EMPLOYMENT TRIBUNALS

Claimant: **Ms J Jones**

Respondent: **Tesco Stores Limited**

Heard at: **Bristol** **On: 19 and 22 to 25 May 2017**

Before: **Employment Judge Livesey**
Mr A J Flemming
Mrs E Burlow

Representation
Claimant: Mr Howells, the Claimant's partner
Respondent: Mr O Holloway, Counsel

JUDGMENT having been sent to the parties on 1 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim form dated 24 June 2016, the Claimant brought complaints of constructive unfair dismissal, discrimination on the grounds of sex, breach of contract, unpaid holiday pay and unlawful deductions from wages.

2. The evidence

2.1 We heard oral evidence from the Claimant and Mr Howells, her partner. On behalf of the Respondent, we heard from Mr Bolton, a Transport Team Manager ('TTM'), Mr Legg, another TTM, Mr McKenzie, Transport Manager and Mrs Dowding, a former People Manager.

2.2 We received the following documents:

- C1; a supplementary hearing bundle supplied by the Claimant;
- C2; the Claimant's written closing submissions;
- R1; the hearing bundle;

2.3 We also read the witness statement of Mr Smith, a friend and former colleague of the Claimant, whose evidence was not challenged by Mr Holloway on behalf of the Respondent.

3. The Issues

3.1 It was clear from an examination of the background to the proceedings that the Tribunal had struggled to identify the issues which the Claimant had wanted to be determined. The further and better particulars that had been supplied on 22 September, 28 October and 31 October 2016 seemed to have done more to perplex than to clarify. Many of the allegations which had been included within the table of 31 October had not been made within her original claim form and they were ultimately not proceeded with when the matters were discussed at the Case Management Preliminary Hearing which took place on 12 December 2016 (see paragraphs 22 and 23 of Employment Judge Pirani's Case Management Summary).

3.2 The issues had been discussed at four Case Management Preliminary Hearings between 8 September 2016 and 24 March 2017 and had been recorded as follows:

3.2.1 In relation to the complaints of discrimination on the grounds of sex, there were complaints of direct discrimination which were set out between paragraphs 26 (i) and 26 (iv) of the Case Management Summary of 12 December 2016 which had been extracted from the table of allegations which appeared at pages 58 and 59 of the bundle which was before the Employment Judge at that hearing;

3.2.2 There was a further complaint of victimisation under s. 27. The protected acts were said to have been the Claimant's grievance and her grievance appeal dated 13 August and 21 November 2015 which were in the hearing bundle R1 at pages 88 A-B and D-E respectively. Mr Holloway accepted that they were protected acts. The alleged detriment had been the issuing of a final written warning on 2 March 2016.

3.2.3 In relation to the complaint of constructive unfair dismissal, the implied term of mutual trust and confidence was relied upon and the breaches were said to have been the complaints of detriment under ss. 13 and 27 (see paragraph 27 of the Case Management Summary of 12 December 2016). The Respondent did not attempt to assert that any dismissal under s. 98 (4) had been fair (see paragraph 12 of the Case Management Summary of 8 September 2016);

3.2.4 The breach of contract complaint related to the Claimant's notice;

3.2.5 In relation to the unpaid holiday pay claim, the Claimant alleged that she was owed 1½ days (see paragraph 18 of the Case Management Summary of 8 September 2016);

3.2.6 There were said to have been three complaints of unlawful deductions from wages which had been identified within paragraphs 13-16 of the Case Management Summary of 8 September 2016.;

(a) A period of eight days alleged unpaid contractual sick pay;

(b) An alleged £50 Fleetboard prize;

(c) Turnaround bonus.

3.6 It was important to note that there were no complaints of harassment under s. 26 and that the Respondent did not seek to rely upon the statutory defence under s. 109 (4)

4. The hearing

Exclusion of documents

4.1 At the start of the hearing, the Claimant raised concerns that four new documents had been produced by the Respondent for inclusion in the bundle; notes taken by Ms Brown dated 26 February 2016, and email from Miss Tollett dated 6 April 2016, the Claimant's letter to the Respondent's CEO dated 26 March 2016 and a letter to the Claimant from Miss Brown dated 7 April 2016. Although the Claimant had no objection to the inclusion of the last two within the hearing bundle, she maintained that she had never seen the first two and that, even though they had been redacted by the Respondent, they were 'top heavy', which we understood to mean that she felt they painted an unfair picture of the events following the redactions, particularly since the authors were not being called by the Respondent as witnesses.

4.2 Mr Holloway explained that the documents had been redacted to conceal matters which had been without prejudice, but it was not clear to the Tribunal whether, even in their redacted form, they complied with s. 111A of the Employment Rights Act which prevented us from receiving evidence not only about any offers that might have been made, but about any discussions that might have been held to that end, in relation to the complaint of constructive unfair dismissal.

