EMPLOYMENT TRIBUNALS

Claimant: **Ms R Roberts**

Respondents: **(R1) Cash Zone (Camberley) Ltd**
(R2) Mr J Cullen

Heard at: **Reading** **On: 3-5 April 2013**

Before: **Employment Judge R Lewis**
Members: Mrs RA Watts-Davies and Mr MJ Selby

Representation:
Claimant: Mr P O'Callaghan, Counsel
Respondents: Ms R Morton, Counsel

JUDGMENT

1. The unanimous Judgment of the Tribunal is:

1.1 The Claimant did not have continuity of service to complain of unfair dismissal, and her claim of unfair dismissal fails.

1.2 The Claimant's claim of harassment on grounds of age is upheld. The first Respondent is ordered to pay to her compensation for injury to feelings of £2,000.00 and interest of £14.76, a total award of £2,014.76.

1.3 The Claimant's other claims of age discrimination, including that of dismissal on grounds of age, fail and are dismissed.

1.4 The Claimant's claim of harassment on grounds of sexual orientation is upheld. The Respondents are ordered to pay to her compensation for injury to feelings of £750.00 and interest of £3.72, a total award of £753.72.

REASONS

Procedural matters
These reasons were requested by Counsel at the conclusion of the Hearing.

1. By a Claim Form presented on 22 June 2012, the Claimant raised a number of complaints arising out of her employment and her dismissal from it.

2. By a lengthy response, Mr Cullen on behalf of both Respondents raised issues as to the identity of the Respondent and denied all allegations.

3. A Pre-Hearing Review took place on 19 October 2012, following which matters were clarified and the Judgment of Employment Judge Chudleigh was sent to the parties on 5 November 2012. That identified the issues. In the event, the claim of wrongful dismissal was not pursued before us. In paragraph A7, the Judge ordered particulars of the Claimant's complaints of direct discrimination and harassment.

4. The Claimant's solicitors submitted particulars on 2 November, which represented a disciplined presentation of the discrimination claims.

5. At this Hearing, it was agreed that the statements of all witness would be taken as read. The Claimant's case was heard first. The Claimant gave evidence and called one additional witness, Ms Jennifer Rowsell, a former employee of a Cash Zone company, who is also the Claimant's partner. The witnesses on behalf of the Respondent were Ms Abigail Peters, formerly shop manager; the second Respondent Mr Cullen, and Mr Peter White, currently employed as shop manager.

6. There was a substantial bundle, and in the event it was necessary for us to read only a very modest part of the papers. In the course of the second day of Hearing, an issue arose as to the log of the alarm of the premises where the Claimant worked. A printout was produced overnight, which we hoped would lead to a simple and agreed summary of the facts as to the Claimant's punctuality. It did not. Very early on the third day it became apparent that production of the document might give rise to a lengthy diversion rather than a neat shortcut, and we therefore declined to allow the document to be admitted at that stage.

Factual summary

7. The factual matrix might usefully be summarised. Mr Cullen has an interest in a number of companies which have the words 'Cash Zone' in their title. Although these companies undertake some minor retailing work, their primary role is financial. They operate as pawnbrokers, loan companies, cheque encashers and the like. The Claimant, who was born in May 1993, started work at the Bracknell Cash Zone company on a Saturday job. She was appointed to the Camberley company as shop supervisor in July 2011, a post from which she was dismissed in April 2012. She complained of unfair dismissal, asserting continuity of employment running since the start of the Saturday job. She alleged that she had been harassed on grounds of her age, directly discriminated against on the same grounds, and dismissed on grounds of age. She made one discrete allegation of sexual orientation discrimination.

Continuity of employment

8. We deal first with the continuity of employment issue. Our material findings were the following:-

8.1 For a number of years until July 2011, the Claimant had a Saturday job, working at a shop in Bracknell, which was run by a company called Cash Zone (Bracknell) Ltd. When she left that company, she was issued with a P45. She started employment with the first respondent on 18 July 2011 and was issued with a contract of employment, giving July 2011 as a start date (43).

