EMPLOYMENT TRIBUNALS

Claimant:	**Ms C. Southgate**
Respondent:	**Toni & Guy (Romford) Ltd**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**6-7 August and 18 September 2020**
Before:	**Employment Judge Massarella**
Members:	**Mrs G. Forrest** **Mr D. Ross**

Representation

Claimant:	In person
Respondent:	Ms H. Cristofoli (Area General Manager)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's claims of unauthorised deduction from wages (holiday pay and expenses) and breach of contract (notice pay) are dismissed on withdrawal;**

2. **the Claimant's claims of harassment related to sexual orientation are not well-founded, and are dismissed;**

3. **the Claimant's claims of direct discrimination because of sexual orientation are note well-founded and are dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

Background

1. By a claim form presented on 30 September 2019, after an ACAS early conciliation period between 31 July 2019 and 29 August 2019, the Claimant complained of sexual orientation discrimination. The claim form also referred to claims for notice pay and holiday pay.

2. The claim form was presented one day out of time, and the case was listed for a preliminary hearing, to decide whether it should be allowed to proceed. That hearing took place before Employment Judge Burgher on 24 February 2020. The Judge extended time in relation to all the allegations relating to the Claimant's employment at Toni and Guy Romford Ltd. No claims in relation to the Claimant's time at Toni and Guy Brentwood were permitted to proceed.

3. By a Notice sent to the parties on 5 March 2020, the case was listed for hearing on 6 and 7 August 2020. Because of the Covid-19 pandemic, the Tribunal wrote to the parties on 16 June 2020, listing a short preliminary hearing, to discuss how the case should proceed; that took place on 17 July 2020 before Employment Judge Gardiner.

4. The Respondent did not attend, and the Judge recorded that the Respondent had not complied with Employment Judge Burgher's orders, in relation to preparation of the bundle and exchange of witness statements. He ordered the Respondent to provide an urgent explanation as to why it had not cooperated with the Claimant to prepare the case, why it had not complied with previous directions, why it appeared not to be engaging with the Tribunal's attempts to contact it in relation to preliminary hearings, and to indicate whether it still intended to defend the claim. The Respondent wrote on 21 July 2020, stating that it had not received the Notice of the preliminary hearing, as it had been sent to the wrong email address.

5. The Claimant complied with the Tribunal's directions and served documents and statements on the Respondent by the due date.

The hearing

6. The Claimant and the Tribunal both received the Respondent's bundle for the first time on the day before the hearing. The Respondent had included a section in the bundle, which appeared to summarise its witnesses' evidence. Ms Cristofoli told the Tribunal on the first day that she had not realised the witnesses would be required to attend. The Claimant had not understood that the requirement to produce witness statements included a statement for herself; she thought it referred to other witnesses she intended to call.

7. Although some progress had been made at previous hearings in clarifying the issues, in respect of a number of the allegations the alleged discriminator was not identified, and no particulars were given of the act complained of.

8. Given the state of preparation generally, the Tribunal spent the rest of the first morning clarifying the issues and explaining the requirements in terms of witness statements. The parties confirmed they would be able to produce and exchange witness statements that day, and send them to the Tribunal by the end of the afternoon, to enable us to begin hearing evidence on the second day. A further day was listed to complete the evidence, and for the Tribunal to hear submissions and deliberate. Judgment was reserved.

9. The Respondent is an independent company. It owns two salons, in Romford and Colchester, and is a franchisee of the Toni and Guy brand. It is owned by Ms Charlotte Spearing. Ms Cowlbeck bought shares in the company, and the company was relaunched as C & C Hairdressing Ltd. The Respondent had informed the Tribunal in correspondence that Toni and Guy Romford Ltd 'ceased trading' on 11 November 2019. In response to questions from the Tribunal, Ms Cristofoli accepted that, according to Companies House, the company was still active, and would be liable for any compensation, should the Claimant succeed in any of her claims. The Claimant subsequently wrote to Companies House, asking it to maintain Toni and Guy Romford Ltd on the register, pending the outcome of these proceedings. Ms Cristofoli also gave an undertaking on the Respondent's behalf that no steps would be taken to wind the company up before the conclusion of these proceedings.