4.3 Mr Holloway made the point that s. 111A did not apply to complaints of discrimination, but the complaints of victimisation and direct discrimination in the case did not concern the Claimant's resignation but, rather, the issuing of a final written warning. We expressed disquiet that the issue had not been raised before, particularly as a Case Management Preliminary Hearing had been held on 24 March to resolve issues over the hearing bundle, yet the issue had not been raised.

4.4 We were not prepared to admit them into evidence because we were not satisfied that, even in their redacted form, they complied with s. 111A, because the Claimant was clearly upset about their inclusion without the authors having been present for her to cross-examine, because they had been produced so late and because their relevance to any other issues was unclear.

4.5 Since the third and fourth document fell into the same category as the first and second, the parties then agreed that they should not have been put before us either. Further, the Claimant accepted that pages 87 and 91 of her supplemental bundle, C1, were documents of the same type. We had not seen or read them and they were also removed before we did so on with the parties' agreement.

Claimant's further disclosure

4.6 During the course of the Claimant's evidence, it became clear that she possessed further relevant documents which concerned issues of remedy but which may also also have been relevant to the reason for her resignation. We ordered that they were produced and some further disclosure was made during the hearing and added to the bundle, R1, at pages 208 and 209.

5. The facts

5.1 We reached our factual findings on the balance of probabilities and we attempted to confine them to matters which were relevant to a determination of the issues. That point needed to be stressed because there was a significant amount of peripheral material that was presented to us.

5.2 Any pages numbers within these Reasons are to pages within the bundle R1 unless otherwise indicated and have been cited in square brackets.

The Respondent

5.3 The Respondent is a well known supermarket chain and the events in this claim concerned its Avonmouth Distribution Centre (the 'Avonmouth DC') near Bristol, which covers the south and west of England and Wales.

5.4 At the material time at Avonmouth, there were a total of eleven TTMs, who included Mr Legg and Mr Bolton, most of whom had been drivers before they had become managers. Above them in the management structure was the Transport Manager, Mr McKenzie. There were approximately 220 drivers, only four or five of whom were women.

5.5 The routes which drivers completed were calculated centrally by software which the Respondent and other logistics companies use called Paragon. Once a route was created, the DC locally allocated a driver to it. At Avonmouth, the local union agreement dictated that drivers would not have been allocated routes with calculated lengths of more than eleven hours. Within each driver's cab there was an on-board system called Microlise which tracked and recorded the driver's journey and fed information back to the DC about it.

5.6 In terms of the Respondent's human resource or personnel function on site, there was one dedicated member of staff on site, Mrs Dowding. Above her was a Stream Manager, Ms Brown.

5.7 Amongst the Respondent's policies, we were referred to;
- Disciplinary Policy [70-2], although the first page was apparently from the union's version of it;
- The Drivers Out of Hours Policy [73];
- The Security Guidelines for Parking Off Site [74].

We have referred to extracts from those policies below where necessary.

5.8 Oddly, no Equality Opportunities Policy was produced to us, nor was evidence lead about the extent to which managers or employees were trained on such matters.

The Claimant

5.9 The Claimant was employed from January 2011 as a Large Goods Vehicle Driver. Her work was governed by the rules relating to limits on drivers' hours which included a 15 hour maximum driving shift. Tachograph rules also limited her driving time.

5.10 The Claimant's line manager had been Ms Dodd, one of the TTMs, until June 2015, when it became Mr Legg.

6.3 Like other drivers, the Claimant regarded some of the routes that she was allocated as having been unrealistic. Due to delays, breakdowns and other unforeseen events, there were occasions when drivers run out of hours whilst partway through a route. In such circumstances, the Claimant accepted that the expectation was generally that a driver would have obtained a lift back home or to the DC by taxi and a relief driver would have recovered the vehicle. Alternatively, a driver would try to book into a hotel or they would sleep or take a rest on board until the rules allowed them to drive again.

6.4 A driver was also governed by the Respondent's Security Guidelines [74], particularly the final two paragraphs, and its Out of Hours Policy [73] in such circumstances;

> "*All Drivers', should they be nearing their maximum Daily Driving time, 1 hour to go, and will not make it back to their Distribution Centre will make all efforts to contact the Transport Office and inform them of the situation. The Transport Office will make the decision to go and meet the Driver at a suitable reference point allowing the Driver to return to the Distribution Centre without contravening their EU Drivers Hours Regulations 561/2006EC.*
> *All Drivers', should they be nearing their maximum Road Transport (Working Time) 2005 12 hours into their Working day and will not make it back within their 15 hour maximum Working day will make all efforts to contact the Transport Office and inform them of their situation. The Transport Office will make the decision to go and meet the Driver at a suitable reference point allowing the Driver to return to the Distribution Centre without contravening the Road Transport (Working Time) 2005 Regulations.*
> *An investigation will be required if the Driver has deliberately not been in contact with the Transport Office in good time due to unforeseen circumstances whilst out on the road.*"

5.11 On two occasions prior to the material events, the Claimant had previously run out of hours because of breakdowns. On the first occasion, she had booked herself into a hotel. On the second occasion, she was picked up by Mr Howells, her partner and colleague, and taken home.

