the reason for treatment – effectively assuming in favour of the claimant that the burden of proof had shifted. Finally, in considering each allegation we had regard to the evidence overall rather than just looking at each matter in isolation.

Allegation 2

120. This allegation concerned the homophobic comments allegedly made by Ewa almost every day since June 2015. We considered carefully the way in which these allegations emerged. The claimant first made a complaint in her grievance of 30 March 2016 at page 197. She said that Ewa had been “repeatedly offending homosexuals” but gave no details of any specific comment; nor were any specific comments identified in her second grievance document of 12 April 2016 at page 207. Similarly, her appeal letter of 9 May 2016 at page 270 gave no detail of any comments she alleged had been made.

121. The claim form also offered no detail beyond what was contained in the two grievance documents. The further particulars provided by the claimant in October 2016 appeared in the bundle between pages 39 and 54. At page 48 they addressed the question of sexual orientation discrimination, but the reference to Ewa on that page appeared to be a reference to the allegations about Ewa brought by Ms Kaminska in her own complaint in mid-2015 because it referred to Ewa being suspended because of harassment. There were no details of any comments by Ewa which the claimant herself had heard.

122. This was the position at the preliminary hearing conducted by Employment Judge Franey on 4 January 2017. Ms Kaminska was present but not the claimant. Ms Kaminska was asked as the claimant's representative to provide the specifics of the claimant's case. She provided to the Tribunal those seven comments which are recorded in sub-paragraphs (a)-(g) of allegation number 2. The written Case Management Order invited the claimant to apply to amend these details if they were not correct but no application was made.

123. Despite the clear terms of the case Management Order there were no further details given in the claimant's witness statement for these proceedings. It was simply a record of an interview of her conducted by Ms Kaminska in general terms.

124. Even more troublingly, in her oral evidence when questioned by Mr Hignett the claimant was unable to give any specifics of these comments. She was repeatedly pressed to provide the context or circumstances in which these comments were made but was unable to do so. She just said the comments were made almost every day and there were too many to remember. Even the comments about gas chambers and burning gays, which she accepted were particularly offensive to Poles given Polish history, were comments that she could not support by any specific recollection of where they were said or when. There were no small incidental details given or any real sense of the emotional impact on the claimant. This caused the Tribunal to have a real concern about whether these were comments which the claimant herself had heard, or whether this was material which in truth came from Ms Kaminska and which the claimant was seeking to adopt as part of her own claim.

125. We also took into account that on the claimant's own case these comments had been taking place almost every day for a period of some nine months before she first complained about them. That seemed difficult to understand, particularly given the extremely insulting and offensive nature of some of those alleged comments. It was particularly surprising that the claimant had not put any specific comments in her grievance appeal given that the conclusion of the grievance was that comments of this kind had not been made. Providing specifics even at that late stage would have been an obvious step. She had been able to provide specific details of other remarks such as the "debil" comment and the allegation of racist comments by Ewa, but not of these.

126. We considered the evidence available from written statements from individuals who were not called to give evidence. The claimant produced a witness statement from Zbyszek Rutecki which consisted of answers to a series of questions from Ms Kaminska. His statement said that the claimant had to listen to jokes about her sexual orientation but the witness statement failed to give any specifics at all. Similarly the statement from Emilia Szydelko spoke in general terms about the claimant being stigmatised for her sexual orientation but gave no specifics of any comment alleged to have been made by Ewa.

127. Set against that was evidence contained in the statements obtained from colleagues in the course of the investigation of the claimant's grievance. Because she failed to give any specifics in her grievance those interviews could only be conducted in general terms. The comments were denied by Ewa and by others.

128. We concluded that the written evidence from persons from whom we did not hear did not add anything to the case either way.

129. Putting these matters together we concluded that the claimant had failed to prove on the balance of probabilities that these comments were made to her or about her as she alleged. The fact she had not herself made any such allegations in any of her written documentation coupled with her inability to recall any specifics about these comments when questioned in our hearing prompted that conclusion. It appeared that the claimant was in truth giving evidence about matters for which Ms Kaminska would have been the appropriate witness, but Ms Kaminska was not called to give evidence in this case².

130. Accordingly the Tribunal unanimously determined that the allegations based on these alleged comments failed. The claimant failed to prove the factual basis of her case. On the balance of probabilities we found that these comments were not made. There was no harassment related to sexual orientation, or direct sexual orientation discrimination.