8.2 The Bracknell company was owned 50% by the first Respondent and 50% between Mr and Mrs Saunders, who managed it.

8.3 The Camberley company, which was 50% owner of the Bracknell company, was 100% owned by Mr Cullen.

8.4 Mr Cullen had interests in a number of Cash Zone entitled companies. His evidence was that each company operated independently, and that he played no part in the management or employment practices of the Bracknell company, but left those matters entirely in the hands of Mr and Mrs Saunders. As he was in effect sole beneficial owner of the Camberley company, he played a greater role in managing its affairs, but delegated day to day responsibility to managers.

9. The Claimant, at time of dismissal, had less than 10 months' service with the first Respondent. The only avenue through which she could qualify to bring a claim of unfair dismissal would be by the aggregation of that service with her previous service with the Bracknell company. That would depend on her being able to rely on section 218(6) of the Employment Rights Act 1996, which in turn would depend on whether the two companies were associated employers. Section 231 provides:

> "Any two employers shall be treated as associated if one is a company of which the other (directly or indirectly) has control, or both are companies of which a third person (directly or indirectly) has control"

10. In the factual matrix above, control could only be established if it were shown that the Camberley company had control of the Bracknell company, or if Mr Cullen had direct or indirect control of both.

11. Ms Morton on behalf of the Respondents produced four authorities on the point, which were Zarb v British and Brazilian Produce Company, 1978 IRLR 78; Hair Colour Consultants Ltd v Mena 1984 IRLR 386; South West Launderettes Ltd v Laidler 1986 IRLR 305; and Payne v Secretary of State 1988 IRLR 352; the latter two being authorities from the Court of Appeal.

12. Ms Morton drew to our attention that although each case had slightly different facts, the Mena case was closest in factual matrix to the present, in that that Claimant had first worked for a company owned 50% by Daniel and then moved to a company 85% owned by Daniel. She submitted that the burden of the authorities was that control could only be established if there were more than a 50% shareholding. The circumstances of a 50% shareholding had arisen in the Mena case, as recorded in the head note:

"The majority considered that a 50% shareholding in a company gave voting control because it gave rise to a "negative control" in that the wishes of the person or persons holding the remaining 50% of the shares could be thwarted on a vote"

13. That view, which was that of the majority in the Industrial Tribunal, was rejected by the EAT, the head note being summarised:-

"Unless there is a holding of more than 50% of shares in a company, there is no control. Contrary to the view taken by the Industrial Tribunal majority in the present case, that definition of control does not extend to "negative control" so as to mean that a person who has a 50% shareholding has control because he can thwart the wishes of the person or persons holding the remaining 50%. If negative control was permissible in this context, then where two people each have 50% of the shares in the company, they would both control it. The language of the statute is inconsistent with there being two controllers at the same time."

14. In reply, Mr O'Callaghan relied heavily on paragraph 18 of the Judgment of Lord Justice Balcombe in Payne, stating,

"I would accept tht normally voting control is the issue ... I would not wish ... to say that in *no* circumstances can any other matters be relevant. Suffice it to say that whereas undoubtedly voting control is the usual and normal test, exceptionally there may be (and I go no further than this) other circumstances to be taken into account."

15. Mr O'Callaghan submitted that there were three exceptional circumstances of which we had heard evidence in this case. One was that evidence was given that Ms Peters had been employed by the Bracknell company, but also worked in the Camberley company. One was that a financial arrangement known as TPE was available to all the different Cash Zone companies operated by Mr Cullen personally. One was that Mr Cullen had in correspondence and in his witness statements referred to a number of employees of a number of Cash Zone companies as "my employees".

