



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Miss A de Souza E Souza

v

Primark Stores Ltd

Heard at: London Central

On: 15, 18, 19, 21 December 2017

In chambers: 20, 22 December 2017

Before: Employment Judge Lewis

Mr D L Eggmore

Mrs M B Pilfold

Representation

For the Claimant: Mr J Arnold, Counsel

For the Respondents: Ms L Bell, Counsel

JUDGMENT

The unanimous decision of the employment tribunal is that:

1. The respondents subjected the claimant to harassment related to gender reassignment by:
 - a. Ms Chiamonwu outing the claimant on or about 29 September 2016, calling her 'Alexander/Alexandra' and laughing at her.
 - b. Ms Chiamonwu continuing to refer to the claimant as 'Alexander' on 30 September 2016, even after the claimant corrected her.
 - c. Ms Chiamonwu continuing to call the claimant 'Alexander' in the next few days.
 - d. On 5 December 2016, Ms Amboyo spraying scent near the claimant and saying 'I can smell urine, like a men's toilet' and discussing with Ms Namusobo that 'it's a man's voice' and 'deep voice'.
 - e. On 6 December 2016, Ms Browne telling the electrician that he could come into the ladies staff toilets as 'there are no ladies in there', when she knew the claimant was in there.
 - f. On 5 January 2017, key staff member 11 saying she would pray for the claimant as 'she's got evil inside her'
 - g. Mr Chan then saying in front of another supervisor, 'She is a joke. She became the joke of the shop'.

- 7.2 The respondents insert into any written modules and PowerPoints used for training managers to recruit staff, a reference to the existence of a policy of confidentiality in regard to transgender new starters.
- 7.3 The respondents amend the materials used for equality training of staff, management and HR to include, if not already there, references to transgender discrimination along with the other protected characteristics, and a reference to the existence of the specific transgender policy.
- 7.4 The respondents ensure that transgender discrimination and harassment is referred to in all their equality and harassment policies, along with any other protected characteristic under the Equality Act 2010.
- 7.5 The respondents add into the training materials for management on handling grievances, the importance of consistent application of the grievance policy and the importance of providing a grievance outcome within a reasonable time and right of appeal.

REASONS

Claims and issues

1. The claimant brings claims for direct discrimination and harassment under the Equality Act 2010 in relation to gender reassignment.
2. The respondents accept the claimant has the protected characteristic of gender reassignment.
3. The agreed list of issues is attached to the end of these Reasons. At paragraphs 1, 4, 7 and 12, square brackets are put around the alleged discriminatory act, as opposed to the background / contextual information in the said paragraphs. The respondents did not seek to argue that the last discriminatory act is out of time. The only point which the respondents take on limitation concerns earlier actions and whether there was a continuing act of discrimination.
4. The respondents did not seek to pursue any argument that they do not have vicarious liability for the alleged discriminatory actions.

Procedure

5. The tribunal heard evidence from the claimant, and for the respondents from Rita Chiamonwu, Shahidul Ahmed, Tia Browne, Fitim Sadriu, Darrell Wyatt. There was an agreed trial bundle of 385 pages.

6. We were told that the claimant is severely dyslexic and as a result, wished to use a yellow plastic reader and to be given time to read any documents in the trial bundle. This was agreed. The tribunal additionally suggested that if the claimant had difficulty assimilating a great deal of information at one time, short single-item questions should be put to her. This was also agreed.
7. The judgment on liability was given on 21 December 2017. The judgment on remedies was reserved.

Fact findings

8. The claimant is a transgender woman. Approximately 16 years ago, she began dressing as a woman on a permanent basis. At the time of her employment with the respondents, her official first name on her passport and national insurance was still 'Alexander' ie her birth name, although she went by the name 'Alexandra'.
9. The claimant started work for the respondents on 2 September 2016 as a retail assistant at Primark, Oxford Street (West). Her application form, submitted 24 August 2016, gave her first name solely as 'Alexandra'. She was interviewed by a Brazilian woman. She had to bring her passport. She explained that she was transgender. The interviewer said they had to use her official name for pay, but she could use whatever name she liked on her name badge.
10. The respondents say the interviewer was probably a night shift manager. The claimant does not know the name of this person and the respondents have not attempted to find out who it was. There is no evidence that the recruiting manager made any note of the claimant's circumstances and stated preference.
11. On 1 September 2016, the day before she started work, the claimant completed on-line induction modules in health and safety and similar matters. She received completion certificates using the name 'Alexandra'.
12. On 2 September 2016, the claimant's first day at work, she was given further induction training. During the training, she was given a name badge which said 'Alexander'. The claimant asked to speak to the HR supervisor carrying out the induction outside the room. She explained she was transgender and that Alexander was her birth name, but that her badge should be Alexandra, which was the name she wanted to use at work. The supervisor said 'That's fine'. She went into her office and printed her a new name badge with the name Alexandra. The claimant does not know the name of this supervisor and the respondents have not identified her. There is no evidence that this supervisor did anything to ensure the issue of the claimant's transgender status and name should be sensitively handled in the future.
13. On applying for the job, the claimant had entered her personal details on the recruitment system 'Brassring'. She used the name Alexandra. When the claimant accepted the job, the information she entered on Brassring was

transferred to the day-to-day personnel system, 'Workday'. The claimant was then given access details to the system.

14. It is the respondents' practice that a new employee's legal name is checked on the first induction day and necessary changes made to the legal name on Workday. An employee cannot thereafter change their legal name on the system, but they can enter a preferred name.
15. Fitim Sadriu was a senior People and Culture Manager. This is an HR function. He reported to the Assistant Store Director for People and Culture, who in turn reported to the Store Director for People and Culture, Peter Campbell. On 1 September 2016, the claimant logged onto Workday and changed her preferred name from 'Alexandra' to 'Alexander'. The change was routinely approved by Mr Sadiu, who was unaware of the background issues. Mr Sadriu said in his witness statement that the claimant's change of her preferred name followed a discussion between the claimant and Mr Campbell about correct details. We do not know what this discussion comprised. Mr Campbell did not give evidence to the tribunal. The claimant was confused about the 'legal name' and 'preferred name' entries. She is dyslexic and English is not her first language. On 2 September 2016, Mr Petrescu (a People and Culture supervisor) changed the claimant's legal name from Alexandra to Alexander. On 3 September 2016, yet another People and Culture supervisor, Emmet O'Mahoney, changed the entry from 'Miss' to 'Mr'.
16. The end result was that both the claimant's legal name and preferred name were logged onto the computer as 'Alexander'. The daily core allocation sheets were linked to the legal name on Workday. As a result, when they were printed, employees' legal names appeared on them. Supervisors were therefore given sheets which had 'Alexander' written for the claimant. Supervisors used the sheets to check / call a register at the start of shifts.
17. The respondents were unable to explain why the computer could not be programmed so that the preferred name appeared on the daily core allocation sheets or at least that the claimant's preferred name so appeared. Nor were they able to explain the purpose of the 'preferred name' entry on Workday if it was not going to translate into core allocation sheets and other documents.
18. The claimant worked on Till Bank 2, the busiest till in the store, with 20 – 25 tills and till staff, and 2 – 3 supervisors on duty at any one time. The supervisors included Rita Chiamonwu and Shahidul Ahmed. The claimant's shift was 4pm – 10.30 pm, Monday – Friday.