The Fleetboard Prize

5.12 A Fleetboard score was a score produced by a vehicle's recording system which reflected how smoothly it was driven.

5.13 In late 2014, Mr McKenzie decided to award £50 of his own money to the driver with the best Fleetboard score. A male driver had been the first winner. Mr McKenzie was, however, criticised for having established the prize because the unions on site felt that it was not good for morale for those who did less well. He did not award any further prizes. It appeared that, on more than one occasion after the financial prize had been cancelled, the Claimant achieved the best Fleetboard score.

5.14 It was clear that the Claimant's driving had been broadly regarded as excellent ([78] and page 3 of C1), but it was also clear that the prize was

withdrawn because of union pressure before she had achieved the best score.

Background evidence regarding Mr Rees

5.15 The Claimant asserted that she had been harassed by Mr Rees, a Shunter. Amongst other things, he had sent explicit photographs of himself to her. In September 2014, she raised a complaint against him which was treated as a grievance. At a meeting in which her complaint was discussed, she admitted to having sent images of herself to him. Mrs Dowding formed the view that the Claimant and Mr Rees had been in a relationship which had ended and that her complaint had been provoked by the fall-out from the end of their relationship.

5.16 The Claimant pursued her complaint to a further hearing, which seemed to have been regarded as an appeal, in 2014. At the start of 2015, things seemed to have quietened down until March when she raised further allegations against him. In April, Mr Rees was interviewed again but denied any recent contact with the Claimant.

5.17 On 21 May, the Claimant's complaints ultimately resulted in an outcome letter from Ms Brown (C1, pages 27-8). A number of things were offered to her; she was given the option of moving to the Magor DC which she did on a trial basis, before subsequently returning to Avonmouth. She was also offered counselling through the Respondent's Occupational Health Department, which she declined. She was also given the option of having her shifts changed so as to avoid overlap with Mr Rees and it appeared that that that was put into effect, as was the Claimant's desire to have undertaken longer shifts to prevent her from returning to the DC so often. The Claimant was also offered a new manager, which was when Mr Legg became her new TTM.

5.18 The Claimant made further allegations against Mr Rees in the latter part of 2015, including that he had deliberately driven his truck at her. Mr Williams, an external Manager, considered those allegations and reviewed the evidence, which had included CCTV footage. He dismissed the complaint. We were invited to draw inferences of discrimination in relation to those events.

Background evidence regarding Mr Chester

5.19 On 19 October 2015, the Claimant alleged that she had been rugby tackled by another colleague, Mr Chester, at work. Mr Chester was interviewed by Mr Legg. He gave a very different account of having hugged the Claimant in the presence of his wife. Mr Legg interviewed more than seven other employees who broadly corroborated Mr Chester's account (C1, pages 39-50) and he concluded that the Claimant had not been violently assaulted or rugby tackled but that Mr Chester's actions had nevertheless not been appropriate.

5.20 What subsequently concerned Mr Smith, who had provided a written statement on behalf of the Claimant, was that Mr Chester did not take the matter seriously and was seen to hug other employees and was known to have started a Facebook page with photographs of the events under the title 'Hug a Troll', which was his nickname (C1, page 77).

5.21 Again, we were invited to draw inferences from that background information.

5.22 We were told that the police had been involved in both issues concerning Mr Chester and Mr Rees but that no formal action was taken in either case.

The training position

5.23 Whilst on a trial at Magor DC, the Claimant applied for a training position. She was not interviewed and she issued a grievance against Mr Powell, who she considered had taken the adverse decision [88A-B]. The grievance, dated 13 August 2015, included allegations of discrimination and was the Claimant's first protected act for the purposes of her claim under s. 27.

5.24 The Claimant's grievance was partly upheld [88G] because it was found that, as an employee who had been on a trial at Magor, she ought to have been interviewed for the job at least, but it was also concluded the failure to do so had not been because of her sex; Mrs Dowding told us that there had been a genuine misunderstanding as to the Claimant's role at Magor (whether she was a transferee or an employee on a trial) and that was the reason why she had not been interviewed.