16. The last point seemed to us no more than a slackness of language. Many proprietors and owners refer to "my staff" in a general sense. We do not think the point went any further. The issue as to Ms Peters seemed to us to help the respondent more than the claimant. It was common ground that although employed by the Bracknell company, Ms Peters had worked part time at the Camberley company. We thought it a significant indication of the separation of the organisations that the Bracknell company invoiced the Camberley company for her time. The TPE arrangement was described to us by Mr Cullen as a financial facility which he operated personally and which any one of the Cash Zone companies had independent discretion to use. It was no more than a pooling of a resource.

17. Mr O'Callaghan's difficulty was that while two of these three points were indications of a pooling of resource, and no more, they seemed to us to come nowhere near the sort of exception indicated by Lord Justice Balcombe, and not at all to address the logical problem that where share ownership is split 50/50, the logic of the negative control analysis (which states that 50% control is sufficient) is that there can be two controllers simultaneously.

18. We find that the test of associated companies is not met by the Bracknell and Camberley companies. We therefore find that the continuity of the Claimant's employment was broken when she moved from the Bracknell company to the Camberley company.

19. The effect of our Judgment is that the Claimant could not acquire unfair dismissal rights until re-qualifying after July 2011. In our judgment, the Claimant's continuity of employment at time of dismissal ran from 18 July 2011 to 16 April 2012 and on that basis the claim for unfair dismissal was struck out.

Age discrimination

20. We now turn to the claim of age discrimination, which was at the heart of this case. We summarise as follows. The Claimant was 18 years old throughout her period of employment. She submitted that her age was the subject of constant hostile, demeaning and belittling remarks, and that she was repeatedly patronised in the workplace. She complained both of harassment on grounds of age through Ms Peters and Mr Cullen, and of discrimination in dismissal.

21. We preface our findings with one important matter. In November 2012 the Claimant's solicitor served particulars (ordered by Judge Chudleigh) which set out a concise summary of a claim of age discrimination. In her witness statement, the Claimant went far beyond the particulars, and it was evident that she prompted Counsel at this Hearing to pursue yet more matters, some of them no more than every day grievances. As we observed a number of times during the Hearing, the Claimant was confined to the contents of the November 2012 particulars, and it was not the function of the Tribunal to adjudicate on unpleaded workplace grievances, no matter how strongly the Claimant might feel about them.

22. We find as follows:-

22.1 The Claimant's employment as a Saturday employee at the Bracknell Cash Zone had proceeded satisfactorily. She had formed a good relationship with Mr and Mrs Saunders, for whom she also worked as a babysitter.

22.2 A vacancy arose for store supervisor at Camberley. Mr and Mrs Saunders put the Claimant's name forward to Mr Cullen as a candidate. Mr Cullen interviewed a number of candidates. The Claimant had in her favour the fact that Mr and Mrs Saunders recommended her, and that she had some experience of the Cash Zone business at Bracknell.

22.3 At the time of interview, the Claimant had just turned 18 and her CV (294A) showed that she had almost no work experience apart from at Cash Zone. We find that Mr Cullen had legitimate concerns, based not on the Claimant's chronological age, but on her relative inexperience of the world of work, and of dealing with potentially distressed members of the public. There was some conversation

about those issues at interview. The Claimant convinced Mr Cullen to give her a job and a chance. Mr Cullen agreed to do so.

22.4 We reject the suggestion that Mr Cullen appointed the Claimant with reservations, and it seemed to us entirely logical that had Mr Cullen been pre-disposed to discriminate against the Claimant at that stage on grounds of age, he would not have appointed her at all.

22.5 The Claimant took up the post at Camberley on 18 July. We note, as background matters of general interest, that there were only one or two people in the outlet at any one time; that it paid low wages; and that the Respondents had every interest in the Claimant succeeding quickly in the new job so that she could work on her own, work in accordance with procedures. They had no interest in having to replace her or in her or in her failing.

22.6 Although we were shown a number of schedules relating to the Claimant's work on a weekly basis, it does not seem to us useful to deal with those matters in that level of detail. Her immediate supervisor, trainer and line manager was Ms Peters. Ms Peters was described in evidence by Mr Cullen as the best manager he had ever known or worked with. We find that those words were genuinely meant. She was a task-driven leader, and we had no doubt as to her effectiveness. She was employed by, and based at, Cash Zone Bracknell, and worked part time.