10. The Claimant confirmed that she was no longer pursuing claims for unpaid expenses, holiday pay or notice pay, and they were dismissed on withdrawal.

11. We had a 74-page bundle of documents. For the Claimant, we heard evidence from the Claimant herself; from her mother, Mrs Lorraine Southgate; from Mr John Allen and Mrs Wendy Allen; and from Ms Sharon Tarr. We also had a statement from Mrs Joan Southgate, the Claimant's grandmother, who was not called, because the Claimant did not consider it appropriate to do so.

12. For the Respondent we heard evidence from Mrs Chelsea Lucas (née Cowlbeck); and from Ms Jodie Scaddan and Mr Iain Fixter (both stylists in the Romford salon).

13. Although not professional advocates, both the Claimant and Ms Cristofoli presented their cases with clarity and courtesy, and we were grateful to them for their assistance. We also record that the Claimant showed dignity and self-possession in the manner in which she participated in these proceedings, which, in part, related to very personal matters.

The issues

14. The issues were clarified on the first day, as follows.

Direct discrimination: s.13 Equality Act 2010 ('EqA')

1 The Claimant claims that she was less favourably treated than other apprentices, namely Ms Naz Begum and Ms Connie Carter, because of her sexual orientation, in the following respects.

1.1 (A) On occasions, Ms Scaddan and Ms Cowlbeck hardly spoke to the Claimant in the staff room at lunchtime; they excluded her.

(B) Ms Cowlbeck did not show the Claimant how to use the till. In mid-May, around two weeks before the termination of her employment, the Claimant made a mistake at the till, and gave a refund of around £30 by the wrong method to a client. The Claimant was working with a stylist, Ms Demi Newington, on that day. She spoke to Ms Cowlbeck and offered to make good the sum out of her own money, but Ms Cowlbeck refused, became angry, and held the incident against the Claimant.

1.2 She was unsupported, unlike her comparators, by Ms Cowlbeck and Ms Scaddan throughout the whole period of her employment in Romford, from 13 November 2018 onwards. When the Claimant asked either colleague for advice on a hair tint or a specific haircut, or to be shown something she was unsure of, they were disinterested and unhelpful towards her, whereas they would happily help and assist the straight apprentices.

1.3 Ms Cowlbeck repeatedly criticised the Claimant for not bringing models in to work on throughout her employment.

1.4 When the Claimant did bring models in to work on, Ms Cowlbeck did not allow her to work on them: specifically, Mr John Allen on 22 March 2019, and Ms Sharon Tarr on 31 May 2019.

1.5 Ms Cowlbeck terminated the Claimant's employment, unlike her comparators.

Harassment related to sexual orientation: s.26 EqA

2 The Claimant relies on the following matters as unfavourable treatment.

2.1 Allegation 1.1 (A) and (B) above are repeated;

2.2 In early May 2019, Ms Cowlbeck asked the Claimant whether hairdressing was the right thing for her to be doing, shortly before she terminated her employment.

2.3 Ms Scaddan, in whom the Claimant confided, constantly pressured her to come out making her feel uncomfortable at work;

(A) from around February 2019 onwards, when the Claimant and Ms Scaddan were on the same shift, Ms Scaddan would give her a dirty look, would look at what she was wearing, and comment that she looked like a lesbian;

(B) in around February 2019 in the staff room at the Romford salon, Ms Scaddan asked the Claimant if she was gay, and advised the Claimant to come out and tell other staff that she was gay.

2.4 Ms Scaddan laughed at the Claimant in around April/May 2019.

2.5 In around April 2019, Ms Scaddan told the Claimant that she could tell that she was gay by the way that she acted and presented herself, and that she walked like a man; she said that her mannerisms meant that others could tell that she was gay.

The law to be applied

Direct discrimination because of sexual orientation

15. S.13(1) EqA provides:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.**

16. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

17. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

18. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

19. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan per* Lord Nicholls at 513).

20. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

21. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here sexual orientation.

22. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls questioned the need for a two-stage approach, particularly in cases where no actual comparator was identified:

> **'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.**
>
> **The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'**

<u>Harassment related to sexual orientation</u>

23. Harassment related to sexual orientation is defined by s.26 EqA, which provides, so far as relevant:

> **(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.**
>
> **(5)The relevant protected characteristics are—**
> **[…]**
> **sexual orientation**

24. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered (in the context of race discrimination) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

25. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

Findings of fact and conclusions

26. The Claimant, who is gay, was employed by the Respondent as an apprentice hairdresser. She started her apprenticeship at Toni and Guy Brentwood Ltd, where she worked from October 2017 until November 2018. She was undertaking an NVQ in professional hairdressing. Alongside her practical work, she also studied English and maths GCSE; she did her academic work online.

27. The Claimant then transferred to the Respondent's Romford salon, which Ms Cowlbeck managed; she commenced work there on 13 November 2018. According to the Claimant, this was because she experienced adverse treatment at Brentwood; such allegations were not within the scope of this case.

28. The funding for the apprenticeship was arranged through an organisation called Total People. On the evidence we heard, Total People was not involved in the conduct of the apprenticeship. The Claimant's NVQ trainer was Ms Emma Mattock, who was based in the Respondent's Colchester salon. Ms Mattock came to the Romford salon on a monthly basis to review the Claimant's progress.

<u>Harassment related to sexual orientation - 2.3(A) - Ms Scaddan, in whom the Claimant confided, constantly pressured her to come out making her feel uncomfortable at work; - from around February 2019 onwards, when the Claimant and Ms Scaddan were on the same shift, Ms Scaddan would give her dirty looks, would look at what she was wearing and comment that she looked like a lesbian;</u>

<u>Harassment - 2.3(B) - in around February 2019 in the staff room at the Romford salon, Ms Scaddan asked the Claimant if she was gay, and advised the Claimant to come out and tell other staff that she was gay;</u>

29. The Claimant believed that she told Ms Scaddan that she was gay in around February 2019. She alleged that Ms Scaddan had been pressurising her to

come out before she confided in her, saying that she knew that she was gay. We are not satisfied that Ms Scaddan pressurised the Claimant to come out. We found the Claimant's evidence on this to be inconsistent: on the one hand, she said that that they got on well and that she felt she could confide in Ms Scaddan; on the other hand, she claimed that she felt uncomfortable confiding in her. We note that the Claimant's mother, Mrs Lorraine Southgate, thanked Ms Scaddan on more than one occasion for looking out for the Claimant.

30. As for the allegation that Ms Scaddan gave the Claimant 'dirty looks' and commented adversely on what the Claimant was wearing, saying that it made her 'look like a lesbian', again the Claimant's evidence was inconsistent. In her initial description of the alleged incident, she said that Ms Scaddan commented on the clothes she wore to work; that is also the way that the allegation is put in the list of issues. It then emerged during the Respondent's evidence, that all the apprentices wore the same uniform to work: black trousers/skirt and a Toni and Guy branded top. The Claimant confirmed that she came to work in her uniform, rather than arriving in her own clothes and changing.

31. The Claimant's case then shifted, and she alleged that Ms Scaddan made the comments in relation to her dress on her trial day, when she had worn her own clothes. Given that striking inconsistency, the Tribunal is not satisfied that Ms Scaddan made the critical remarks, as alleged, or that she gave the Claimant 'dirty looks', an allegation so vague that it would be difficult to uphold in any event.

32. We find that the Claimant chose to confide in Ms Scaddan about her sexuality in February 2019, because they had a friendly relationship. They had a further conversation some time after that, in which Ms Scaddan expressed the view that, if the Claimant did choose to come out to other colleagues, she was confident that no one would think anything of it. There was then a third conversation, which the Claimant did not mention in her evidence, in which the Claimant asked Ms Scaddan's advice about her personal life. We find, on the balance of probabilities, that in all these conversations Ms Scaddan behaved appropriately and supportively. If she had not done so - for example if she had put pressure on the Claimant in relation to her sexuality early on - we think it unlikely that the Claimant would have sought her advice on the third occasion.