5.25 The Claimant took her grievance to a second stage on 10 November [88D-E]. She repeated the allegations of discrimination within that email and that was accepted by the Respondent to have been her second protected act. The second stage of her grievance was not completed before the Claimant's ultimate resignation. It had apparently then been in the hands of Mr McKenzie.

The parking issue

5.26 At the heart of the case was an incident which occurred in the early hours of the morning on 18 January 2016, a Monday.

5.27 On 17 January, the Claimant had been given a route into south and west Wales. She delivered to Llanelli then went to Cardigan. She had to be back at Avonmouth DC by 5.00am, having also delivered to Ammanford, because that would have been the end of her maximum 15 hour working day.

5.28 During the early part of her route, she maintained contact with Ms Price, the TTM who was then on duty. Later, she called Avonmouth at 10:20pm before she had reached Cardigan and she told the DC that she was concerned about being late because she had been delayed at Llanelli. That conversation was recorded by her own cab camera and the transcript showed that the new TTM on duty, Mr Bolton, had been keen for her to have made her drops nevertheless and that they would speak later [97]. He was particularly keen that she had gone to Ammanford because it was one of the Respondent's '.com' stores against which certain key performance indicators were measured.

5.29 The Claimant then made her drop at Cardigan and spoke to Mr Bolton again at 1:20am as she was leaving. It was agreed that he wanted her to

continue to Ammanford, knowing that she may have run out of time. There was a general discussion about the possibility of her being picked up from near Chepstow if that happened. Shortly after 1:20am, the Claimant's partner, Mr Howells, also telephoned Mr Bolton and remonstrated on her behalf.

5.30 The Claimant then made her drop at Ammanford. When she was there, she called Mr Howells and arranged to be collected by him at a specific point on her return when she judged that her drivers' hours would have run out because she said that she had realised then that she was not going to have made it back to Avonmouth. She said that that call had been at 3:20am, but she became very hesitant during that part of her account. We were not able to understand how she could have predicted her whereabouts at 5.00am when she had spoken to Mr Howells at 3:20am.

5.31 Crucially from the Respondent's perspective, she did not then, or subsequently, phone Avonmouth DC to arrange to be collected anywhere or to make any plans regarding the possibility of her exhausting her drivers' hours.

5.32 Instead, she proceeded along the M4 and pulled off at junction 23A at Magor. She did not go into Magor Services, where there could have parked free for two hours, nor did she proceed for 1.74 miles to the Respondent's Magor DC in the last five or six minutes that she had left of her driving time ([137] and [119]). Instead, she drove to a lay-by opposite a brewery on a B-road near the village of Magor and she parked her truck facing the direction of on coming traffic.

5.33 The lay-by was shown in photographs within the hearing bundle [184] and the Respondent asserted that it was a bus stop. A bus stop sign had clearly existed there in 2011 [92], but it appeared to have been removed by 2015 [93]. There nevertheless remained a raised kerb for bus passengers.

5.34 Mr Bolton, who had been monitoring the Claimant's vehicle and about a hundred others out on the road via their Microlise data, spotted that she had parked by about 5:30am. He then tried to contact her.

5.35 During her evidence, the Claimant asserted that Mr Howells had contacted Avonmouth on her behalf after she had parked her lorry; that had been alleged in her Claim Form [7], but it was not something which she had repeated in her statement nor was it something which Mr Howells gave evidence about, either in his statement or during his oral evidence. Further, it was not a point which the Claimant had relied on at any stage of the disciplinary process and it was not put to Mr Bolton when he gave evidence. Having considered all of the evidence, we did not conclude that it was probable that such a call had in fact been made.

5.36 The Claimant was then taken home by Mr Howells, who had met her at the lay-by. They went straight back to Chepstow together with the lorry's keys. The Claimant then had two days of rest on the Monday and Tuesday but she dropped the keys into the DC on Tuesday. She then returned to work on Wednesday 20 January. In the meantime, the vehicle had been

recovered from the lay-by having apparently been spotted on the road by another driver and reported to Mr McKenzie.

5.37 On 18 January, Mr McKenzie heard about the events. He emailed all of his TTMs [122-3]. The email read as follows:

> "*Good Evening*
> *I understand that Emily had some issues with her day on Sunday resulting in her having a night out in Magor. The truck was parked up opposite the InBev Brewery on the side of the road – not a legal parking area and half a mile from Magor DC. We have had no communication from Emily at all through the day.*
> *Our plan is to despatch a driver with the spare set of keys to the truck and bring it home.*
> *On Emily's first shift back we need to conduct and investigation into the chain of events.*
> *My concerns are…*
> *1. The amount of time Emily spends at stores wasting time. Please print off the debrief.*
> *2. Why was the truck illegally parked?*
> *3. Why have we had no communication from Emily* [illegible] *was the plan to leave it there for few days?*
> *4. Who did she speak to at the DC?*
> *Without pre-empting anything I am looking for a Written Warning at least for this driver's poor conduct over this event. If anyone has anything to add please let me know asap."*

5.38 Ms Price, who had been the TTM on duty at the start of the Claimant's shift, set out her account of the events in an email back to Mr McKenzie [121-2]. On 19 January, Mr Bolton set out his account in a detailed email as well [120-1].