22.7 Ms Peters was tasked with the initial training of the Claimant. This involved rigorous induction into a large number of rigid procedures. The first Respondent dealt with cash and with significant amounts of money. It dealt with gold. It was required and regulated in such a manner as to demand adherence with procedures, and it placed high value on maintaining accurate paper records of transactions. It was a crucial part of the Claimant's training that she be trained in these matters and that she absorbed the value of accurate, reliable and timely record-keeping.

22.8 Mr Cullen had operated the business for a number of years, and he had two major training tools. The first was the training manual, which was a manual of procedures retained in the Camberley office. There was dispute between the parties as to whether or not such a document existed in Camberley and we find that it did. We are confident, having heard Ms Peters and Mr Cullen give evidence, that in light of the importance which they attached to adherence to procedures, they would have ensured the presence of written procedures in the office for which they were responsible. We accept that the manual may have required to be updated. We find that Ms Peters from time to time issued the Claimant with copies of procedures to retain in a personal training folder.

22.9 If and to the extent that the Claimant complained that she was inadequately trained, as a general complaint, or on grounds of age,

we reject that complaint. We find that adequate and appropriate paper training materials were available to her.

22.10 The second training technique relied upon by the first Respondent was more troublesome. Ms Peters and the Claimant were both part time and rarely overlapped at work after the first two weeks or so. Ms Peters' means of addressing this were that when she was acting store supervisor at Camberley in the Claimant's absence, she would create a Word document at the start of the day, and as the day progressed, add notes on it about matters which required attention when the Claimant returned to the shop. These notes would then be left for the Claimant to attend to the following day.

22.11 Ms Peters gave evidence that that was how she had been trained. Mr Cullen gave evidence that this had been an effective training tool in the past. While we accept that evidence, it does not follow that this was an appropriate training tool for everyone, or that everyone would respond to it.

22.12 We find that in general Ms Peters was not tolerant of, or patient with, the shortcomings of others or of the Claimant. We accept her evidence that she perceived things go wrong for the Claimant from about November 2011 onwards.

22.13 The bundle contained a significant quantity of the notes prepared by Ms Peters, between 3 August 2011 and 31 March 2012 (49-140 inclusive).

22.14 We do not in this Judgment propose to set out a detailed chronology of what the notes deal with. A number of general themes arise. Their style is informal to the point of unprofessionalism. They repeatedly refer the Claimant to specific events, procedures and transactions, and repeatedly draw to her attention specific errors and omissions; the tone varies and is occasionally personalised and at times suggestive of desperation, with large portions in capital letters, large font, extended words, and lines of question marks and exclamation marks.

22.15 The note of 19 December 2011 (106) contains what were described to us as swear words: the words "Christ's sake" appeared twice, "God's sake" once, "pissed off" once, and "crap" once. The Claimant's written objection to this language produced the following in a note of 20 December: "The last set of notes was the only ones that had swear words on it and I apologise for that." (111).

22.16 The Claimant said in evidence that pages 49-140 were not the documents which she was given by Ms Peters but redacted copies, from which had been removed obscenities and references to her age, such as the phrase *"fucking teenager"*. Ms Peters and Mr Cullen denied this. They referred the Tribunal to correspondence which appeared to indicate that the Claimant and her solicitors had been invited to consider the original documents on the computers at the

first Respondent's premises, in order to test the properties of the documents (which would show the date(s) upon which they had last been amended). This had in fact not taken place.

22.17 There was evidence that in one endeavour to train the Claimant, Ms Peters had asked her to bring back to the office all the notes which Ms Peters had given her, but that the Claimant said in reply that the notes had been thrown away.