33. For these reasons, allegations 2.3(A) and 2.3(B) fail on their facts: the alleged treatment did not occur.

<u>Direct discrimination - 1.2 - The Claimant was unsupported, unlike her comparators, by Ms Cowlbeck and Ms Scaddan throughout the whole period of her employment in Romford from 13 November 2018 onwards. When the Claimant asked either of them for advice on a hair tint or a specific haircut, or to be shown something she was unsure of, they were disinterested and unhelpful towards her, whereas they would happily help and assist the straight apprentices.</u>

34. The Claimant's original case, as recorded in the list of issues, was that she was subjected to discrimination because of her sexual orientation from the outset, in November 2018. When the timeline was clarified with her at the beginning of the hearing, she acknowledged that no one within the Respondent organisation knew about her sexual orientation until February

2019. The Claimant was asked in cross-examination how any negative treatment before February 2019 could be because of her sexuality; she was unable to explain, and accepted that she had no complaints about the way she was treated before February 2019.

35. The Claimant alleged that Ms Cowlbeck and Ms Scaddan failed to support her, by giving advice or help with specific techniques. She alleged that Ms Cowlbeck was disinterested, and that this was because of the Claimant's sexuality.

36. Ms Cowlbeck was primarily a manager, not a trainer. Ms Olivia Lovegrove was responsible for training new stylists. Ms Mattock was responsible for overseeing the Claimant's training as a whole. Other stylists, including Mr Fixter, occasionally oversaw particular haircuts.

37. The Claimant said in cross-examination that Ms Cowlbeck consistently encouraged her fellow apprentice, Ms Begum, when on the shopfloor and that her witness, Ms Sharon Tarr, observed this when she attended the salon as a model. Ms Tarr only attended the salon on the last day of the Claimant's employment. She made no reference in her witness statement to seeing any difference in treatment by MS Cowlbeck of the Claimant and other apprentices; it was only in her oral evidence, having heard the Claimant's evidence, that she said she had observed the Claimant being ignored; she made no reference to observing Ms Cowlbeck encouraging Ms Begum. We found Ms Tarr's evidence on this issue to be contrived.

38. Despite being given several opportunities to do so, the Claimant was unable to give specific examples of ways in which Ms Cowlbeck's disinterest manifested itself, and the Tribunal was not satisfied that this conduct occurred.

39. There is also a more fundamental problem in relation to the Claimant's allegations of discrimination against Ms Cowlbeck: Ms Scaddan's evidence was that she treated the information about the Claimant's sexuality as confidential, and did not tell any other member of staff that the Claimant was gay, including Ms Cowlbeck. We note that the Claimant at no point suggested in her evidence, nor did she put to Ms Scaddan, that any other member of staff (including Ms Cowlbeck) had mentioned her sexual orientation to her. We find that this is consistent with Ms Scaddan's evidence, and we accept that she maintained confidentiality.

40. The Claimant accepted that she herself did not tell Ms Cowlbeck about her sexuality; she merely 'suspected' that Ms Scaddan had told her. Ms Cowlbeck was adamant that she knew nothing about the Claimant's sexual orientation until these proceedings were issued. We accept Ms Cowlbeck's evidence on this issue: there is simply no evidence, beyond the Claimant's bare suspicion, to rebut it.

41. Given these findings, insofar as there was any difference in Ms Cowlbeck's treatment of the apprentices, we conclude that the Claimant's sexual orientation played no part in it. For these reasons, insofar as allegation 1.2 is made against Ms Cowlbeck, it fails.

42. Insofar as this allegation is made against Ms Scaddan, she had an allergy to bleach, and never took part in any training sessions which involved colouring.