5.39 On 20 January, the Claimant was then invited to an investigatory meeting [124] but the following day she raised a grievance against Mr Bolton [125]. She alleged that he had failed to consider her circumstances adequately which had given rise to the predicament on 17 and 18 January.

5.40 On 21 January, the investigatory fact finding meeting took place. Mr Legg chaired it, he was not only the Claimant's line manager, but he was the *only* manager who she had been prepared to deal with at the time. He was accompanied by a dedicated note taker and the Claimant was supported by a union representative, Mrs Wall [126-133].

5.41 Mr Legg considered the Highway Code with the Claimant, particularly those parts which related to parking on a road and the need not to have faced oncoming traffic (Rules 239 and 248 [101-2]). The Claimant said that she had been menstruating at the time and that had been the reason why she had needed to get home. Mr Legg asked why she had not called Avonmouth. It was a question that had to be put to her on a number of occasions, but he did not manage to get an answer to it.

5.42 It was clear that the meeting produced new evidence; the Claimant said that Mr Bolton had suggested a pick up at Chepstow when they had spoken earlier on in her shift, but that had not been something which Mr

Bolton had himself described in his email to Mr Legg. She also said that a similar thing had happened to Mr Howells in the past. Mr Legg, however, conducted no further enquiries or investigations into those matters and certainly none that were recorded.

5.43 There was a further, short meeting that took place on 10 February at which the Claimant was simply informed that, based upon what Mr Legg had discovered, the matter was going to have been passed on for consideration under the disciplinary process [139-140]. It had taken some time for the hearing to have been arranged because the Claimant and Mr Legg worked on different shift patterns.

5.44 The Claimant alleged that Mr Legg went through the investigatory meeting minutes with Mr McKenzie before the next step in the process took place. That was firmly denied by Mr Legg and, having considered his evidence, we did not consider it likely to have occurred. It appeared to have been little more than an assumption on the Claimant's part.

5.45 On 11 February, the Claimant was then invited to a disciplinary hearing to face three allegations [141]; that she had parked illegally, that she had left a company vehicle unattended and that she had failed to inform the DC of the situation. She was not provided with anything more than the notes of her own investigatory meeting. She was not given copies of the emails from Mr Bolton and from Ms Price which formed the rest of the investigation which Mr McKenzie had [120-2]. Mr McKenzie also spoke to Mr Bolton before he conducted the disciplinary hearing but kept no record of what he had gathered from that discussion and therefore did not share it with the Claimant before the hearing either.

5.46 The hearing took place before Mr McKenzie on 2 March. Mrs Wall was late and Mr Howells offered to represent the Claimant instead. Mr McKenzie was prepared to wait for Mrs Wall to arrive which she subsequently did. A dedicated note taker was also present [142-7].

5.47 Mr McKenzie was particularly interested in the reason why the Claimant had not used Magor services to stop on the night in question. He considered that the vehicle could have been parked safely and legally and that she could have stayed at the hotel on site or called for a vehicle to have collected her within the two hours of free parking [94]. He was also curious to know why the Claimant had not attempted to get to the Magor DC and was concerned that, instead, she had parked in what he thought was a bus stop and against the flow of traffic at night, which he considered to have been in breach of the Highway Code. He informed the Claimant that he had contacted Monmouthshire County Council who had confirmed that the area was in active use as an bus stop but, again, no evidence was shown to her to that effect, nor did the Respondent produce any to the Tribunal.

5.48 Importantly, the Claimant confirmed that she had not stopped to call Mr Bolton again as she had travelled back along the M4 or as she had neared Magor at the end of her driving time, nor had she done so after she had parked and left the vehicle. She claimed that she had been delayed during her route, particularly at Llanelli, which Mr McKenzie did not take

issue with. It was what she had done at or near the end of her shift which concerned him. The Claimant complained that no compassion had been shown over the fact that she had been menstruating but Mr McKenzie considered that any problems that she had been experiencing could have been addressed at a service station.

5.49 Mr McKenzie decided that the Claimant would receive a final written warning. Once told, she stood up, took of her uniform polo shirt off to reveal another beneath it with a slogan which read "*If you think I'm a bitch, you should see my mother*" and she then went to leave. Mr McKenzie asked her to sit down because the meeting had not ended. She was persuaded to sit down by Mrs Wall. The meeting then concluded and she received confirmation of the final written warning and a note was placed on her file [158-9].