22.18 We do not accept the Claimant's contention that the bundle copies were not copies of the true documents. We noted that if, as the Claimant alleged, the documents had been redacted to render them less unprofessional, much more would have been removed from them than was. Secondly, if the documents had been redacted to remove swear words, some had been left in place. Thirdly and most significantly: If the documents were redacted so as to create false documents for use in proceedings, the Respondents in doing so were taking the risk that the Claimant would be able to produce the original document (whatever she had said had happened to it) and thereby open up an unanswerable challenge to the Respondents of having altered a document or documents with a view to misleading the Tribunal. That seemed to us an incalculable risk which neither Mr Cullen nor Ms Peters would contemplate.

22.19 The Claimant alleged that the notes were false in basis, and that she was capable of doing the job, and that any mistakes or omissions were due to lack of training. We fear that the Claimant's reliance of this evidence may have in part reflected her own misunderstandings to the role of the Tribunal. It is not our role to form any view as to whether or not she was in fact competent to undertake her duties and we decline to do so.

22.20 However, we accept Ms Peters' evidence, which was that the notes are a truthful reflection of her sincere analysis and opinion of the shortcomings of the Claimant, given over a period of time and in the light of her involvement in the training and supervision of the Claimant. In so saying, we note the consistency of the notes over time, their repeated references to past training, their repeated references to specific identifiable customers and events, and the very considerable effort of time which their production demanded.

22.21 Mr Cullen visited the Camberley premises about twice a week. We accept that he often was left with concern about the Claimant's work and working behaviour when he did so. In particular he gave cogent evidence that despite repeated requests, the Claimant failed to maintain the proper standard of cleanliness at the premises.

22.22 Ms Peters gave evidence that she reported her difficulties in bringing the Claimant to an acceptable level of performance to Mr Cullen and began to suggest that he had made a poor appointment. She gave evidence that she was frustrated by Mr Cullen's refusal to act on the matter. Mr Cullen gave evidence that in response to Ms Peters'

comments, he made a terrible mistake and buried his head in the sand, hoping that in time things would click and the Claimant would suddenly become competent. That did not happen, and the tone of Ms Peters' notes became increasingly irate and frustrated. We sympathise with Ms Peters in her frustration and with Mr Roberts in being on the receiving end of the frustration, when in fact what both were frustrated by was Mr Cullen's failure to act on the information placed in front of him by a trusted and competent subordinate.

22.23 Although Ms Peters' view was that the Claimant should be dismissed before Christmas 2011, matters in fact did not come to a head until the Claimant went on holiday in the first two weeks of April 2012. By that time, Ms Peters had told Mr Cullen that she was actively thinking of other employment. Mr Cullen asked Ms Peters in the Claimant's absence to undertake a thorough audit and investigation at Camberley, as a result of which Ms Peters produced an impressive report (223) setting out an analysis of what she had found, and pointing to repeated errors and omissions on the part of the Claimant. Mr Cullen read the report. He accepted it, partly because he trusted Ms Peters' judgment, and partly because it accorded with his own observation of the Claimant.

22.24 On 16 April, the Claimant returned from holiday. She was immediately asked into a meeting with Mr Cullen, which was noted by Ms Peters. Although Mr Cullen said that the purpose of the meeting was to investigate the report and hear the Claimant's side of things, he decided in light of the Claimant's responses that she should be dismissed at once, and she was dismissed at the meeting.

22.25 We find that the Claimant was not told in advance in writing about any investigatory or disciplinary meeting; not told that she was at risk of dismissal; not advised of her right of accompaniment; not given papers in advance; not given any or sufficient time to take advice or prepare for the meeting; and not advised of any right of appeal. In reply to a direct question from the Tribunal, Ms Morton submitted that the requirements of fairness embodied in section 98(4) of the Employment Rights Act 1996 had been met.

22.26 We find that the reason for dismissal was that Mr Cullen accepted and relied upon Ms Peters' analysis, which was in turn based upon her genuine view of the Claimant's shortcomings. We do not consider that consideration of the Claimant's age fell into Mr Cullen's consideration whatsoever. In our view a shop supervisor of any age of whom Ms Peters had written the same report based on the same analysis would have been dismissed in the same circumstances.