The Claimant's criticism of Ms Scaddan is as generalised as it is against Ms Cowlbeck. The Claimant was asked in cross-examination why she did not raise a grievance against Ms Scaddan. She explained that she did not know what a grievance was; when that was clarified, she stated that she was afraid to do so. She said that she did speak to Ms Mattock, and told her how she was feeling. When pressed as to what exactly she had told Ms Mattock, she acknowledged that she had disclosed her sexuality, but had not alleged any discrimination; crucially, she had not mentioned Ms Scaddan at all.

43. Given the absence of any contemporaneous complaint, the lack of specific details in relation to this allegation, and our findings above about Ms Scaddan's supportive approach to the Claimant, the Tribunal is not satisfied that the Claimant has proved that Ms Scaddan behaved towards her in an unhelpful or disinterested fashion.

44. For these reasons, we conclude that the alleged conduct did not occur, and allegation 1.2 also fails against Ms Scaddan.

Direct discrimination and harassment - 1.1(A) - On occasions, Ms Scaddan and Ms Cowlbeck hardly spoke to the Claimant in the staff room at lunchtime; they excluded her.

Harassment - 2.4 - Ms Scaddan laughed at the Claimant in around April/May 2019,

Harassment - 2.5 - in around April 2019 Ms Scaddan told the Claimant that she could tell that she was gay by the way that she acted and presented herself, and that she walked like a man; she said that her mannerisms meant that others could tell that she was gay.

45. Again, the Tribunal was struck by the fact that these allegations lacked any specificity. The Claimant was unable to identify any particular occasion on which the alleged exclusion at lunchtime occurred. Ms Scaddan and Ms Cowlbeck denied that it occurred at all.

46. As for Ms Cowlbeck, even if it did occur, we conclude that it was not because of/related to the Claimant's sexuality, because Ms Cowlbeck did not know about it. Accordingly, allegation 1.1(A) fails in respect of her.

47. As for Ms Scaddan, it emerged in the course of her oral evidence that, far from ostracising the Claimant, there were occasions when she went out for lunch with the Claimant. Ms Scaddan gave details of where they went: initially to a Chinese restaurant, where the Claimant was unable to find anything that she could eat, and then to Gingham Kitchen. The Claimant denied that this had happened. The Tribunal was struck by the confidence and precision of Ms Scaddan's account, and we believed it.

48. When probed about the allegation that Ms Scaddan laughed at the Claimant in around April/May 2019, the Claimant explained that Ms Scaddan 'would say something indirect about my sexuality and then would laugh about it'. Neither the specific occasion, nor the words allegedly used by Ms Scaddan, were identified. The Tribunal cannot uphold a serious allegation of discrimination based on such scant, and generalised, evidence.

49. Turning to the allegation that Ms Scaddan commented inappropriately on the way the Claimant walked and acted, Ms Scaddan adamantly denies it. The Claimant made no record of it at the time, nor did she report it to anybody. Even in her account to the Tribunal, there was a lack of clarity as to when it occurred, indeed whether all of the alleged statements were made on the same occasion, or on different occasions.

50. We are simply not persuaded that Ms Scaddan, who struck us as someone who had approached the Claimant's discussions about her sexuality in a supportive fashion, would then behave towards her in such a hostile fashion on later occasions.

51. We conclude that the Claimant has not discharged the burden on her to show that Ms Scaddan's conduct complained of in allegations 1.1(A), 2.4 and 2.5 occurred. Accordingly, these claims fail on their facts.

Direct discrimination and harassment - 1.1(B) - Ms Cowlbeck did not show the Claimant how to use the till. In mid-May, around two weeks before the termination of her employment, the Claimant made a mistake at the till, and gave a refund of around £30 by the wrong method to a client. The Claimant was working with Ms Demi Newington on that day. She spoke to Ms Cowlbeck and offered to make good the sum out of her own money, but Ms Cowlbeck refused, became angry, and held the incident against the Claimant.