The Claimant appealed on 6 March, in a long letter which contained a number of allegations, including the assertion that she had not parked in a recognised bus stop [160-6]. We did not hear any evidence about the appeal. We understood that there were discussions about which we could not hear, because of which certain documents had been removed from the bundle to which we have already referred. However, it was nevertheless clear that the Claimant resigned with an effective date of termination of 26 March 2016. After the Claimant had gone, Mr Chester was given her old start time of 3:00pm.

5.50 It was worthy of note that, during the entire disciplinary process, the Claimant never alleged that any decision had been taken against her because of her sex or because of the fact that she had committed protected acts.

5.51 The Claimant went straight into other work. She had received an offer to work as a bus driver in 2015 which she had not taken up then and it had lapsed. However, in evidence, she said that she had reapplied for that job after 2 March 2016 and had been successful.

5.52 On the third day of the hearing, the documents to which we have ready referred were produced and they strongly suggested that the Claimant's evidence could not have been right because the letter from First Bus showed that the Claimant must have applied for, been offered and accepted the job all *before* the 2 March 2016 [208]. Neither the Claimant nor the Respondent applied to have her recalled to deal with that apparent inconsistency, despite the possibility having been canvassed with them.

<u>Comparators</u>

5.53 We received evidence about the comparators who were relied upon by the Claimant; Mr Howells, Mr Moore, hypothetical comparators and/or a number of other named drivers (see paragraph 26 of the Case Management Summary [64]).

5.54 In relation to Mr Howells, he stated that he had once run out of hours in 2013 or 2014 and had parked in a lay-by for nearly fifteen hours and had not contacted the DC, yet nothing had been done and no questions had been asked. He said that he had left his vehicle in a lay-by near

Chepstow overnight and that there had been an understanding between and his manager that the lorry would not have been returned until after his rest. Mr McKenzie had known nothing about it when he was asked to deal with that matter in evidence.

5.55 Mr Moore had been referred to in paragraph 26 (iii) of the Case Management Summary [64], but we heard very little evidence about the situation which he had been involved in, save what was contained within four lines on page 9 of the Claimant's statement. Again, there was no evidence that Mr McKenzie had known of the alleged event.

5.56 The Claimant purported to rely upon other male drives in relation to the allegation at paragraph 26 (iv) but there was no evidence given as to their circumstances.

Holiday pay

5.57 The Claimant's statement contained no evidence about that aspect of the case.

5.58 At the end of her employment, the Respondent calculated that she had accrued three days of holiday pay [177-8]. Because she actually left at the end of the financial year, the payment was made as an arrears payment in her May pay slip. There was also a deduction of three days pay to be made because she had not worked for three days which were covered by the last pay slip (16, 17 and 18 March) and so the May pay slip was confusing [178] because it showed a credit of £271.58 for holiday pay ("*ARREARSN*") and a deduction of £271.56 for 25.5 hours which had not been worked, shown as a credit to basic pay. That was evidence that we received from Mrs Dowding.

Turnaround Bonus

5.59 Part of the Claimant's case related to the bonus which was received in line with the Respondent's overall performance which it had considered needed to have been 'turned around' from previous years. The bonus was, however, only paid to those who were actually *in* employment on 23 May 2016 [87-8]. The Claimant, of course, was not employed by the Respondent in May and, according to the Respondent, she was not therefore eligible to have received the bonus. This was also covered by Mrs Dowding.

5.60 Oddly, however, she did receive a final unspecified arrears payment in a later June payslip of £16.26 [181] and a very small payment which was labelled a '*Turnaround Bonus*' payment even though she did not appear to have been entitled to it.

6. Conclusions

Direct discrimination; legal test

6.1 Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

> "*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.*"

The protected characteristic relied upon was sex and the comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

6.2 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(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.*"

6.5 In order to trigger the reversal of the burden, the Claimant needed to show, either directly or by reasonable inference, that the prohibited factor may have been the reason for the treatment alleged. She needed to establish more than a difference in treatment and a difference in protected characteristic before the burden would have shifted. The evidence needed to have been of a different quality, but she did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground. Evidence from which reasonable inferences could have been drawn might have sufficed. Unreasonable treatment of itself was generally a little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference that the Claimant had been treated less favourably than others not of her sex, because of her sex.

6.6 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were however permitted to take into account it's factual evidence at the first stage, but ignore explanations or evidence as to motive within it. If we made clear findings of fact in relation to what had been the allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32).

6.7 When dealing with a number of discrimination allegations, a Tribunal was permitted to go behind the first stage of the burden of proof test and step back to look at the issue holistically and the reasons why something happened (*Fraser-v-Leicester University* UKEAT/0155/13/DM). In the case of *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider the reason why something had happened first before addressing the treatment itself.

<u>Direct discrimination; conclusions</u>

6.8 First, we considered the background information upon which the Claimant relied in an attempt to draw inferences of discrimination in respect of the

later events. The information included the issues which had concerned Mr Rees and Mr Chester and the training position at Magor DC, about which we heard very little. We concluded that, whilst there had been incidents which had arisen between the Claimant and her colleagues which the Respondent had had to address, there was no evidence from which we were able to conclude that its handling of those matters had been discriminatory, which would have been more important for the Claimant to have demonstrated than the behaviour of the other employees themselves.

6.9 It was important to note that Mr McKenzie had had very little to do with those issues yet he was the one who ultimately issued the final written warning about which the Claimant really complained.

6.10 Next, we considered whether inferences could have been drawn from certain aspects of the disciplinary process. Mr McKenzie's email of 18 January could have been read as a snap, pre-emptive judgment in respect of the Claimant's wrongdoing [123-4]. He had accepted in evidence that it could have been worded better and Mrs Dowding clearly sought to distance herself from it. But there were also flaws in the investigatory and disciplinary process which followed, which the Respondent's witnesses had candidly acknowledged. For example, the failure to have provided the Claimant with a copy of Mr Bolton's and Ms Price's email evidence or the enquiries which Mr McKenzie had made with Monmouthshire County Council and/or Mr Bolton. Further, there was Mr Legg's failure to investigate any of the new issues which she had raised with him at the investigatory stage.

6.11 There was ample evidence of poor industrial practice, but we did not consider that the flaws had inferred discrimination on the grounds of the Claimant's sex. We were satisfied that the Respondent's explanation for those flaws had had nothing to do with her sex. It essentially relied upon two arguments; first, that the extent of the investigation was limited because of the extent to which the Claimant had actually challenged the key elements of the allegations which she had faced and, secondly, that the flaws had reflected human error and inexperience, but not discrimination.

6.12 In relation to the first point, the Claimant had not challenged the fact that she had left the lorry in a lay-by on a public road and that she had not contacted Avonmouth after 1:20am to agree a plan for her collection and/or that of her vehicle.

6.13 In relation to the second issue, it was clear that both Mr Legg and Mr McKenzie were relatively inexperienced managers in relation to the application of the disciplinary process. It was also clear that they were not closely guided through that process by Human Resources. We had the clear sense of naïve inexperience, but not of mistakes tainted with malice or discriminatory motive. As Mr Holloway put it in closing, it was a leap too far to infer sex discrimination from the mistakes of busy and inexperienced people in light of the clear misconduct on the Claimant's part.

6.14 We always had to remember that the Claimant actually complained about the issuing of a final written warning, not the process which led to that warning. There had been rational, objective, non-discriminatory reasons for the imposition of that penalty. The Claimant's actions had been contrary to the Respondent's Security Guidelines [74], particularly the final two paragraphs, and its Out of Hours Policy [73], as set out above.

6.15 Critically, it was the Claimant's failure to contact the DC which struck with Mr McKenzie, who had not known any such similar situation in his sixteen years of experience with the Respondent. As Mr Holloway put it in closing, he had issued a final warning because the Claimant had not contacted the distribution centre after 1:20am and had left the lorry on the side of the road and had gone home.

6.16 For the sake of completeness, we have considered each of the allegations of direct discrimination separately within paragraph 26 of the Case Management Summary [64] as follows:

(i) The Claimant was not forced by Mr Bolton to park away from site. The route had initially been calculated by Paragon and the delay had been caused at Llanelli. Mr McKenzie had had nothing to do with it.

As to Mr Howells, we had no evidence that he had been picked up or provided with a hotel in the past as alleged. We were satisfied on the evidence that, if the Claimant had called the DC at or before 4:56am, she too would have been provided with similar assistance. We could not accept that a male comparator, whether hypothetical or otherwise, would have been treated differently in those circumstances;

(ii) On the basis of the evidence that we received, we did not consider that anybody had lied to the Claimant in respect of the Microlise data. She had wanted data as to the telephone calls that had been made from the cab during her shift but the Respondent never produced those records and it consistently maintained that the data did not include such information. Further and far more importantly, there was no dispute that the Claimant had called the DC last at 1:20am;

(iii) Mr Bolton did not "*investigate*" the Claimant's conduct. Mr Legg did, but what the Claimant complained of was the imposition of the final written warning, which Mr McKenzie had been responsible for. We have already dealt with the reasons for that warning and how, in our judgment, it had been issued for no reason related to her sex.

As to the alleged comparator, we heard a limited amount of evidence about Mr Moore but we considered that it described a very different set of circumstances;

(iv) This allegation did not concern the Claimant. We could not see what detriment she suffered after she had left her employment by Mr Chester having gained her old start time. We heard no evidence

as to how her named comparators had allegedly been treated more favourably.

Victimisation; legal test

6.17 Although the Respondent did not dispute the fact that the Claimant had performed protected acts within the meaning of s. 27 (1) in the form of the emails of 13 August and 21 November 2015, it disputed the suggestion that she had been subjected to the detriment complained of because of those acts.

6.18 The test of causation under the section was similar to that under s. 13 in that it required us to consider whether the Claimant had been victimised because she had done the protected acts. We did not apply the 'but for' test; the act had to have been an effective cause of the detriment, but it did not have to have been the principal cause. In order to succeed under s. 27, the Claimant therefore needed to show two things; that she was subjected to a detriment and that it was because of the protected acts. We therefore applied the shifting burden of proof under s. 136 to that test as well.

Victimisation; conclusions

6.19 It will already have been clear from our findings in respect of the final written warning that we considered that it had been issued for non-discriminatory reasons. The same applies under s. 27 since we concluded that it had had nothing to do with the fact that she had made complaints about her colleague's behaviour months earlier. Mr McKenzie was not even asked about that issue during his evidence.

6.20 We were, however, conscious that Mr McKenzie had been tasked with considering the Claimant's grievance appeal and that it was inexplicably delayed, but we were nevertheless of the view that the final written warning had been issued because of her perceived act of misconduct and for no other reason.

Constructive unfair dismissal; legal test

6.21 The Claimant alleged that there had been a fundamental breach of the implied term of mutual trust and confidence. The term was not breached merely if an employer behaved unreasonably. It was, however, if it participated in conduct which was calculated or likely to have caused serious damage to or destroyed that relationship (what has been referred to as the unvarnished Malik test from the case of *BCCI-v-Malik* [1998] 1 AC 20). Breaches must have been serious. The parties were expected to withstand what might have been referred to as 'lesser blows'. One of the more recent approaches to the test in the Court of Appeal decision of *Tullett Prebon-v-BGC* [2011] EWCA Civ 131 was to ask whether, looked at in light of all of the circumstances objectively, the parties' intention had been to refuse further performance of the contract. It was also important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct for it to have been regarded as a fundamental breach of the implied term.

6.22 As to the question of causation, the breach relied upon did not need to have been the only cause of the employee's resignation in order for a claim to succeed. It was sufficient for it to have been *an* effective cause.

6.23 There was no issue that arose in relation to the question of affirmation or in relation to the possible application of s. 98 (4) since the Respondent did not run a positive case in either respect.

Constructive unfair dismissal; conclusions

6.24 The breaches relied upon in this case were the same acts of detriment relied upon under s. 13 (paragraph 27 of the Case Management Summary [65]).

6.25 We did not consider that the first or second of those had been breaches of the implied term for the reasons that we have already given.

6.26 In relation to the fourth, it could not have been a breach which had caused the Claimant to resign because she had already done so before Mr Chester was allocated her start time.

6.27 In relation to the third in the list, the final written warning itself, there had been a reasonable and proper cause for the warning to have been issued and it had not constituted a breach of the Claimant's contract.

6.28 The lingering doubt in our minds concerned the disciplinary process adopted by the Respondent. We might have accepted that, if the Claimant had seen the email of 18 January for example [122-3], she may have lost faith in the process and taken the view that the outcome was predetermined. There were other flaws to which we have already referred and which the Respondent recognised, but they had not been breaches relied upon by the Claimant and neither they, nor the warning itself, had not been the reason why she had resigned in any event since she had already applied for and accepted another job before 2 March [208]. Accordingly, that claim also failed.

Breach of contract

6.29 In consequence of our findings above, the Claimant's claim for breach of contract was also dismissed.

Unpaid holiday pay

6.30 As previously mentioned, the Claimant's statement contained no evidence on the issue. Mrs Dowding's evidence was compelling and unshaken through cross examination. We concluded that no sum was owed in that respect.

Unlawful deductions from wages

6.31 There were three elements to this claim but, again, they had not been covered by the Claimant in her evidence;

6.31.1 Sick pay; there was simply no evidence on that issue;

6.31.2 The Fleetboard prize; the Claimant's evidence itself did not enable us to be satisfied that there was any contractual entitlement to that sum;

6.31.3 Turnaround Bonus; the Claimant had not been entitled to that bonus because she had left the Respondent before May 2016. She did, however, receive a small bonus payment in June, but we concluded that that had probably been an error and not a payment made as a result of any contractual entitlement.

6.32 Accordingly, all claims were dismissed.

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Employment Judge Livesey

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Date 30 June 2017