Allegation 3

131. This allegation was that verbal complaints made by the claimant about Ewa were ignored whereas her heterosexual comparator, Mr Mungaila, made verbal complaints which were treated more favourably than hers. However, the claimant wholly failed to prove facts from which we could reach the conclusion there had been any harassment related to sexual orientation or direct discrimination. She gave no evidence of any oral complaint she herself had made. There was no occasion given on which she made a complaint prior to her grievance at the end of March 2016.

132. Further, the evidence the claimant gave in cross examination about Mr Mungaila did not support her own case. She said that he had made verbal complaints about Ewa but when asked how his complaints had been resolved she said:

“He told me nothing had changed.”

133. That answer suggested his complaints had been ignored too. Even if she had proven that oral complaints had been made, there was no less favourable treatment. The allegation failed. There was no harassment related to sexual orientation, or direct sexual orientation discrimination.

Allegation 4

134. This was an allegation for which the claimant consistently gave a specific date, 18 March 2016. In her complaint 12 days later at page 198 she used the word “debil” but made no allegation that it was related to sexual orientation, save for a general statement at the end of her grievance that all of it was because she was a lesbian.

² We did not see Ms Kaminska's own complaint but this impression was reinforced by a reference in the grievance interviews to the similarity of her allegations – page 225.

135. The comment was investigated, although management had mistakenly assumed it was a mistranslation of the English word “devil”. Ula denied having said anything to the claimant that day.

136. When the claimant appealed in her letter of 9 May at page 270 she corrected the misunderstanding about the term used, but again (page 272) made no suggestion that it related to sexual orientation.

137. Her two witnesses who made written statements did not deal with this comment at all.

138. In cross examination the claimant said that there had been so many people making comments and poking fun at her that she was unable to recall whether this specific occasion was due to sexual orientation or not.

139. We took into account that there were no other allegations of homophobic comments made against Ula, and nor was there any evidence of such comments being made.

140. Putting these matters together we concluded that the claimant had failed to prove facts from which the Tribunal could conclude that there was any link between her sexual orientation and this alleged comment. It seemed to be an insult about a level of intelligence which had no connection to sexual orientation on the face of it, and nor did the claimant provide any material from which such a link could be inferred. The burden of proof did not shift to the respondent and the allegation failed.

Allegation 5

141. The claimant alleged that she had been prevented from applying for the post of a team leader because of sexual orientation and compared herself with a colleague Piotr Winczura.

142. However, the factual position was entirely clear from the documents and from the evidence we had from Mrs Hackett. When the restructuring was first announced team leader posts were only open to those who were already team leaders. Not all team leaders applied for the same role in the new structure. Some applied for machine minder roles and some opted for redundancy (page 312). Once all successful candidates had been allocated roles, the remaining vacant team leader roles were offered to existing team leaders who had opted for redundancy to see if they would change their mind. That process still did not fill every team leader post, and therefore in early July the post of team leader was offered to people who had not been team leaders. This accounted for the email to the claimant of 8 July 2016 at page 298 which indicated that there were five team leader roles open. The claimant chose not to apply for the role at that stage because she was still seeking clarity as to the criteria. Piotr Winczura, however, was asked to act up as a team leader because cover was needed. The claimant could not have been asked to act up because she was not in work at that stage. The email of 21 July 2016 at page 311 showed that he had an interview for the team leader post the following day.

143. From this it was apparent that the claimant had been initially excluded from applying for a team leader role because she was not a team leader; when invited to apply for the role she declined to do so for her own reasons, and she had not been

considered as cover for the role because she had not been in work at the relevant time. Even if the burden of proof shifted to the respondent, it had shown that none of this had anything to do with sexual orientation and this allegation failed.

Allegation 6

144. In a letter of 28 April 2016 at page 255 the claimant queried why she had not had the outcome of her test for the machine minder position on 13 October 2015. In her letter she said that the computer had crashed during her test. She had not asked to take the test again.

145. The explanation given by the company in the grievance outcome (page 259) was that the vacancy was put on hold because of the pending restructure. The claimant did not challenge this in her grievance appeal letter at pages 270-273. Although the link she made between that test and the opportunity to apply for the same position in the later restructure was understandable, there was no material suggesting that the absence of any test results was due in any way to sexual orientation. It was simply because she did not complete the test and there was no point getting her to retake it because the vacancy was put on hold. This allegation failed. Even if the burden of proof shifted to the respondent, it had shown that it had nothing to do with sexual orientation.