52. On an occasion in around mid-May, the Claimant gave a refund to a customer. She took the cash out of the till, rather than processing the refund through the computer. She confirmed that a colleague, Ms Demi Newington, was present, but the Claimant did not ask her to help, because she was busy, and she did not want to disturb her. The Claimant did not speak to Ms Cowlbeck on the day; Ms Newington spoke to Ms Cowlbeck on the phone, and explained what had happened. The Claimant saw Ms Cowlbeck the next day. At one point in her evidence the Claimant described Ms Cowlbeck's reaction to the incident as 'aggressive', but then adjusted this to 'not very calm' and 'uptight'. We find that Ms Cowlbeck was displeased, but did not react inappropriately.

53. We accept Ms Cowlbeck's evidence that none of the apprentices were trained on the till. The Claimant did not have authority to give a refund, and she followed the wrong procedure. To her credit, the Claimant offered after the event to reimburse the money herself, but Ms Cowlbeck declined the offer.

54. Rightly or wrongly, this incident appears to have played a significant part in Ms Cowlbeck's subsequent decision to terminate the Claimant's apprenticeship. However, we conclude that Ms Cowlbeck's reaction cannot have been motivated by considerations of sexual orientation, because she did not know the Claimant was gay. Accordingly, allegation 1.1(B) fails. Further, the Tribunal was satisfied that the sole reason for Ms Cowlbeck's irritation - which was no more than that, and certainly would not have satisfied the statutory test for harassment - was that the Claimant had made quite a serious mistake.

Direct discrimination - 1.3 - Ms Cowlbeck repeatedly criticised the Claimant for not bringing in models for her to work on, throughout her employment.

Direct discrimination - 1.4 - When the Claimant did bring models in to work on, Ms Cowlbeck did not allow her to work on them: specifically, Mr John Allen on 22 March

2019, and Ms Sharon Tarr on 31 May 2019.

55. Apprentices were encouraged to introduce people to the salon, who could act as models for them, as they developed their skills. The Claimant alleged that Ms Cowlbeck repeatedly criticised her for not bringing enough models in, and then did not allow her to work on them, when she did bring them in.

56. Ms Cowlbeck accepted that she did criticise the Claimant for not bringing in enough models. The Tribunal found her evidence on this issue unsatisfactory. The impression given was that the onus was on the apprentices to bring in models. However, in answer to questions at the beginning of her oral evidence, Ms Cowlbeck confirmed that there was no shortage of models, that indeed the Respondent had a register of models, and had access to models through other means, including its own social media presence.

57. Furthermore, the Claimant was able to show that she did bring in models, albeit some of them were related to her. In around March/April 2019, the Claimant's grandmother, Mrs Joan Southgate, was a model for her; and on 22 March 2019, Mrs Wendy Allen was a model for her.

58. On 25 April 2019, the Claimant's mother Mrs Lorraine Southgate was a model for the Claimant. The Claimant accepted that Mr Fixter provided her with guidance on that occasion. She was happy with the level of training provided to her. She makes no allegation of discrimination against him. Mrs Southgate also attended a Toni and Guy competition with the Claimant on 28 April 2019.

59. In around April 2019, Mr John Allen attended the salon in Colchester to model for her, not the salon in Romford. The Claimant accepted that it cannot have been Ms Cowlbeck (who was not working in the Colchester branch), who prevented her from working on Mr Allen.

60. On 29 May 2019 (the Claimant's last day of employment) Ms Sharon Tarr attended the Romford salon to be a model for the Claimant. It is right that Ms Cowlbeck did not permit the Claimant to work on her. However, we find that there was an entirely innocent explanation for that: it was a day set aside for colour training; Ms Tarr had not had a skin test (which was the Claimant's responsibility to arrange), and so her hair could not be coloured.

61. Notwithstanding some inconsistency in the Respondent's evidence, allegations 1.3 and 1.4 fail, because we have already found that Ms Cowlbeck did not know that the Claimant was gay. Insofar as Ms Cowlbeck criticised the Claimant with regard to models, or prevented her from working on models, there was no evidence from which the Tribunal could reasonably conclude that the Claimant's sexual orientation played any part in that criticism.