Credibility and overview

19. In general, we found the claimant an honest and credible witness. As a result of her dyslexia, there were times when her memory of dates was confused. However, she was patently telling the truth as she saw it. There are a number of reasons for our conclusion. She had no reason to fabricate these events. This is not a case where she needed to defend herself against disciplinary action for example. On the contrary, she was a good performer. Given her

desire to present herself as a woman, it is also unlikely she would want to draw attention to her transgender status. She complained a number of times about her treatment during her employment and went as far as going to the police, another courageous act. In relation to one of the incidents which we describe below, she persuaded a third party witness (an electrician contractor) to come with her to HR by way of corroboration.

20. We also note that there is some independent evidence that the claimant's transgender status was known amongst a number of colleagues and supervisors, and that at some stage at least she was a topic of conversation in a sometimes explicit manner. This is referred to below in connection with evidence given by Ms Amboyo and Ms Robinson to the grievance investigation. Further, there is a letter from another employee, Ms Camara, in December 2016 saying she had noticed gossip and discrimination by a lot of staff based on gender/orientation.
21. Notwithstanding the above, we have examined each individual allegation carefully in order to reach a view as to whether on the balance of probabilities it occurred and what it signified. We were alive to the possibility that, for example, the claimant may have misheard, misunderstood or misinterpreted comments and behaviour.

First incident with Ms Chiamonwu

22. One of the claimant's supervisors was Rita Chiamonwu. The claimant started working with Ms Chiamonwu from 12 September 2016, if not before. They had a good relationship in the beginning. Ms Chiamonwu called the claimant 'Alexandra' and frequently complimented her work and high-fived her.
23. On or about 29 September 2017, Ms Chiamonwu came up to the claimant with the daily core allocation sheets on which the claimant's name was still recorded as 'Alexander'. She asked, 'What's your name again?' and called the claimant 'Alexander'. This conversation was in front of customers and another colleague.
24. The claimant responded, 'What do you mean? You know my name'. Ms Chiamonwu was with a colleague, and they started talking in a language which she did not understand. The claimant thought it might have been French, tho she was not sure. The claimant heard Ms Chiamonwu say 'Alexander / Alexandra' and start laughing.
25. Ms Chiamonwu gave a different account. In her witness statement, she said that she checked the claimant's name with her the first time they worked together, not having met her before. She said the claimant corrected her, and that she called her 'Alexandra' from then on. She said she didn't laugh.
26. In cross-examination, Ms Chiamonwu said she was aware that 'Alexander' was male and 'Alexandra' was female and that she had at the time understood the significance of the correction. She knew about transgender people because she had seen them on television. She said she clarified the

claimant's name with her on a second occasion, because 'Alexander' was still on the sheets. She did not take the option of checking with HR instead. Ms Chiamonwu said this second conversation was not in front of anyone else.

27. We have preferred the claimant's account of these events. If Ms Chiamonwu's account is to be believed, she asked the claimant again about her name after having been clearly told by the claimant that it was Alexandra, understanding what that signified ie that the claimant was transgender, and seeing the claimant presenting as a woman. We do not think it likely that Ms Chiamonwu would have had a benevolent reason for raising the issue of her name again with the claimant rather than taking the matter up with HR.
28. We also found Ms Chiamonwu's evidence internally inconsistent in a number of ways. For example, the claimant, who gave evidence first, was cross-examined on the basis that the first time she worked with Ms Chiamonwu was the week starting 26 September 2016, and that the only time Ms Chiamonwu queried her name was the first shift they worked together. Ms Chiamonwu's evidence departed from this and from her witness statement in the tribunal, both as regards the date she first worked with the claimant, and as regards how many times she queried the claimant's name. This followed disclosure of the rotas on day 2 of the hearing, which showed they first worked together on 12 September 2016. The earlier date is more consistent with the claimant's account that Ms Chiamonwu already knew and had been using her name for some weeks by the time she raised her query on 29 September.
29. Further, there was a contradiction between paragraph 9 of Ms Chiamonwu's witness statement, where she said that she was aware before she worked with the claimant that the claimant had a challenging nature, and paragraph 11, where she states that she innocently called out 'Alexander' on the first shift they worked together because she was unaware of the claimant's gender at that stage. In trying to explain this contradiction away under questioning, Ms Chiamonwu said that she had found out about the claimant's challenging nature in the three hours before starting her own shift and the claimant starting hers on the first time they worked together. She said the staff had told her in this short period that the claimant was difficult, that you can't chat with her and whatever you do she reacts. She said the whole team did not want to be assigned a till near her. We found this explanation simply incredible. We do not think so much information could have been imparted and taken seriously in three hours; even more so from staff working in banks of busy tills.
30. The respondents make the point that Ms Chiamonwu does not speak French, her language is Igbo, and that the claimant is wrong on this point. We accept Ms Chiamonwu does not speak French. The claimant said she was not completely sure it was French. In any event, we do not find this detail sufficient to doubt the claimant's account in the light of the other factors we have analysed above.

30 September 2016 and ongoing issues

31. Subsequent to the incident on 29 September 2016, Ms Chiamonwu's attitude towards the claimant changed, and she ceased being friendly and complimenting her. On 30 September 2016, Ms Chiamonwu called the claimant Alexander three times. The claimant said her name was Alexandra, and showed her her name badge. Ms Chiamonwu continued calling her Alexander.
32. Ms Chiamonwu asked the claimant to move some trolleys. These had been stacked unusually high with baskets. The claimant believed that Ms Chiamonwu had deliberately stacked the trolleys high and was asking her to move them by way of an implicit suggestion that she was strong because she was a man.
33. The claimant moved the first trolley, returned with a number of shopping bags, and dropped them on the till. She then walked off. When she returned 10 – 15 minutes later, she said again that she wanted to be called Alexandra and that if Ms Chiamonwu had a problem with that, she should call HR.
34. Ms Chiamonwu denies she stacked the trolleys deliberately high. She said it was a normal task to move the trolleys from the till and normal for the claimant, amongst others, to do that. We accept this evidence. We were not given sufficient detail on the matter to find that the stacking was higher than usual. Even if it was, there is no evidence to suggest that was done deliberately. Nor was there any evidence that it was done because the claimant was a man. It is not suggested, for example, that Ms Chiamonwu said, 'You must move the trolleys all in one go, you are strong enough'. This therefore is far too speculative.
35. The name is a different matter. Ms Chiamonwu says she called the claimant 'Alex', not Alexander, and that she stopped as soon as the claimant objected. She says 'Alex' was intended as a contraction of Alexandra, and that it was intended to be familiar and friendly. She gave examples of other employees whose name she shortens, although it is not clear whether that is at their request or on her own initiative.
36. In the trial bundle, there is a photocopy of a note which Ms Chiamonwu says she made following the incident because she felt the claimant's attitude was confrontational. The note was made in a notebook. The original has not been disclosed. There are no other notes of this kind by Ms Chiamonwu in the bundle. The note records that she called the claimant 'Alex'.
37. We do not find the note useful. The original has not been disclosed. We do not know when it was written. Even if it was written at the time, it would have been at a point when the claimant had been confrontational and indicated she might go to HR. Ms Chiamonwu might have been protecting herself. It is an entirely self-serving document.
38. We find that Ms Chiamonwu did call the claimant 'Alexander' (not 'Alex') and continued to do so after the claimant objected. This is not a matter of potential misinterpretation. The claimant gives consistent evidence that she was called