22.27 Although we heard submissions on contribution, we could form no view. We were not convinced that the Claimant's conduct had been blameworthy, as opposed to a matter of incapability arising out of unblameworthy factors. It did however seem to us that the Claimant's position was irretrievable, given the view of her incapability and its irretrievable nature formed by Mr Cullen and Ms Peters by that stage.

We are confident that a properly conducted disciplinary procedure would at most have run for four weeks, and would inevitably have led to the same outcome.

22.28 We do not accept that the performance management matters raised in the period July 2011 to April 2012 by Ms Peters in any way related to the Claimant's age. We find that they were matters based on Ms Peters' genuine belief in the Claimant's poor performance and incapability. Any claim of age discrimination which relates to any of those matters fails.

22.29 We now turn briefly to discrete issues which arose in evidence. There was evidence that when Mr Cullen came to the Camberley store, he might on occasion have what he in office terms called a *"little chat"* with the Claimant. The purpose of these in Mr Cullen's evidence was to have a one to one about the Claimant's work. We accept that while the Claimant may have found this a stressful experience, there was no element of age discrimination in them, and we do not accept that as alleged Mr Cullen referred to the Claimant's youth in a belittling or demeaning manner in these conversations. Mr Cullen, like Ms Peters, was task-driven. We accept his evidence that his concern was to have work performed, and he was not interested in the protected characteristics of the performer, so long as she was up to the job.

22.30 We heard evidence about an incident on 23 March. Mr Cullen gave evidence that the Claimant repeatedly failed to clean up after herself. Ms Peters gave evidence that the Claimant was seriously at fault in maintaining the cleanliness of the office. The Claimant alleged that Mr Cullen had taken a bin out on 23 March and then thrown it at her, nearly causing her injury. Mr Cullen's evidence was that in his frustration at the Claimant's poor office maintenance, he had sarcastically said to her that he would show her how to empty a bin; had emptied rubbish into a bin liner, taken it out, and then made some remark to the effect that that was how a bin was to be emptied. He denied throwing a bin at the Claimant, pointing to the physical imbalance between the two. We accept Mr Cullen's evidence on this point. However sarcastically or irately he expressed himself, we accept that he did not behave towards the Claimant in a manner which was violent or potentially threatening.

22.31 The final matter of age discrimination which that left for our consideration was that it was agreed by Ms Peters that she had on occasion in meetings and in writing referred to the Claimant as a teenager in a disparaging manner; as *"a kid"*; as *"a stroppy kid"*; and had used the phrases *"stroppy little teenager"*, and referred by comparison to her own experience of living with her teenage stepchildren. In evidence, Ms Peters accepted that she had used language to this effect from time to time when she spoke to the Claimant about aspects of her performance which she found particularly frustrating. We accept her denial of having written the words, *"fucking teenager"* and subsequently removed those words from notes which were in the bundle.

22.32 The Claimant complained that the use of this language constituted harassment on grounds of age. This part of the case caused us the most anxious consideration. We preface our findings by stating how in principle we approach this claim.

22.33 It may, at first glance, seem counter intuitive to award compensation to a Claimant whose complaint is that she was called a 'teenager' at a time when she was in fact 18 and therefore in her teenage years. The word 'teenager,' like the words 'middle aged' may have more than one usage. It may be a neutral, objective description of a numerical or chronological fact. Examples might be, *'In England, some teenagers have the right to vote,'* or *'Some doctors regard a man of 55 as middle aged.'*

22.34 An alternative usage may express a subjective value judgment, often pejorative, and often related to stereotypical behaviour. (It is not material whether the stereotype has any foundation in fact, either generally or individually). Examples could include, *'My son is 25 but behaves like a teenager,'* or *'He's too middle aged to be creative director of this business.'*