Harassment - 2.2 - In early May 2019, Ms Cowlbeck asked the Claimant whether hairdressing was the right thing for her to be doing, shortly before she terminated her employment.

62. Ms Cowlbeck accepted that, at a meeting in early May, which is documented in notes (albeit in a fairly minimal way), she asked the Claimant whether hairdressing was the right career for her. We are satisfied that she made the remark because she had concerns about the Claimant's commitment to the work, and thought it right to query with her whether this was really the career

that she wanted to pursue. It was an innocent enquiry, not a challenge, as the Claimant characterised it.

63. At this meeting Ms Cowlbeck told the Claimant that she needed to bring in more models, and needed to improve. This was a verbal warning, although Ms Cowlbeck did not warn the Claimant that she was at risk of dismissal.

64. Again, we are satisfied that the remark cannot have been related to the Claimant's sexual orientation, because Ms Cowlbeck did not know about it. Even had that not been the case, we conclude Ms Cowlbeck's conduct, although critical of the Claimant, did not begin to approach the statutory test for harassment: there was no evidence that it had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, either subjectively or objectively. Accordingly, allegation 2.2 fails.

Direct discrimination - 1.5 - Ms Cowlbeck terminated the Claimant's employment, unlike her comparators.

65. There was some lack of clarity as to when exactly the Claimant was told that her apprenticeship would be terminated. The Claimant accepted that it must have been on 29 May 2019. We accept the Claimant's evidence that Ms Cowlbeck brought up the mistake she had made with the refund, told her that she was not putting enough effort in, and informed her that she was going to dismiss her. Ms Cowlbeck said that she could either leave that day, or the following day. The Claimant said that she would leave the same day.

66. Again, we conclude that the decision to dismiss the Claimant cannot have been because of her sexual orientation, because Ms Cowlbeck did not know the Claimant was gay. There was no evidence from which the Tribunal could reasonably conclude that considerations of sexual orientation played any part in the decision. For that reason, allegation 1.5 fails.

Conclusion

67. For the reasons given above, the Claimant's claims of sexual orientation discrimination are not well-founded, and are dismissed.

68. The Tribunal considers it important to record that, had this been an unfair dismissal claim (which, of course, it was not), the Tribunal would have had serious concerns about the fairness of the dismissal. The fact that an employee has not accrued unfair dismissal rights does not excuse an employer for failing to observe some basic norms of fair treatment, even if only as a matter of good practice, rather than legal obligation.

69. The Claimant was a young woman at the beginning of her professional career, who appeared to be unfamiliar with the usual processes available within the workplace, including the ability to bring a grievance, if she had concerns about her experience at work. The Respondent must take responsibility for this. They seem to have done little to inform or educate her in this respect. Indeed, we were struck by the apparent absence of the usual management/HR processes within the Respondent organisation.

70. If the Respondent had concerns about the Claimant's progress, she was not given an appropriate opportunity to improve. The notes of the warning, to which we were taken, indicated that she would have three to four months to improve, yet she was dismissed two weeks later.

71. Nor is there any indication that, at that meeting, Ms Cowlbeck made what most employers would regard as routine enquiries, especially with a young/inexperienced employee, as to whether there were any underlying issues, which might be affecting her performance, or her ability to progress at the speed expected of her by the Respondent.

72. We accept the Claimant's evidence that, when she was invited to the meeting at which she was dismissed, she was given no warning that the meeting concerned such a serious subject. No notes were taken of the dismissal meeting, which seems extraordinary in the circumstances, given the Claimant's youth, and the serious consequences to her professional development of the termination of her apprenticeship, so close to its completion.

73. There was not even a letter, setting out the reasons for dismissal. Of course, the Claimant had no statutory right to such a letter but, had the Respondent approached the matter in a more considered way, or even just taken some care to explain its reasoning to the Claimant in a sensitive manner, she may not have felt so aggrieved, and these proceedings may not have been necessary.

Employment Judge Massarella
Date: 9 December 2020