Alexander and for reasons we have already explained, we find the claimant credible. Even more importantly, we do not find it credible that Ms Chiamonwu would have called the claimant 'Alex' in circumstances where she had been carefully corrected by the claimant the previous day (or very recently), had been asked to say 'Alexandra' rather than 'Alexander', and had known the implications of that. Nor do we find it credible that Ms Chiamonwu would have shortened the name out of friendliness if her account of events is to be believed, ie that she had only worked with the claimant for a few days and that she had known from the outset that the claimant was confrontational and likely to complain about everything.

39. Having found the above, we also accept the claimant's evidence that Ms Chiamonwu continued to call her 'Alexander' in the days following this incident.

Shahidul Ahmed

40. Mr Ahmed was another of the claimant's supervisor's. The claimant says there was an occasion when he was with another employee who had the core allocation sheets, that the other employee called out her name as 'Alexander' from the work sheets, said 'Oops Alexandra' and they both laughed. The claimant cannot remember the date of this incident.
41. Mr Ahmed denies this, although he says that when he first worked on a shift with the claimant, he also had a core allocation sheet naming the claimant as 'Alexander'. He called out her name as 'Alexander' in front of other customers and staff.
42. On 5 October 2016, Mr Ahmed completed a probation review for the claimant. He was handed a form on which someone had written 'Alexander de Souza E Souza' as the claimant's name. Mr Ahmed noted his comments using the name 'Alexander' twice, though he did also say 'she'.
43. Mr Ahmed did continue to refer to the claimant verbally as 'Alexander', even though her name badge said 'Alexandra'. Mr Ahmed told the tribunal that he did not realise 'Alexander' was a male name and that 'Alexandra' was a female name. We accept that he did not understand there was a gender difference between the two versions of the name. In the probation review, although he wrote the name 'Alexander', he used the adjective 'she'. If he meant to be disrespectful or worse by referring to the claimant as a man, we feel he would have also used the word 'he'.
44. As regards the incident described by the claimant, we are unable to find on the balance of probabilities that it occurred. This is because of a combination of factors. She told the tribunal that she got on well with Mr Ahmed. She reported the perfume incident to him in the first instance. There is evidence that he did not understand the significance of the difference between the names, and he did not realise she was transgender until the perfume incident in December. The claimant's inability to pinpoint the date of this incident was

particularly problematic for us given these factors, and we found the evidence too vague.

Spraying scent incident: 2 December 2016

45. On Friday 2 December 2016, the claimant heard a colleague on the adjacent till, Ms Amboyo, talking to another colleague next to her, Ms Namusobo. She heard Ms Amboyo say, 'I can smell urine, like a men's toilet'. Ms Amboyo left the till and asked another employee for a bottle of perfume. She was given something which looked pink. She gave it back and was handed another bottle. She returned and sprayed the perfume, which was a men's perfume, heavily over her till. The claimant started coughing.
46. The claimant went to report it to her supervisor, Mr Ahmed. She was told to give him a few minutes and return to her till. Almost immediately, Ms Amboyo started talking at length to Ms Namusobo. The claimant heard, 'It's a man's voice' and 'deep voice'.
47. The claimant says that two days previously, she had heard Ms Namusobo tell someone to play the song 'Hidden gender'. The claimant says she had googled the song afterwards, but could not find it.
48. The claimant spoke to Darell Wyatt (department manager), who told her she could make a formal complaint or everyone could get together and talk the matter over. The claimant chose to make a formal complaint. She wrote her grievance letter on 5 December 2016. She referred to comments and jokes about her sexuality, supervisors and work colleagues discussing her sexuality and the incident on 2 December 2016. She said she had been told when she joined that the respondents have a clear policy against discrimination and that she had contacted a LGBT organisation.
49. HR asked Mr Wyatt to investigate the allegations. Mr Wyatt interviewed the claimant first. The claimant admitted she did not see whether Ms Amboyo sprayed the perfume on her, but she couldn't stop coughing.
50. On 6 December 2016, Ms Amboyo submitted a complaint against the claimant for false allegations and remarks made.
51. Mr Wyatt interviewed 7 Members of staff including Ms Amboyo. Ms Amboyo said she must have seen the perfume at the front of her till and that she sprayed it towards her own chest. She said shortly after, Ms Namusobo asked 'Is it nice;' and she replied, 'No, one of them smells like a toilet'. She said the claimant then told her not to spray that and it was making her sick. Ms Amboyo said she apologised.
52. Ms Amboyo said that later she was having a conversation with Ms Namusobo about losing her voice and said 'I don't like my voice. It sounds like a man or sometimes I sound like a horse'. She said the claimant then started shouting in front of customers about her disrespecting her.

53. Mr Wyatt asked Ms Amboyo whether she had heard anyone make comments about the claimant. Ms Amboyo said when she started, people were asking if she was a man or a woman. Mr Wyatt asked if she remembered any specific comments. Ms Amboyo said 'Yes, some were too personal. Something to do with her voice and her private parts and I think that's it'. Mr Wyatt said 'Any names?' Ms Amboyo said, 'No comment. It's from people at her till bank.' Mr Wyatt did not press Ms Amboyo to give him names or dates.
54. When she was interviewed, Ms Robinson said that in general when the claimant first came, people questioned her transgender, but that had died down. Again Mr Wyatt did not press for detail.
55. Ms Namusobo broadly corroborated Ms Amboyo. Mr Ahmed said he did not have a clue what had happened.
56. Mr Wyatt concluded there was no evidence that the perfume had been sprayed towards the claimant. He found Ms Namusobo's evidence particularly persuasive. He did not consider the possibility that she and Ms Amboyo may have been sticking up for each other. He took it that all the witnesses against the claimant were telling the truth.
57. Looking ahead, on 20 January 2017, Mr Wyatt wrote to Ms Amboyo saying no further action would be taken. The claimant was never informed of the outcome of her complaint on this matter.
58. We have not had the benefit of hearing from Ms Amboyo or Ms Namusobo at the tribunal. On the balance of probabilities, we accept the claimant's account and interpretation of the incident.
59. We find that the spraying of the perfume and remarks made were directed towards the claimant because she was transgender. We infer this from the context. Knowledge of the claimant's transgender status was fairly widespread due to the lack of safeguarding of her legal name by the respondents' systems. On Ms Amboyo's own admission, a number of people on Till Bank 2 had been making very personal remarks relating to the claimant's gender. She would not give names and had not previously reported it. There is other corroboration that such remarks were made from Ms Robinson and Ms Camara. The next day, as set out below, another staff member makes a remark in a similar vein. One of the supervisors was deliberately calling the claimant 'Alexander'. This kind of action and remark with perfume fits into this pattern of behavior.
60. Furthermore, although it is conceivable that a member of staff might spray store perfume to try it out, there was no particular reason for doing so on this occasion, when the claimant happened to be right next to her. Moreover, Ms Amboyo went over to another till to fetch the perfume. It was not at the end of her till.
61. We also find that Ms Amboyo and Ms Namusobo were discussing the claimant when they referred to 'it's a man's voice' and 'deep voice'. We do not know

whether or not Ms Amboyo had lost her voice, but we find it too much of a coincidence that there should be a discussion in those terms, knowing the claimant is on the next till, knowing she is transgender, immediately after the claimant has made a fuss and left the till over the perfume incident, and when in her later interview with Mr Wyatt, Ms Amboyo says that discriminatory remarks had at one stage been made about the claimant by others to do with 'her voice' and private parts. We also note that a few days previously, Ms Namusobo had told someone to play a song called 'Hidden Gender'.

62. We add that we accept the claimant's evidence regarding 'Hidden Gender' because of the added detail that she googled the song and could not find it. This does not strike us as something she would have made up.

Female staff toilets incident: 6 December 2016

63. On 6 December 2016, the claimant was in the female staff toilets fixing her make-up. Tia Browne then came in. Ms Browne knew the claimant by face, though she did not know her name or to speak to her. The claimant did not at that time know her name.
64. Shortly after, someone knocked on the door and called out 'Ladies, this is an electrician. May I come in?' Ms Browne left the room. As she left, she held open the door and said 'You can go in. There are no ladies in there'. She laughed. The electrician entered the toilets and was surprised to see the claimant. He repeated what Ms Browne said, and said it did not make sense. The claimant explained she was transgender and was being discriminated against, and asked him to come with to HR to report what had happened. The electrician agreed.
65. On the way to see HR, they bumped into Mr Wyatt. The claimant was very upset. She told him what had happened and asked the electrician to confirm it. The claimant says the electrician confirmed what happened, although she cannot now remember his exact words. In his witness statement, Mr Wyatt said the electrician confirmed he had spoken to Ms Brown about who was in the toilets 'but did not say whether she had said there were 'no females' in the toilet'. In cross - examination, Mr Wyatt said he asked the electrician what had happened and that the electrician had said he had asked whether anyone was in the toilets and had been informed by Ms Browne (though he could not remember her exact words) that there was no one in the toilets at the time. Mr Wyatt did not ask any follow up questions of the electrician and he did not take any note of what he said. The electrician left and Mr Wyatt asked the claimant to come with him to his room. Another supervisor was in there. Mr Wyatt told the claimant to calm down. According to the claimant (although Mr Wyatt denies this), he also told her she was trying to get too much attention and that she should go back to her till and not mention what had happened to anyone.
66. Later that day, Mr Wyatt interviewed Ms Browne about the incident. She remember that she had been in the toilets and that the contractors had asked if anyone was in there. She said she had said 'Yes, there are girls in here'.

She denied she had said there were no females in the toilet. She said she was aware there was 'one' female who she had seen working at the tills. It is agreed this was a description of the claimant. Mr Wyatt did not put to her that the electrician said he was told there was no one in the toilets.

67. On the same date, Mr Wyatt concluded his investigation outcome sheet. He noted that Ms Browne had said she did inform contractors there was someone in the toilet. He then ticked the box for 'no further action'. The reason for his recommendation was 'No witness or evidence'.
68. On 24 January 2017, Mr Wyatt wrote to Ms Browne notifying her of his decision that no further action would be taken. The claimant was never notified of the outcome of her complaint. Nor, as a consequence of that, was she ever given the opportunity to appeal.
69. The failure to give the claimant an outcome to her grievance and the failure to offer her the right of appeal were contrary to the respondents' grievance procedure. When asked in cross-examination his reasons for this, Mr Wyatt said it was not something that was done in the store. He did not say this in his witness statement and there was no other evidence supporting this bald statement. Mr Wyatt had been trained on conducting disciplinaries and grievances, as are all store managers. He also had access to HR advice throughout, but he chose not to speak to them.
70. We accept the claimant's account of the incident in the toilets. We find that Ms Browne did tell the electrician 'There are no ladies in there'. The claimant would not have asked the electrician to come with her by way of corroboration if she did not believe that was what Ms Browne had said. The electrician agreed to go with. At the very least, the electrician confirmed he had been told no one was in there. But Ms Browne admits she knew the claimant was in there. Further, she told Mr Wyatt she had said 'there are girls in here' and that she was aware there was 'one' lady, ie someone fitting the claimant's description. In her witness statement, Ms Browne says there was also another lady in the cubicles, which is inconsistent again. The electrician was an independent person and we see no reason why he would have lied or been mistaken.
71. We further find that Mr Wyatt followed up telling the claimant to calm down by saying she was trying to get too much attention and that she should go back to her till and not mention what had happened to anyone. We find this consistent with Mr Wyatt's lack of care to interview the electrician properly.
72. The claimant says that following this incident, Ms Chiamonwu continued to laugh at her every time she walked into the canteen. We do not find this occurred. The canteen was a large room with various corners and angles. It is very hard to know for certain when entering a room whether laughter has just started up and whether it is directed at oneself. There was no evidence that the claimant's name was used. Therefore on the balance of probabilities, we find the claimant is mistaken that any laughter was directed towards her.

Move to Till Bank 1

73. The claimant was off sick from 9 – 20 December 2016. When she started hearing comments again soon after her return to work, the claimant spoke to another HR manager, Emmanuela Nwaju, who asked if she wanted to move to another Till Bank. The claimant said that she did and she was moved to Till Bank 1. Ms Nwaju manually amended the core allocation sheets to read 'Alexandra'. Unfortunately by this time, the whole store knew about the claimant and some of her colleagues at Till Bank 1 made remarks.
74. On 15 December 2016, a former employee of the respondents, Ms Camara, wrote to Mr Campbell regarding her experiences working for the respondents. She had recently handed in her notice. As well as talking about her own experiences of sexual harassment, she said she had noticed a lot of staff would gossip about other staff members and discriminate against them based on their gender/orientation, which made her feel uncomfortable even though she was not a member of the LGBT community.
75. We accept the claimant's evidence that on 5 January 2017, a member of staff ('key staff member 11') said she would pray for the claimant as 'she's got evil inside her', and that a male security guard ('key staff member 12') said in front of customers, 'She is evil'. The respondents produced no evidence to rebut this evidence. As we have already stated, we find that the claimant was truthful in her evidence. We do not find these remarks were of a kind which the claimant would have misinterpreted or misremembered.
76. Mr Chan, one of the supervisors, was present when key staff member 11 made her remark. The claimant heard him talk to another supervisor and say 'She is a joke! She became the joke of the shop'. The other supervisor said she liked the claimant. We accept the claimant's evidence on this. The respondents produced no evidence to rebut it. We find the claimant generally credible, as we have said, and the description of the exchange is also credible.
77. We accept that around January 2017, key staff member 15 said to an East European female colleague something like, 'We need to get rid of her ... Her! She is the employee of the month', and the colleague replied 'don't worry. I will make her life hell.' Both were laughing. However, we do not find that this related to the claimant's transgender protected characteristic. The remark specifically referred to the claimant being employee of the month and could well have been some banter about that.
78. From 6 – 20 January 2017, the claimant was off sick with stress. Her state of mind was very bad at this point.
79. On 6 January 2017, the claimant made a complaint to the police about discrimination at work because she was transgender. The claimant emailed Mr Campbell to tell him she was still being bullied on the new till and was going to the police. The claimant subsequently gave the respondents a copy

of her report to the police. On 9 January 2017, Ms Nwagu interviewed her about her allegations to the police

80. On 23 January 2017, the claimant returned to work on Till Bank 1. The people who she felt had harassed her were still there. On 24 January 2017, the claimant went to speak to HR about some employees she felt were talking about her. She talked loudly and angrily, saying things like, 'I am tired of this. I'm tired of working with fucking ugly people'. On her way out, she said she would be sending a resignation letter. HR (Ms Abubakar) told her to go home and contact the store if she wished to resign.
81. As already stated, on 20 and 24 January 2017, Ms Amboyo and Ms Browne respectively were sent outcome letters as a result of the claimant's previous grievance. The claimant was unaware of this.
82. The claimant did not return to work the next day. On 31 January 2017, Mr O'Mahoney from HR telephoned her. The claimant said she was very upset and would not return to work unless the respondents did something about the people who had been bullying her.
83. On 6 February 2017, Mr O'Mahoney wrote to the claimant in a letter headed 'Absence without leave and failure to follow absence notification procedures'. He noted that in their telephone conversation she had said she did not plan on returning to Primark Marble Arch; that she would be writing a letter regarding her job status; and that when he had asked her whether she would like him to take it as her verbal resignation, she had said yes. He went on to say it was her responsibility to keep the respondents informed of the reasons for her absence, and absence from work without this is seen a gross misconduct and may lead to dismissal. Therefore he was writing to call her to an investigatory interview with Mr Sadriu on 10 February 2017 to establish the facts surrounding her absence from work without leave. At this stage, her absence implied she had resigned or intended to resign. If that was so, please could she provide her resignation in writing.
84. The claimant had to wait outside HR for the meeting on 10 February 2017 to begin. As she waited, the security guard who had called her evil came and sat near her. While they were there, Ms Browne walked by. The security guard and Ms Browne looked at each other, looked at the claimant and started laughing. We find this was directed at the claimant because of her transgender status. These two individuals had already made negative remarks towards the claimant because of her transgender status as stated above.
85. The meeting was conducted by Patrick Wurie (another department manager). He started by asking why she had been absent. The claimant left the meeting after 20 minutes. She was very upset. Following the meeting, she sent an email referring to having met some of her harassers while waiting outside for the meeting to start. She said unless her harassers were fired and her case was treated seriously, 'don't bother to contact me again. I will be looking for my rights and legal help.'

86. The claimant did not receive a reply until an email dated 20 February 2017 from Mr Sadriu. He referred to the fact that she had walked out of the AWOL meeting and said that as she had not chosen to engage in that meeting, they had been unable to resolve the issues. He offered to arrange another meeting and asked the claimant whether or not she was intending to resign since she had not given written notice of resignation.
87. The claimant responded on 22 February 2017, saying that she was already upset when she started the meeting because the staff member in the toilet incident had walked by, and that she was told in the meeting that it was just to discuss her absence from work. Mr Sadriu responded again that the meeting was in relation to her absence of work without leave. He said the recent allegations could be investigated but she must engage. He said the washroom incident had been fully investigated.
88. The claimant replied on 24 February 2017, 'The toilet incident was fully investigated??? Really! It was so investigated that the same girl walked past me when I was seated outside HR waiting for Patrick and she laughed at me. Please don't insult me. I think it disgusting that people can say and whatever they like and your company does nothing about it.'
89. Mr Sadriu responded 'As mentioned in my previous email your concerns regarding the toilet incident were investigated, unfortunately we are unable to disclose what action has been taken'. Mr Sadriu was unable to give any coherent explanation in the tribunal about why the claimant could not be told the outcome. He admitted an outcome should have been given. He tried to say it was Mr Wyatt who should have given the outcome and there might be a data protection breach if he gave inaccurate information himself. He could not explain why he could not just instruct Mr Wyatt to give an outcome now.
90. The claimant answered by email that she had been depressed and on antidepressants because of this but now she was getting angry, which was good. The next day, 25 February 2017, she sent an email resigning. She said 'I cannot work in a place where my gender is an issue'.
91. The claimant resigned because of the ongoing harassment which she was subjected to and the failure to do anything about it. As she said in a letter immediately following her resignation, 'The real sad thing was that I really like my little job, it was perfect for me to go to Uni and work in the evening and I love interacting with people, I guess that's why I was your employee of the month when I left'.

Law

92. The legal principles in this case were agreed by Counsel and we do not need to reproduce them all here. We have born them in mind.

93. Under s13 of the Equality Act 2010, it is direct discrimination for someone to treat the claimant less favourably than he or she treats or would treat another person because of a protected characteristic.
94. Under s26, EqA 2010, a person harasses the claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.
95. By virtue of s212, conduct which amounts to harassment cannot also be direct discrimination under s13.
96. Under s7, a person has the protected characteristic of gender reassignment if, inter alia, he or she has undergone a process or part of a process for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. It is not necessary for this to be a medical process.
97. Under the Equality Act 2010, a person who has the protected characteristic of gender reassignment is referred to a 'transsexual person', This is an old-fashioned term, which many people no longer find acceptable. Therefore in this decision we have used the claimant's preferred term, ie 'transgender'. By this we mean that she has the protected characteristic of gender reassignment.
98. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

Remedies

99. Under s124(3) EqA, a tribunal can make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant. The tribunal has a wide discretion in the recommendations which it may make.
100. A tribunal can make an award for injury to feelings. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression etc and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. Nevertheless, employment tribunals have to do the best they can on the available material to make a sensible assessment.

101. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were suggested in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102, CA
102. For those cases in which an injury to feelings award was made after 1 April 2013, there is a requirement to apply the 10% uplift laid down in Simmons v Castle [2012] EWCA Civ 1039.
103. A tribunal may award interest on its award and must consider whether to do so. Interest on an award for injury to feelings runs from the date of the discrimination until the date of calculation by the tribunal (inclusive). Interest on any financial loss starts on a date midway between the act of discrimination and the calculation date, and ends on the calculation date.
104. The rate of interest is that fixed by section 17 of the Judgments Act 1838. Since July 2013, that has been 8%. On injury to feelings, interest runs from the date of the injury to the calculation date. For financial loss, interest runs from the midpoint between the discrimination and the calculation date. (Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.)
105. Section 207A says that the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25% if:
 - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
 - (b) the employer has failed to comply with that Code in relation to that matter, and
 - (c) that failure was unreasonable.
106. Section 207A applies inter alia to the ACAS Code on Disciplinary and Grievance Procedures. The Code states that where the employee raises a formal grievance, a formal meeting should be held to discuss the grievance without unreasonable delay. Paragraph 40 says that following the meeting, the employer should decide what action to take, if any, and communicate the decision in writing to the employee without unreasonable delay. The employee should be informed that they can appeal if they are not content with the action taken.

Conclusions

107. We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Allegation 1

108. Allegation 1 is not upheld. It is not disputed that the claimant was issued with 'new starter' material including a staff ID badge in the name of 'Alexander' on 2 December 2016. However, we do not find that this was direct discrimination or harassment. The reason why the material was issued in the name of 'Alexander' was because that was entered on the Workday system as the claimant's legal name. The claimant was treated no differently to anyone else. We have considerable criticism of the respondents for their failure to have a safe system to protect the claimant's identity but we do not think the reason for this failure was 'because' the claimant is transgender or was 'related to' the fact that she is transgender.

Allegation 2

109. Allegation 2 is upheld. On or about 29 September 2016, Ms Chiamonwu asked the claimant 'What's your name again?' in front of customers and another colleague and called the claimant 'Alexander'. When the claimant said, 'What do you mean? You know my name', Ms Chiamonwu said 'Alexander, Alexandra' and laughed at her.
110. Ms Chiamonwu already knew the claimant's name was Alexandra. She knew the difference between the male and female forms of the name. She knew that the claimant was transgender and could see that the claimant was choosing to present as a woman. We therefore find that Ms Chiamonwu's actions constituted harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. They also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said Ms Chiamonwu's actions also constituted direct gender reassignment discrimination.

Allegation 3

111. The day after the previous action, Ms Chiamonwu continued to call the claimant 'Alexander', knowing that she was transgender and wished to be called 'Alexandra'. This was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said Ms Chiamonwu's conduct also constituted direct discrimination.
112. For reasons explained in our fact-findings, we do not find Ms Chiamonwu's request to the claimant to move the baskets in the trolley was because of or related to the claimant's gender reassignment. This was therefore not direct gender reassignment discrimination or harassment.

Allegation 4

113. Ms Chiamonwu continued to call the claimant 'Alexander' in the next few days. For the reasons set out in relation to allegation 2, this was gender reassignment harassment. If it were not harassment, it would be direct discrimination.

Allegation 5

114. We did not find the facts of this incident proved. The claims for direct gender reassignment discrimination and harassment in relation to this matter are therefore not upheld.

Allegation 6

115. We have described this incident involving Ms Amboyo and Ms Namusobo in the facts above. We find that the spraying of the scent combined with the comments 'I can smell urine, like a men's toilet' and the audible discussion about 'it's a man's voice' and 'deep voice' were directed at the claimant because of her transgender status. Ms Namusobo had two days previously suggested a song called 'Hidden gender' be played. Ms Amboyo, when questioned by Mr Wyatt, had admitted some employees were making discriminatory comments about the claimant's private parts 'and voice'. The claimant was working next to these employees during the perfume and 'man's voice' discussions, and we find that it was intended that she hear the conversation.
116. This was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said this conduct also constituted direct gender reassignment discrimination.

Allegation 7

117. On 6 December 2016, Ms Browne answered an electrician's enquiry as to whether there were ladies in the toilets with, 'You can go in. There are no ladies in there.' She had seen the claimant in there and recognised her though she did not know her by name. It is highly likely she was aware of the claimant's transgender status, as this had become fairly widely known in the store. There is also no other explanation as to why she would have said there were no ladies in the toilet when she knew full well the claimant was there. This was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said this conduct also constituted direct discrimination.

Allegation 8

118. As already stated, we do not find it proved that Ms Chiamonwu laughed at the claimant whenever she walked in the canteen. The allegations of direct discrimination and harassment in relation to this matter are therefore not upheld.

Allegation 9.1

119. On 5 January 2017, key staff member 11 said she would pray for the claimant as 'she's got evil inside her'. By this time, even staff on Till Bank 1 knew the claimant was transgender. There is no other explanation for such an extreme comment.

120. This was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said this conduct also constituted direct discrimination.

Allegation 9.2

121. Around 5 January 2017, key staff member 12 (a male security guard) said in front of customers, 'She is evil'. As already stated, by this time, staff on Till Bank 1 knew the claimant was transgender. There is no other explanation for such an extreme comment.

122. This was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said this conduct also constituted direct discrimination.

Allegation 10

123. On 5 January 2017, Mr Chan was present when key staff member 11 made her remark at allegation 9.1. He said audibly to another supervisor, 'She is a joke! She became the joke of the shop'.

124. This was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct

discrimination. Were that not the case, we would have said this conduct also constituted direct discrimination.

Allegation 11:

125. Around January 2017, key staff member 15 said to an East European female colleague 'We need to get rid of her ... Her! She is the employee of the month'. The colleague replying "don't worry. I will make her life hell.' Both laughed. However, this conversation was not because the claimant is transgender or related to that fact. The claims of direct discrimination or harassment are therefore not upheld.

Allegation 12

126. On 10 February 2017, while the claimant was waiting outside HR for the meeting to begin, the security guard who had called her evil came and sat near her. While they were there, Ms Browne walked by. The security guard and Ms Browne looked at each other, looked at the claimant and started laughing.
127. Given that both of them had referred to the claimant as 'evil', and the further incident with Ms Browne in the female staff toilets, we find this response was harassment contrary to s26 of the Equality Act 2010, being unwanted conduct related to gender reassignment which had the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It also had that effect. Under s212, conduct which is harassment cannot also be direct discrimination. Were that not the case, we would have said this conduct also constituted direct discrimination.

Allegation 13

128. The respondents did not investigate and deal with the matter properly. Most strikingly, they did not give the claimant the outcome of their investigation into the perfume and female staff toilets incidents. This deprived the claimant of the opportunity of querying any inadequacy in the investigation or the basis of its conclusion or making an appeal. This was in breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures and also the respondents' own grievance procedure.
129. Even at a late stage in the run up to the claimant's resignation, when they knew their failure to deal with matters was a major issue, Mr Sadiu refused to tell the claimant the outcome.
130. There were also inadequacies in the way Mr Wyatt carried out the investigation. Although he interviewed seven staff members, he did not apply a questioning mind to the process. He placed weight on the corroboration by Ms Namusobo, one of the protagonists, He did not even consider whether she and Ms Amboyo might be covering for each other. He did not press Ms Amboyo or Ms Robinson for more details of the discriminatory remarks that

they said had been made in the past. He did not take a note of the electrician's evidence or question him more carefully or put his account to Ms Browne.