Allegation 7

146. This allegation was that the claimant was allowed shorter breaks than heterosexual colleagues. She accepted in oral evidence she had not raised it at all until her grievance of 30 March 2016 at page 198. There she made no specific allegation of sexual orientation discrimination but simply said that the team leaders gave colleagues extra cigarette breaks.

147. In cross examination the claimant accepted that the central element was being friends with the team leader. Nicola Branigan gave evidence on this point and said that some team leaders (who were smokers themselves) would allow longer breaks, or alternatively people who wanted a cigarette break would ask to be allowed to go to the toilet but then go for a cigarette instead. She said there were a couple of team leaders who allowed extra breaks on this basis. However, when a complaint was made, management said that everyone was restricted to a 30 minute break and no extra breaks at all were allowed.

148. The claimant had a sense that she was not friends with the team leaders because of the sexual orientation issue but there was no evidence provided from which we could reach that conclusion. Even if the burden of proof had shifted to the respondent, it had shown that there was no link to sexual orientation. The difference in treatment was due to the friendship of some of the operatives with team leaders, and that this explained why some people were allowed longer breaks to have a cigarette before management drew everyone into line. The allegation that this was related to or because of sexual orientation failed.

Allegation 8

149. As with allegation 2, we considered carefully the way in which the specific allegations of homophobic remarks by Krystyna were made.

150. The initial grievance of 30 March 2016 at page 198 contained no specifics other than to say that Krystyna spoke negatively about homosexuals. There was no mention of these matters in the second grievance, nor in the grievance appeal letter of 9 May at page 270.

151. The further particulars provided by the claimant in October 2016 (page 48) repeated the phrase used in the grievance. No specifics of the comments were provided at all until Ms Kaminska offered them at the preliminary hearing on 4 January 2017 and they were recorded in the Case Management Order.

152. We noted that the claimant's witness, Ms Szydelko, on page 2 of her witness statement made reference to a comment about someone getting "infected" but there was no confirmation of the comment itself or who said it. That was counterbalanced by the denial by Krystyna in her interview during the grievance process of having made any negative comments.

153. Importantly, when the claimant was cross examined as to why she had not given specifics in her grievance she gave an answer that said she did not want to include it because it had been mentioned in Ms Kaminska's complaint already. That was a surprising answer because the general thrust of her case was that the treatment about which she was complaining occurred after (and as a consequence of) Ms Kaminska's complaint. This reinforced our view that the claimant had no first hand evidence herself of these comments. They were matters, we inferred, about which Ms Kaminska told her. The lack of any specific details in any of her written documentation, or any detail she was able to give in cross examination, led us to the conclusion that she had failed to prove that these comments were made. Like allegation 2, therefore, this allegation failed on the facts.

Allegation 9

154. This concerned homophobic comments by Agnieszka and Remigiusz. Once again the way in which these allegations had developed was unsatisfactory. The grievance of 30 March 2016 at page 198 simply said that the two individuals had insulted homosexuals. It gave an example of a racist comment they were said to have made ("black lazy"), but no particulars of any homophobic insult. There was nothing more specific in the second grievance of 12 April at page 207.

155. The grievance outcome (page 261) rejected this complaint because the two individuals said they had not been working with the claimant, and denied having made any homophobic insults. When the claimant wrote her appeal letter of 9 May she made no specific reference to the alleged comments save that she included these two individuals in a group of people (page 272) that she said wanted revenge after Ms Kaminska's complaint.

156. There were no specifics in the further particulars and the alleged comment was only provided to the Tribunal by Ms Kaminska at the preliminary hearing on 4 January 2017. There was nothing in the claimant's witness statement or the two statements from her former colleagues to support the allegation.

157. The answers the claimant gave in cross examination to our hearing were also unsatisfactory. She initially said that the comments were made in June but when it was pointed out she was not in work in June 2016 she said they must have been

made in March or April that year. She suggested that she had not written the actual comment in her grievance because if she had put everything in it would take a month to write, yet the comment in question would only have taken a few words. When cross examined about whether she had worked with the two individuals she said that she had worked with them until Ms Kaminska's complaint, but not after that. That suggested that the comments must have been made at the latest by July or August 2015. The claimant did not accept that and went on to say that she had heard the comments in the canteen but was unable to give any details at all of when the comments were made or who was present. Even in cross examination, therefore, there was a complete lack of detail beyond a bare allegation.

158. Putting these matters together we concluded again that the claimant had failed to prove that the comments had been said as she alleged. Had she actually heard them herself she would have been able to have given more details when pressed. The allegation therefore failed.

Allegation 10

159. This allegation concerned jokes and comments allegedly made by Mr Wiekiera and Ms Wojtczak about the claimant and her partner's sex life.

160. In the grievance of 30 March at page 198 the claimant made an allegation against Mr Wiekiera and Ms Wojtczak, but it was a different allegation: that they made fun of Ms Kaminska by saying she was cheeky for coming back to work after her own complaint. There was no suggestion of any comments of this kind made in the grievance, the subsequent grievance of 12 April, or in the grievance appeal letter of 9 May; nor did these allegations feature in the further particulars. They were first made by Ms Kaminska at the preliminary hearing on 4 January 2017. They did not appear in the claimant's witness statement.

161. We heard from Mr Wiekiera and Ms Wojtczak in person and each of them denied having made any such comments.

162. When cross examined the claimant said that she may have missed these comments out by mistake from the grievance, but went on to say that it was not just these two individuals but a larger group who made such comments. She said that everyone was doing it as part of a group and it was an ongoing occurrence where she could not recall who said what.

163. We concluded that the claimant had failed to establish that these comments were made. It was a concern that they were not only absent from her grievance, but that the allegation she made against these two individuals was a different allegation. There was no evidence supporting the claimant's allegation and she never provided the specifics which would give this allegation a ring of truth. We accepted the evidence of Mr Wiekiera and Ms Wojtczak that these comments were not made. This allegation failed on the facts.

Allegation 11

164. The allegation in the initial grievance at page 199 was as follows:

“Ewa came to me on the other line and takes my work tools (that was spoon)...”

165. At the preliminary hearing Ms Kaminska explained that on various dates after June 2015 Ewa had taken work tools off the claimant.

166. When cross examined, however, the claimant confirmed that it was a single incident and when pressed to recall the date she suggested it might have been a month or so before her grievance. The outcome to the grievance at page 262 was that Ewa had taken a scoop off the claimant but that was because some of the scoops had gone missing and sometimes they had to be redistributed. The claimant did not challenge that in her grievance appeal. She accepted, however, that scoops were sometimes in short supply and that it was the role of a team leader to make sure the scoops were where they were needed. She had not seen where Ewa took the scoop in question.

167. Having rejected the allegations of homophobic comments made by Ewa there was nothing from which we could conclude that this incident was related to or because of sexual orientation. Even if the burden of proof had shifted the respondent had shown that it was simply a team leader doing her job. The allegation failed.

Allegation 12

168. The allegation in the initial grievance at page 199 was that Krystyna had moved the claimant to work in a place that was worse and did not do that for all employees. This was investigated in the grievance and the outcome letter at page 262 recorded that Krystyna had said she moved everyone every couple of hours or so and had not singled out the claimant. The claimant did not challenge that in her appeal against that decision.

169. There was no further information about this in her further particulars or in her witness statement.

170. In cross examination the claimant gave a different account. She said that this was a complaint not about being moved during a shift, but on those few occasions when she had gone in early to pick the best place on the production line for the start of her shift. She said she had still been moved by Krystyna when there was no need. She accepted, however, that team leaders were entitled to move people around to ensure the work was spread around, and that the team leader would want a balance of permanent and agency employees on the production lines. A decision of that kind could be taken at the start of a shift as well as during it.

171. It was a concern that the claimant's case on paper did not match what she said to our hearing, but in any event there was no evidence from which we could conclude that this was related in any way to her sexual orientation. We concluded that it was simply a management decision taken by the team leader from time to time with which the claimant was not happy and which she had not identified as sexual orientation discrimination until Ms Kaminska did so on her behalf at the preliminary hearing. The burden of proof did not shift and the allegation failed.

Allegation 13

172. This allegation originated in the claimant's grievance at page 199 where she said that Ms Branigan said the claimant was not suitable and worked too slowly. She did not allege that this was related to sexual orientation save in so far as that

grievance ended with a general statement that it was all because the claimant was a lesbian. It was not raised in the second grievance.

173. The outcome letter (page 263) recorded that Ms Branigan was a training partner who asked the claimant to move more quickly if there were gaps in the line. She would do that for other operatives. There was no sexual orientation element.

174. In her appeal letter of 9 May 2016 the claimant said at page 272 that Ms Branigan did not use her name but instead just said "lesbian". However, it was unclear whether that passage related to this allegation or not.

175. In her oral evidence the claimant said that Ms Branigan had actually used the word "lesbo". This was in answer to a question about why she thought that the comment was implying that lesbians were slow and lazy. Even allowing for the fact that English is not the first language of the claimant or Ms Kaminska, we were concerned at this change in the allegation. The claimant had been able to make an allegation about the use of that word by Ms Branigan (allegation 23) without difficulty but had not done so here.

176. In her evidence Ms Branigan recalled the incident. She said that she had asked the claimant to pull away but the claimant sniggered and knew she was doing it on purpose. That was why she had asked the claimant to work more quickly. She told her she was working too slowly. Ms Branigan said she was acting in her role as team leader.

177. We noted the change in the claimant's case. Ms Branigan's case remained consistent. If the burden of proof had shifted the respondent had shown a non-discriminatory reason for the treatment. The role as training partner entitled Ms Branigan to intervene even outside formal training arrangements. It was simply the team leader doing her job with no link to sexual orientation. The allegation failed.

Allegation 14

178. The allegation that the company had breached confidentiality in relation to the grievance of 30 March 2016 was raised in the second document of 12 April at page 208. The claimant was very clear that it happened on 6 April 2016 when she was speaking to Mark Artus in the presence of Krystyna about the return of the statement of interest form for jobs in the new structure. Her case was that she told Mr Artus that she would not sign the form until she had an answer to her "letter", to which he responded that her "complaint" would be examined later. The claimant considered that his use of the word "complaint" breached confidentiality and made Krystyna aware that she had filed a complaint.

179. The matter was investigated by Mrs Ashdown in the grievance and in her outcome letter of 5 May 2016 at page 263 she confirmed on enquiries that no-one had been made aware of the grievance other than the HR personnel dealing with it. Of course, once the interviews were carried out people became aware that a complaint had been made.

180. In her appeal letter of 9 May at page 271 the claimant made clear that she did not accept that Krystyna had been asked to interpret between her and Mr Artus in that discussion because Krystyna herself needed an interpreter when interviewed.

She thought this showed that the real reason for Kystyna's presence was something else. We rejected that and found that there was no inconsistency. There is a significant difference between being interviewed in a formal grievance investigation and helping a manager talk informally to a colleague whose first language is not English.

181. As for the breach of confidentiality, it was clear that the claimant was the first person to mention that document by calling it a "letter". She did so in the presence of Krystyna, presumably in Polish. We do not know how that was translated by Krystyna to Mr Artus. The use of a different word in English by Mr Artus may not have added anything. In any event there was no material from which we could conclude that the claimant's sexual orientation had any bearing on how this discussion went.

182. As to confidentiality more broadly, Mrs Ashdown confirmed in evidence to our hearing that she had not told anyone about the grievance, and those people who were interviewed were reminded to keep matters confidential. Although it may be human nature for the complaint then to become the subject of discussion despite those warnings, that is not something which could be attributed to sexual orientation. The claimant did not provide any evidence from which we could infer that it was related to sexual orientation, and her comparison with Mr Mungaila was misconceived because his complaint was only ever verbal. It does not appear that anyone was interviewed about his complaints and therefore it was a different position.

183. Putting these matters together we concluded that the initial awareness that the claimant had made some kind of complaint arose because she mentioned the letter in front of Krystyna, and that her perception that others knew of her complaint in the period before she went on paid leave was due to over-sensitivity on her part. There was no breach of confidentiality amounting to harassment related to sexual orientation or direct sexual orientation discrimination.

Allegations 15 and 18

184. It was convenient to consider these two allegations together as they essentially related to the same point: the alleged perpetrators were not suspended (allegation 15) and the claimant had to work with them (allegation 18). The former allegation was put as victimisation as well as harassment or direct discrimination; the latter was not.

185. In relation to suspension, the claimant identified 15 people in her initial grievance. A number were team leaders. Her allegations were put in general terms. There were very few specific comments identified. It was not practicable to suspend 15 people. We concluded that this was the reason the respondent did not suspend the people against whom the allegations were brought and that it would have been exactly the same for a hypothetical heterosexual person bringing complaints against so many individuals which were of a generalised nature. There was no information from which we could conclude that sexual orientation played any part in this decision, not that it was unwanted conduct relating to sexual orientation. Nor was it because the claimant had complained about sexual orientation discrimination.

186. In relation to allowing the claimant to work with the people about whom she had complained, the respondent accepted that with hindsight this should have been addressed upon receipt of the first grievance not the second. When the second was received the claimant was given an option of transferring to a different production line or going on paid leave, and took the latter because she feared that there were friends of the people about whom she had complained working on other lines. To that extent the respondent can be criticised for not having acted more promptly when the allegations were first made. However, there was no material from which we could conclude that this had anything to do with sexual orientation. The claimant did not provide any evidence of a complaint by a heterosexual which resulted in prompt action to move him or her away from the production line in question. We were satisfied that it simply represented a failing by management to deal with the matter immediately, albeit recognising that the claimant did not ask to be moved or to go on leave in her grievance document or at any stage prior to her second complaint of 12 April.

187. These allegations both failed.

Allegation 16

188. This allegation was that because of a two week delay in arranging the grievance meeting the grievance had not been taken seriously. Paragraph 1.16 of the grievance procedure (page 93) said that a grievance meeting would “normally” be arranged within one week of receiving the written grievance.

189. The grievance of 30 March was acknowledged by a letter of 31 March at page 201. The letter from Mrs Marston-Mooney said that an investigating officer would be assigned. On 5 April she wrote to the claimant (page 202) to say that it would be heard by the department manager, Ms Davies, but that Ms Davies was on annual leave until Monday 11 April. On 11 April Ms Davies returned from leave and wrote to the claimant the same day (page 203) to invite her to a meeting on 13 April. She enclosed a copy of the grievance procedure. This prompted the claimant to say at the outset of her letter of 12 April that the meeting was taking place outside the timescale in the grievance procedure.

190. It was clear to us that the reason for the delay was the absence on leave of the department manager. It was not related to or because of sexual orientation. The claimant did not provide any evidence of a grievance by a heterosexual comparator which was dealt with more quickly. Even if the burden of proof had shifted the respondent had shown a non-discriminatory reason. This complaint failed on its merits.

Allegation 17

191. The allegation that the claimant had been given only one day to prepare for her grievance meeting was made in her second grievance of 12 April 2016 at page 207. The allegation was factually correct. Once the claimant's grievance was acknowledged it was to be dealt with by Ms Davies who was on leave until 11 April. On the day she returned from leave Ms Davies wrote to the claimant (page 203) inviting her to attend a meeting on 13 April. That letter ended by inviting the claimant to contact her if she was unable to attend on the above time and date.

192. In the email which attached her complaint letter the claimant asked for Ms Kaminska to be her representative (page 206). This was refused because Ms Kaminska was no longer an employee of the respondent. She was told that the meeting could be postponed if she wanted to find an alternative representative. The meeting went ahead but began by Ms Davies acknowledging that they would not discuss the grievance but just have a general chat. The grievance meeting itself was re-arranged for 21 April, when the claimant did not attend.

193. There was no basis on which we could find that this was in any way related to sexual orientation or because of sexual orientation. The claimant provided no evidence of a heterosexual comparator who was given more time to prepare. Even if the burden of proof had shifted the respondent had shown a non-discriminatory reason: the shortage of time was due to Ms Davies' absence on leave and her desire to expedite matters. In any event the claimant was given the chance to ask for a postponement if she needed one. This allegation failed.

Allegation 19

194. The allegation that Ms Branigan threw a box at the claimant was first made in the second grievance of 12 April 2016 at page 208.

195. When Ms Branigan was interviewed by Mrs Ashdown in the grievance investigation (page 244) she was not asked about this incident. However, she volunteered it to Mrs Ashdown and said that the claimant had asked her why she had thrown a box at her and Ms Branigan said she had not done so. It was obviously an incident which was in Ms Branigan's mind when interviewed.

196. We had a more detailed explanation in Ms Branigan's witness statement at paragraphs 17 and 18. She had gone to fill up a tray with an ingredient but the claimant knocked it away and said she would do it. The claimant did not offer any detail in her witness statement but in oral evidence she disputed that account and denied that she had knocked the box away.

197. The claimant accepted that she was only speculating in so far as she alleged that this was victimisation. She had no evidence that Ms Branigan knew of her complaint the previous day. Ms Branigan denied any such knowledge. We accepted that denial and rejected the victimisation complaint.

198. As to harassment or direct discrimination, there was no evidence from which we could conclude that this was related to or because of sexual orientation. It appeared to be another example of an ordinary working incident which the claimant took the wrong way and believed was due to sexual orientation discrimination without any evidence to support that belief. The claim failed.

Allegation 20

199. This allegation had two components. The first was that on 6 April 2016 Mr Artus disclosed to Krystyna that the claimant had made a complaint. We dealt with that earlier and for the reasons set out in paragraphs 178 – 181 above we found that the claimant first raised the matter during that discussion. There was no discriminatory treatment on that occasion, whether by way of harassment, direct discrimination or victimisation.

200. The second element was that Mr Artus was pressuring the claimant to sign the statement of interest form. That was factually correct. The statement of interest form was originally to be returned by 1 April (page 189). As team leader Mr Artus was responsible for trying to get people to complete the forms. From the account given by the claimant when she first complained about this in her letter of 12 April 2016 (page 208), it was clear that he had already asked her twice and the third time took Krystyna with him to translate into Polish if necessary to make sure the claimant understood. We noted that the thrust of the passage about this matter in the second grievance letter was concerned with the apparent breach of confidentiality, not with the fact that he was pressurising the claimant to sign the form. Signing the form was in her own interests since without a signed form she had no prospect of obtaining an alternative position in the redundancy exercise. There was no material from which we could conclude that this pressure was in any way related to sexual orientation or because of it.

201. As to whether it was victimisation, the claimant asked the Tribunal to infer from the fact that she used the word "letter" and he used the word "complaint" that he knew she had lodged a complaint. Even if that inference were appropriate, there was no evidence that he took this action because of the complaint. It was in truth in the claimant's own interest to sign that form and his efforts to get her to do that were to be commended rather than criticised. There was no detriment to the claimant. This allegation failed.

Allegation 21

202. This allegation was that on 11 April 2016 the claimant was separated from the people with whom she was working because of concern about transmission of the "disease" of being gay. However, the matter was put in very different terms in her complaint letter of 12 April at page 208. There she said that she was repeatedly separated from the people she had been talking with. There was no suggestion that the separation was because of "disease" or of sexual orientation. It appeared to be a separation because the claimant was talking rather than working. The claimant did not give us any information from which we could conclude that this incident had anything to do with her sexual orientation. The best she could do was to point to the statement towards the end of her complaint that it was all because she was a lesbian, but that broad assertion was nothing more than an assertion in relation to this instance. The burden of proof did not shift and this allegation failed.

Allegation 22

203. Allegation 22 was factually very closely related because it appeared to be something which occurred immediately after allegation 21. It was that the manager, Andy Stott, shouted at the claimant telling her to shut up.

204. In her complaint at page 208 the claimant said that after she had been moved she spoke to an agency worker in Polish and this angered Andy Stott so that he shouted at her to shut up. Her complaint went on to say that she had seen him shout at a pregnant woman refusing her a break.

205. When interviewed Mr Stott said that he had told the four women as a group to shut up as a joke and had not said anything directed at the claimant. That was adopted by Mrs Ashdown in her grievance outcome letter.

206. When the claimant appealed on 9 May she said that Mr Stott's behaviour was not acceptable (page 273) but did not provide any clue as to why she thought it was due to sexual orientation.

207. The fact that he had behaved in what she considered to be a comparable manner to a pregnant woman did not help the claimant's case. Overall we concluded on the evidence before us that even if Mr Stott did speak to the claimant in an unnecessarily abrupt manner it was because of annoyance that she was talking when she had been moved already because of talking to other people, and that it was not related to or because of sexual orientation. This complaint failed.

Allegation 23

208. This was an allegation which was raised in the complaint of 12 April 2016 at page 209. The claimant said that employees like Nicola Branigan would stigmatise her by naming her a lesbian. She did not give any dates or specifics.

209. Ms Branigan was interviewed about this during the grievance investigation. The note at page 244 recorded her saying that she sometimes forgot the claimant's name and would call her "Elvira's girlfriend", but her own brother was gay and she denied making any such comments. In the absence of any witnesses to these alleged comments, that conclusion was adopted by Mrs Ashdown in the grievance outcome at page 267.

210. The claimant did pursue this in her appeal letter at page 272. She complained that Ms Branigan did not use her name but instead called her "lesbian". That point was not specifically addressed in the appeal outcome letter and the claimant raised it again in her further letter at page 337.

211. In terms of the evidence to our hearing, the claimant was cross examined about this. She said that she had not been able to give it a date when writing her letter of 12 April, even though it had only occurred since her first complaint of 30 March. That was a surprising omission. In addition it contradicted what the claimant said earlier in her evidence when being asked about allegation 13. At that stage she said that Ms Branigan had always referred to her as "this lesbo". She appeared now to be saying that these comments only started after her first complaint at the end of March 2016.

212. Further, we were concerned that the claimant was unable to give any specifics as to when the comment was made, where it was said or any other details. In contrast we had evidence on oath from Ms Branigan which denied having used that term about the claimant in the way alleged.

213. Putting these matters together we concluded the claimant had failed to prove that these comments were made. We accepted Ms Branigan's denial. This allegation failed.

Allegation 24

214. On 9 July the claimant sent an email (page 299) attaching a three page document with a list of questions for Janet Hackett. That was sent on a Saturday. The claimant did not receive an acknowledgement until more than a week later, on

Tuesday 19 July. That was an email from Mrs Hackett (page 308) which said she had been off sick since the previous Friday (presumably 15 July) and would respond as soon as she was back which she hoped would be the following day. Mrs Hackett then returned to work and sent a detailed response to the claimant on 22 July (page 319).

215. In her oral evidence Mrs Hackett explained that she had food poisoning and therefore in a food factory it was particularly important that she did not attend work until fully recovered. This evidence was not challenged.

216. We were satisfied that this explained the delay in her response to the queries from the claimant. The claimant provided no evidence from which we could conclude that her sexual orientation played any part in that delay or was related to it in any way; nor was there any evidence from which could conclude that this amounted to victimisation because of the grievance of 30 March 2016. This allegation failed.

Allegation 25

217. This allegation concerned the decision to dismiss the claimant made in August 2016. It was said to be direct discrimination and/or victimisation.

218. On the face of it the procedure adopted was entirely what one would expect from a genuine redundancy dismissal in a restructuring. There had been an announcement of the restructuring and the risk of redundancy made in January, and extensive collective consultation with workforce representatives during February and March 2016. The notes from the meeting of 16 March recorded that there had been an increase in demand for a particular product and that production levels would be increased by means of agency staff as a temporary measure until the new automated production lines became available. Once collective consultation had ended individuals were given details of roles available within the selection pool and given an opportunity to apply. The claimant failed to pursue this opportunity by not signing the statement of interest form; nor did she attend an assessment for the operative role on 29 April despite being informed that a failure to attend would result in a zero score. Once the reallocation of employees to posts in the new structure had been completed, the claimant was advised by email of 8 July at page 298 of the vacancies that were still available. She did not pursue an application for any of those vacancies but instead raised a host of questions about the process. She was invited to two individual consultation meetings, neither of which she attended, and at the second meeting the decision was taken to dismiss her by reason of redundancy.

219. Part of the claimant's case that this was in truth a dismissal because of sexual orientation or because of victimisation was a reflection of her belief that it was not possible to make staff redundant whilst also recruiting agency workers. She was wrong about that. The restructuring was the consequence of a long-term business decision to move to more automated production lines. That would mean there was a reduced requirement for numbers of employees in the future. That underlying trend was not affected by a temporary surge in production which required the recruitment of agency workers, the extension of notice periods and the offering of overtime. Those measures to enable that temporary spike in demand to be addressed do not mean that the restructuring and redundancy dismissals were not genuine.

220. We took account of the fact that a heterosexual employee who had not brought any complaint was dismissed in exactly the same way at around the same time (page 356).

221. We concluded, therefore, that there was no evidence to support the case that this amounted to direct sexual orientation discrimination or victimisation. If the burden of proof had shifted the respondent had shown that the reason for dismissal was in no way related to sexual orientation or the claimant's grievance. This complaint failed on its merits.

Conclusion

222. For the reasons set out above we found against the claimant on each individual allegation. We were also satisfied that even when viewed cumulatively and against the relevant background the allegations failed on their merits. All the complaints brought by the claimant in these proceedings failed and were dismissed.

Time Limits

223. As there had been no discriminatory treatment of the claimant we found that there was no instance of conduct extending over a period so with hindsight the allegations were out of time in any event. Of course, had there been any discriminatory treatment this question would not have been academic and we would have considered it in more detail.

Employment Judge Franey

27 July 2017