22.35 The word 'kid' is more problematical, because it does not have an objective numerical value, and it may be used more as slang than a mainstream word. Like the word 'child' it may have a descriptive usage (*'Kids go half price'*) or a judgmental usage (*'This employee's behaviour was just childish.'*)

22.36 We find that when Ms Peters referred to the Claimant's age, it was always in the latter senses. She did not, by use of that language, identify any objective, work-related failing which she wanted the Claimant to put right. She said 'kid' or 'teenager' to criticise the Claimant for behaviour which she associated with those words. In doing so, she treated the Claimant in accordance with a stereotype which was related to the protected characteristic of age.

22.37 This claim was brought under the provisions of section 26 of the Equality Act 2010, when read with sections 4 and 5. Section 26 provides so far as material:

> "(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 in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

22.38 It was helpful to be referred to Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 336. We noted, when considering the matter, that that claim was decided under a different definition of harassment

from that which now applies. That said, we find the approach set out at paragraph 17 to be useful. We have found as a fact what words were spoken. We secondly find that the speaking of the words constituted unwanted conduct on the part of the first Respondent. The third Richmond question is changed by the Equality Act 2010 and we follow the language of section 26 by asking the question, was the conduct related to a relevant protected characteristic, and we find that it was. It was, in context, related to the protected characteristic of age. We separate the fourth Richmond question into two. We entirely accept that the words were not used with the purpose of causing offence. We then ask whether the words had the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We have regard to the need to strike the right balance between not fostering a culture of hypersensitivity on the one hand, and not appearing to gloss over unacceptable uses of language on the other. In our judgment, the effect of the words, whatever their intention, was to use personalised language in a managerial setting to belittle the Claimant. They had the effect of creating a hostile or offensive environment.

22.39 Finally, we ask whether the words should reasonably be considered as having that effect in all the circumstances, including the perception of the Claimant, and we have no doubt in finding that they should. We repeat what is said in the last sentence of the previous sub paragraph.

22.40 The Claimant gave evidence that she was upset, and the notes which she sent occasionally in reply to Ms Peters indeed did refer to her sense of upset. We consider the appropriate award to be £2,000.00. For the purposes of the interest calculation we take the date of contravention to be 1 December 2011 and the interest calculation is 3p per day for 492 days. This portion of the award is made against the first Respondent only.

22.41 The factors which lead to the award at this level are that this was not a single event, but a series of events. It was not a casual piece of conversation in the workplace, but it related to the performance of work, and it originated with the line manager in the performance of line management duties. The Claimant had felt sufficiently concerned about it to record her sense of upset in writing.

Sexual orientation discrimination

23. We now deal briefly with the claim of sexual orientation discrimination.

23.1 The Claimant is gay, and Ms Rowsell, who had been employed by the Bracknell company and gave evidence, has been her partner for some time.

23.2 We were taken to some evidence by the Claimant of background allegations against Mr Cullen alleging homophobic events. Although these were not pleaded heads of claim, and arose only as

background, we have not upheld any such allegation. We accept that the Claimant's sexuality was known at all material times to Ms Peters and Mr Cullen. It was common ground that the Claimant and Ms Rowsell had been to at least two parties at Mr Cullen's home and had stayed overnight after one party in a guest room. It was common ground that Mr Cullen had rented a rental property to them. It was common ground that when Ms Rowsell was studying for university exams, Mr Cullen permitted her the use of the Camberley office when the Claimant was working there as a quiet space and to use the computer. We accept that taken together these matters indicate that Mr Cullen was not generally homophobic, or in any way hostile to the Claimant and Ms Rowsell as a couple.

23.3 The sole allegation of sexual orientation discrimination which was pleaded was summarised in the Claimant's particulars as follows:-

"On 30 March 2012, the Claimant's colleague, Ms Peters, was testing gold in the store. Such tests require the use of a small amount of acids. Ms Peters spilled some acid onto the upper thigh of her trousers and showed the Claimant what had happened. Mr Cullen, who was aware that the Claimant was homosexual, stated to Ms Peters "Oh be careful, you may get Ray excited". The Claimant felt embarrassed and humiliated at this remark and contends that it amounts to direct discrimination and/or harassment on the grounds of her sexual orientation".