131. We find that the reason for these inadequacies was that the claimant was transgender. Although the claimant was not given the outcome of her grievance, Ms Amboyo and Ms Browne were given written outcomes. As far as we know, they are not transgender. No explanation was given for that differential treatment. Mr Wyatt tried to say that the store did not usually tell people grievance outcomes. We did not find that convincing. He did not elaborate. The respondents' policy says otherwise. Mr Wyatt, along with other managers, had been trained on handling disciplinary and grievance procedures. HR had appointed Mr Wyatt and were available to advise. He chose not to go to them.
132. Nor have we had an adequate explanation why Mr Wyatt readily believed the corroboration by a person who was also implicated, Ms Namusobo, as opposed to the claimant's perspective. Nor why he chose to believe Ms Browne rather than the claimant, backed by the electrician to sufficient extent to throw question on Ms Browne's account. As far as we know, Ms Browne was not transgender. Indeed after the electrician had given his account and left, Mr Wyatt told the claimant to calm down, that she was trying to get too much attention, to go back to her till and say nothing.
133. Mr Sadriu accepted the claimant should have been given the outcome of the toilets investigation. He gave no sensible explanation as to why that had not happened and why he failed even at a late stage to ensure it happened.
134. We do not believe that an employee who was not transgender would have been treated in such a dismissive way in similar circumstances. We therefore find the failure to investigate and handle the matter properly was direct gender reassignment discrimination. The concept of direct discrimination most obviously fits these actions and omissions. It is superfluous to go on to consider whether in the alternative these actions were harassment. The parties did not object to us leaving it there.

Constructive dismissal

135. One reason why the claimant resigned was because she was subjected to remarks and harassment by a number of colleagues including supervisors, because of her transgender status. These were acts of direct discrimination for reasons set out above. They were sufficiently serious to amount to a fundamental breach of contract entitling the claimant to resign.
136. The other reason she resigned was because nothing was done about it, because she did not receive outcomes to her grievances, and because as a result of the inaction - right to the last minute - she was still subject to discriminatory actions by other employees, ie Ms Browne and the security guard feeling able to laugh at her even as she was waiting for the meeting with HR on 10 February 2017.

137. This failure was also direct discrimination. It was sufficiently serious to amount to a fundamental breach of contract entitling the claimant to resign.

Time-limits

138. We find a continuing discriminatory state of affairs from 29 September 2016 until the claimant's resignation. The claimant's transgender status was a topic of conversation in the store and a number of staff had expressed their disapproval or had mocked the claimant. These were not independent and unconnected actions. The respondents' failure to investigate properly then continued from 5 December 2016 until the claimant's resignation, the respondents continuing to fail to give her the outcome of the investigation.
139. Had we not found continuing discrimination, we would in any event have found it was just and equitable to extend time. The claimant was badly affected. It is a personal matter. She tried to resolve it internally. It is completely understandable why she may have been reluctant to rush to a tribunal. The respondents have put forward no particular detriment resulting from the delay.

General comments

140. All this may well have been prevented had there been proper systems from the outset to preserve confidentiality for transgender employees. We find it shocking that the respondents could not devise a way of keeping the claimant's legal name off the core allocation sheets and out of the knowledge of her supervisors. The respondents ought to have been able to devise a system whereby only one or two people in HR and payroll were aware of the claimant's transgender status. In the event, several managers and supervisors were made aware at a very early stage, but took no steps to ensure a confidential system was put in place. The respondents showed a complete lack of understanding from the beginning as to what was required.

RESERVED REASONS ON REMEDY

Evidence and submissions

Impact on the claimant

141. The claimant did not provide a detailed medical report regarding the impact of the unlawful actions on her. We have therefore had to reach conclusions based on her evidence together with the facts which we have found, her fit notes, and short letters from her GP dated 19 October 2017, from a consultant physician on 14 March 2017 and from a health adviser on 23 August 2016. The claimant was not cross-examined on her evidence regarding remedy.

142. The effect on the claimant of the discrimination has been severe. She felt she was made the joke of the whole store. She was subjected to playground-style bullying and innuendo. She was called 'evil' and a 'joke'. Then when she tried to complain, she was told to calm down and that she was drawing attention to herself, and the outcome of her grievance was never passed on to her. Her reactions at the time and her contemporaneous emails show that all these events caused her considerable distress. She visited the police when she was at her lowest ebb and she feels the reaction of the policeman in shaking her hand for coming forward, saved her from what she might otherwise have done.
143. The claimant was bullied out of a job which suited her and which she really loved. She enjoyed getting on well with customers and receiving compliments from them. The hours suited her and the work fitted in with her university course and aspirations to work in fashion.
144. The discrimination has made her insecure about her gender identity and her very self. She described looking in a mirror and not seeing herself anymore. Although she has dressed as a woman for 16 years, she has now become self-conscious about it. When she walks into a room, the first thing she wonders is how people will see her. She feels they will just see a man dressed as a woman. All her confidence has gone. She feels she has to constantly explain herself to people.
145. The claimant has been unable to work, and will be unable to work for some time because of the impact of the discrimination on her. She has lost all confidence in how she will be viewed and treated in a new job.
146. As a result of her unemployment, the claimant is at risk of losing her housing. She has had to go to a dog food bank to feed her dog.
147. She was put on anti-depressants by her GP in January 2017, and the doctor has since been juggling them because of their effect. The claimant has developed panic attacks. Sometimes she has to get off the tube after two stops. She made two attempts to dress up and go for a job next to the LGBT organisation where she has been receiving support, but each time had to return home because of a panic attack.
148. The letter from the health adviser shows that the claimant had been suffering an extended period of low mood from the previous year, and that she had suffered varying degrees of distress and acute anxiety throughout August 2016. This appears to be because of her feelings of some discrimination by fellow students at the College because of her trans status.
149. The physician's letter of 14 March 2017 says they have been working with the claimant over the last two years. On numerous occasions, the claimant had expressed significant distress as a result of transphobic discrimination in relation to her workplace and the education centre.

150. The respondents agree that the claimant is entitled to loss of earnings and pension loss up to the date of the hearing. The parties have agreed this figure (see below). The parties have also agreed the weekly net loss of pension and earnings.
151. In respect of future loss, the respondents accepted after some discussion, that it is inappropriate to deduct for benefits, since the claimant may not be entitled to receive these in the light of the tribunal's award.
152. The issue on loss of earnings was therefore the amount of time in respect of which future loss should be awarded. The respondents argued for 72 days, bringing total loss of earnings to 12 months from termination. The claimant argued for 12 months from the hearing date.
153. In relation to injury to feelings, both sides agreed the appropriate band was the middle Vento band. This was because it was accepted that the claimant did have some pre-existing injury from her College experiences, and the appropriate measure was the extent to which the discrimination had exacerbated her injury to feelings. The dispute between the parties was as to the level within the band.
154. In relation to loss of earnings, the respondents argued that retail jobs, particularly at the level in which the claimant was working, are very easy to find. They appreciate that the claimant has been unable to get a new job to date because of her mental state, but they believe she ought to have recovered sufficiently by the 12 month mark, especially now that she has won the tribunal case. They note that the claimant was able to work in the past, even with some level of low mood and distress. The tribunal should therefore not consider when the claimant is likely to have recovered completely, but when she is likely to have recovered to an extent sufficient to start working again. Also, while not disputing the claimant's evidence, the respondents noted we did not have the benefit of an objective medical report on long-term impact.

Conclusions on remedy

Injury to feelings

155. The injury to the claimant's feelings is very severe indeed, going to her very identity and ability to function in society. Had there not been evidence of a pre-existing cause of a certain level of distress, we would have had no hesitation in putting the injury into the top Vento band. As we are only looking at injury caused by the unlawful acts or, to put it another way, the degree to which the unlawful acts exacerbated the injury, we agree with the parties that the middle band is the correct measure.
156. As for the margins of the size of the bands, plainly the figures set out in Vento in 2002, even as uprated by Da'Bell in 2009 have not kept pace with inflation. The Presidential Guidance only applies to claims presented on or after 11 September 2017, which excludes this case. For claims presented before that

date, the Guidance says a tribunal may uprate the bands using a formula. Neither Counsel responded to the tribunal's invitation to work through the formula in the present case. Mr Arnold wished to adopt the figures for 4 September 2017 in the Guidance as being near enough. Ms Bell did not object to that particular calculation, provided the tribunal decided as a matter of principle that there should be an uprating. She did not give any reason why there should not be an uprating. On balance, in the interests of proportionality, we adopt the 4 September 2017 figures on which the Guidance is based. Including the 10% for Simmons v Castle, the middle band is therefore £8400 - £25,200. The top band is £25,200 to £42,000.

157. We consider the appropriate award to reflect injury to feelings caused by the respondents' actions is £20,000. Although there was pre-existing low mood, anxiety and distress, it had not stopped the claimant getting a job. It had not reached the point where she felt she needed to report the matter to the police. Nor had it caused panic attacks and complete loss of confidence.

Period of loss of earnings and loss of pension

158. We have concerns about when the claimant will be in a fit mental state to find new employment. She is clearly very far from that point at the moment. She had to retreat on two occasions from applying for a job which was next to her support organisation. We hope that an ending to the employment tribunal litigation will help her recover, but we still believe this will take a while. At a conservative estimate, we put her loss of future earnings at a further 9 months from the tribunal hearing. In this we make allowance for the fact that there was a separate and pre-existing cause of a level of anxiety and distress which might have impacted on the claimant's future ability to work.

ACAS uplift

159. The respondents breached paragraph 40 of the ACAS Code by failing to communicate their decision on the grievance in writing without unreasonable delay and failing to notify the claimant of her right to appeal. Indeed, the respondents never gave the claimant the outcome at all.
160. The ACAS Code relates to the claimant's claims for harassment, failure to investigate and the consequent constructive dismissal. The claimant brought a grievance about the acts of harassment. The respondents did not deal with that grievance properly. As a result, the claimant resigned. We therefore find that the respondents failed to comply with the Code in relation to all those matters when they failed to deal with the grievance properly.
161. The failure was unreasonable. The respondents are a large employer. They were also in breach of their own procedures. Mr Wyatt had been trained on handling disciplinaries and grievances. He had access to HR. HR knew at a later stage through Mr Sadriu that the claimant had not been given an outcome and continued to refuse. By contrast, Ms Amboyo and Ms Browne were given outcome letters.

162. We find it just and equitable to adjust the award for compensation. We consider the appropriate uplift to be 25%. This was an extremely large employer with handbooks, HR departments and training on procedures. Providing an outcome is fundamental to a grievance procedure. Carrying out an investigation is fairly pointless if the claimant is not told of the conclusion. Nor was she offered the right of appeal. The failure to give an outcome led directly to the claimant's resignation. Moreover, an outcome was given to those who were the subject of her complaints.

Calculation

163. The parties agreed there should be an award for past loss of earnings, ie to the date of the tribunal, of £9,193.02 and past loss of pension contributions of £367.72. This was based on agreed annual net salary of £11,452.05 and a 4% pension contribution by the employer. From this, we deduct ESA received to date, ie £2,595.05.
164. We calculate 9 months future loss of earnings and pension as follows. £8,589.04 future loss of earnings (£11,452.05 x 9/12) and £343.56 loss of pension (x 0.4%). No deduction of future benefits is made as these might not be payable.
165. Sub-total loss of earnings and pension: £15,898.29 (past and future loss of earnings and pension less state benefits (ESA) claimed). Recoupment does not apply as this is a discrimination award.
166. Applying a 25% to the £15,898.29 award for loss of earnings = **£19,872.86**
167. Applying 25% to the £20,000 award for injury to feelings = **£25,000**
168. Interest on past loss of earnings was agreed at **£472.50**.
169. Interest on injury to feelings is 8% from the date of the injury to the calculation date (22 December 2017). There is no one date when the injury occurred as there were a number of discriminatory events over a period of time. We take 6 December 2017 as a broad midpoint of the injury, ie 381 days. £25,000 x 0.08 x (381/365) = **£2087.67**.

Tax

170. During the remedies part of the hearing, it was recognised that even if the tribunal were to award the maximum claimed for financial loss, such sums would not exceed the £30,000 tax allowance. An award for injury to feelings might take the total over £30,000, but Mr Arnold did not seek to persuade us to gross up in that instance, on the basis of EAT authority (albeit in conflict with Moorthy.) We therefore do not gross up, but we note that in any event, that the bulk of the award for injury to feelings related to the discriminatory actions prior to her dismissal.

Recommendations

171. The claimant indicated that it would be helpful to her if the tribunal were to make recommendations to improve systems and training regarding transgender discrimination, and the handling of grievances. It is apparent that the respondents do not understand transgender issues and do not have developed policies. They need to think both about preserving confidentiality and of training to prevent harassment if people do find out.
172. We recommend that the respondents take the following actions by 31 March 2017:
 - 175.1 The respondents adopt a written policy regarding how to deal with new or existing staff who are transgender or who wish to undergo gender reassignment. The policy must encompass how to preserve confidentiality from the outset if that is desired and agreeing a plan with the individual concerned. It should cover access to and confidentiality of sensitive data, entries on core allocation sheets, work badges and personnel documents such as probation forms. It is recommended that the respondents consult a specialist organisation regarding the formulation of this policy.
 - 175.2 The respondents insert into any written modules and PowerPoints used for training managers to recruit staff, a reference to the existence of a policy of confidentiality in regard to transgender new starters.
 - 175.3 The respondents amend the materials used for equality training of staff, management and HR to include, if not already there, references to transgender discrimination along with the other protected characteristics, and a reference to the existence of the specific transgender policy.
 - 175.4 The respondents ensure that transgender discrimination and harassment is referred to in all their equality and harassment policies, along with any other protected characteristic under the Equality Act 2010.
 - 175.5 The respondents add into the training materials for management on handling grievances, the importance of consistent application of the grievance policy and the importance of providing a grievance outcome within a reasonable time and right of appeal.

Employment Judge Lewis on 22 December 2017