23.4 Mr Cullen agreed with this summary of events, and that he had made the remark, and in evidence expressed his regret at what he called his stupidity in doing do.

23.5 We accept that Mr Cullen made the remark as an attempt at humour. We accept that he and Ms Peters laughed, and that the Claimant either smiled or laughed, even if she was not amused. We do not fault her for not reacting in any other way.

23.6 We find that the Claimant was uncomfortable when the remark was made, and went out to have a cigarette. Shortly afterwards, Mr Cullen, realising that something was amiss, went to speak to her and made some remark to the effect that he hoped that she had not been offended. The Claimant did not engage in confrontation with him, and said that she had not been, although she told us, and we find, that she had been hurt and upset by the remark.

23.7 We apply to this event the same analysis as that set out above in relation to the claim of harassment on grounds of age, and we do not repeat what is said there. We find that this remark amounted to unwanted conduct. It was not made with the purpose of the statutory effect but it did have that effect, in that it violated the Claimant's dignity and created an intimidating environment for her at the workplace. We find that it was plainly related to the Claimant's sexual orientation, and we find that it was reasonable that the remark had the statutory effect, in all the circumstances.

23.8 In so saying, we find that the circumstances at that time were the following. The event took place within the last weeks of the Claimant's employment and we accept the Claimant's dating of it in late March 2012, a time when she was failing in her employment. Her working relationship with Ms Peters was uncertain and unhappy. As between the Claimant and Mr Cullen, there was plainly an imbalance of power, both economic and physical (Mr Cullen in evidence repeatedly referred to himself as 6ft 3in, in comparison with the Claimant's slightness). Although the Claimant had not concealed her sexuality from her colleagues, it was common ground that she had never spoken about it or volunteered it as an issue. She had never consented to it being a general topic of conversation or humour.

23.9 In upholding the claim, we then go to consider the appropriate award. The event was a single event. The Claimant did not complain of it at the time. To his credit, Mr Cullen attempted to make good for it at the time. We have regard to the observations in Dhaliwal about the necessity to balance the rights engaged. Our award is £750.00 for injury to feelings. For these purposes, the date of discrimination was 30 March 2012. We calculate interest at 0.5% per day for 372 days at £3.72. This award is made against both Respondents.

Unfair dismissal

24. As the qualification point was not taken as a preliminary issue, the Tribunal heard full evidence on the claim of unfair dismissal including remedy. In the absence of jurisdiction, it is not necessary for us to give full findings on those matters. However, having heard the oral evidence, it seems to us fair and in the interests of finality to state at least in outline what our findings would have been, if we had accepted jurisdiction to decide the claim of unfair dismissal. We would have found as follows:-

24.1 The Claimant's dismissal on 16 April 2012 was unfair, because of a deliberate failure to abide by any one of the basic requirements of a fair procedure. Having regard to Mr Cullen's experience as an employer, and evident access to professional advice, there would have been an award of uplift at, or approaching, the maximum for failure to abide by any slightest shred of the ACAS Code of Practice.

24.2 Applying the Polkey approach, we would have found that the Claimant's entitlement to a compensatory award was extinguished after 4 weeks, which we would have taken as the period necessary to institute and complete a fair disciplinary and dismissal procedure. We were however in no doubt, having heard Mr Cullen's evidence, that the Claimant's position was irretrievable, and that her employment could not have been saved.

24.3 Although Ms Morton invited us to make findings as to contribution, we considered ourselves unable to do so, and no such finding is made. We were in considerable doubt as to whether we could find that the Claimant had contributed through blameworthy conduct, as opposed to the occurrence of other matters.

Employment Judge R Lewis

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 APRIL 2013

M Keep

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS