RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Chifu**

Respondent: **Stratford City Hotels Limited**

Heard at: **East London Hearing Centre**

On: **2, 3 and 4 April 2019**

Before: **Employment Judge Russell**

Members: **Ms K Labinjo**
Ms J Owen

Representation
Claimant: **In person**
Respondent: **Mr S Hoyle (Consultant)**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(1) The claims of discrimination because of sex and/or sexual orientation fail and are dismissed.

(2) The claim of constructive unfair dismissal fails and is dismissed.

(3) The claim of sexual harassment is dismissed upon withdrawal.

REASONS

1 By a claim form presented to the Employment Tribunal on 31 May 2018, the Claimant brought complaints of constructive unfair dismissal and discrimination on grounds of sex and/or sexual orientation and sexual harassment. The Respondent resisted all claims.

2 At earlier Preliminary Hearings, the parties and Tribunal agreed a schedule of 24 issues relied upon by the Claimant. A copy is attached to this Judgment. The Claimant subsequently confirmed that she did not pursue a complaint of sexual harassment in respect of the behaviour of a colleague (whom we shall refer to as Charlie) on 5 October

2017 but maintained her complaint of sexual discrimination in the way in which the Respondent dealt with her complaint about that behaviour. The Claimant relied upon each of the 24 issues as conduct which had the cumulative effect of breaching the implied term of trust and confidence causing her to resign. Broadly, matters relating to her shift pattern, her hours of work and undertaking additional duties without additional pay were relied upon as sex discrimination due to her child care responsibilities. The matters relating to the working relationship, such as not being welcome, supported or properly appreciated were relied upon as discrimination on grounds of sexual orientation in circumstances where the General Manager and Operations Manager at the hotel were gay whereas she is not. The Tribunal considered it appropriate to decide whether each of the issues happened as a matter of fact before then considering whether it was on grounds of sex or sexual orientation and whether it amounted to a repudiatory breach of contract.

3 We heard oral evidence from the Claimant on her own behalf. The Claimant relied upon the written statements of Mr Vasilescu (her husband) and Ms Valkova. The Tribunal read both but as neither statement was signed, we attached little weight to their contents. For the Respondent we heard oral evidence from Mr Nicholas Dubas (Rooms Division Manager), Ms Anker Davidoaia (HR Manager) and Mr Steven Cowie (General Manager). The hearing was listed for three days. At mid-morning on day 2, Mr Hoyle was still cross-examining the Claimant. The Claimant's answers were sometimes long but largely because the question itself was not focussed and sought to re-visit matters already considered. After several warnings and being allowed more time than he had initially estimated, the Tribunal considered it proportionate to require Mr Hoyle to finish his cross-examination by midday so that the Claimant's evidence, after any questions we may have, would finish by lunchtime. To have done otherwise would have resulted in the hearing going part heard with considerable further delay and cost to the parties.

4 We were provided with an agreed bundle of papers and we read those pages to which we were taken in the course of evidence.

Findings of Fact

5 The Respondent operates an apartment hotel facility in Stratford, East London known as Staybridge Suites. It shares a building with Holiday Inn, an associated company providing more traditional hotel accommodation. The Claimant is a mother of two young children, aged 5 and 7 years at the relevant time. She commenced employment with the Respondent on 16 March 2015. Initially working at Holiday Inn, the Claimant was promoted on 12 October 2015 to Guest Services Manager for Staybridge Suites. Mr Steven Adonis, an existing receptionist at Staybridge Suites, also applied but was not successful. Mr Steven Cowie, the General Manager and Mr Nicholas Dubas, then Operations Manager, selected the Claimant as they decided that she was the best candidate for the role. Mr Cowie, Mr Dubas and Mr Adonis are gay.

6 As General Manager for both Staybridge Suites and Holiday Inn, Mr Cowie initially had eight direct reports: operations manager for Staybridge Suites, operations manager for Holiday Inn, HR manager, facilities manager, sales manager, revenue manager, food and beverage manager and accounts manager. From October 2016, the two Operations manager roles were removed and Mr Dubas was promoted to the new more senior position of Rooms Division Manager covering both Staybridge Suites and Holiday Inn. Reporting to Mr Dubas in the rooms division were the Claimant, a night manager covering

both Staybridge and Holiday Inn, a front office manager for Holiday Inn and a Head Concierge. Two were male, two were female (including the Claimant). There was no evidence of their sexual orientation.

7 In November 2015, Mr Dubas issued a rota requiring the Claimant to work the night shift without prior discussion with the Claimant. The Claimant objected, Mr Dubas did not require her to work the night shift. The issue did not arise again.

8 As Guest Services Manager, the Claimant managed the reception staff (including Mr Adonis). Most of her duties were carried out at reception but she was required to carry out some paperwork off the reception desk. On 13 January 2016 the Claimant sent an email to Mr Cowie complaining that she did not have an appropriate office and desk to carry out her paperwork. The Claimant had been unhappy sharing an office with Mr Dubas as it was messy and lacked natural light. Mr Dubas agreed in evidence that as it was shared by up to 10 people, the office probably was messy. The Claimant had by January 2016 been provided with a desk and computer in another office but was unhappy that this office did not have a telephone. None of the previous Guest Service Managers had had their own office; office facilities and computers were shared by the food and beverage and reception staff. Mr Dubas had his own laptop, the Claimant did not. By the time she left, the Claimant still shared an office with colleagues but there is no evidence that she complained about it again.

9 On 25 January 2016 the Claimant complained to the then HR Manager, Mr Androliakos, about a lack of support, citing the deletion by Mr Adonis of a memo ("trace") which she had written. In fact, the working relationship between the Claimant and Mr Adonis was poor. Whilst we did not need to make findings of fact on the Claimant's assertion in evidence that Mr Adonis had planned to steal money from the safe and blame it on the Claimant to get her fired as it was not one of the agreed issues and had not been pleaded, we considered it indicative of the level of dysfunction in their working relationship. The Claimant's case is that Mr Dubas, Mr Adonis and Mr Cowie were a small group of friends united by a shared sexuality and that they wanted her to leave the Respondent. Mr Dubas and Mr Cowie both denied this. The Tribunal preferred the evidence of the Respondent. It is not plausible that Mr Dubas and Mr Cowie would select the Claimant ahead of Mr Adonis in October 2015 only to want to remove her or replace her with Mr Adonis only three months later. Had this been the case, they would simply not have promoted her in the first place.

10 On 27 April 2016, the Claimant sent an email to Mr Dubas expressing concern about her pattern of a late shift followed by an early shift, in part because it conflicted with her childcare and domestic commitments. The Claimant was unhappy that Mr Dubas had told her that this was part of the job and asked him to be empathetic towards her. The issue was discussed by the Claimant and Mr Cowie at a meeting on 28 April 2016. Contemporaneous notes of the meeting show that Mr Cowie was understanding of the Claimant's position but explained that her requests could not always be accommodated as he needed to balance the needs of other working mothers. The Claimant repeated her belief that Mr Dubas was unsympathetic to those with childcare commitments and said that he made her feel that she did not belong there. Mr Cowie asked the Claimant to set out in writing for him what it was that she wanted the Respondent to do. There is no evidence before the Tribunal that the Claimant did so nor any evidence of problems with this shift pattern after April 2016.

11 On 3 June 2016, Mr Dubas told Mr Cowie that the Claimant had left work before the end of her shift, leaving a staff member alone on the 12th floor during a busy period. Mr Dubas had been annoyed that he had to go and collect a late food delivery and upon his return discovered that the Claimant had left work early.

12 At an investigation meeting on 10 June 2016, the Claimant said that her shift had finished and she did not need to tell anyone that she was leaving. The Claimant expressed dissatisfaction with Mr Dubas, suggesting he was always following her and was "pathetic". The Claimant maintained that her timesheet showed her actual, rather than rota'd, times of arrival and departure but, when asked about the timesheet for the week commencing 23 May, accepted that this was completed at the end of the week rather than on the actual day as she should have done. When asked if there was anything else she wished to add, she said that there was not. The Claimant did not state in this meeting that Mr Dubas had told her that she could complete the timesheet at the end of the week or that he told her that there was no problem with lateness so long as notified to the manager on duty.

13 The Claimant was invited to a formal disciplinary hearing to consider two allegations. First, without authority or reasonable excuse, she had arrived late or left early on each of five days in the week commencing 23 May. Second, she had falsified her timesheets. The disciplinary hearing on 15 June 2016 was chaired by Jenny Wieland, the other Operations Manager. The Claimant was advised of her right to be accompanied but chose not to.

14 At the hearing, the Claimant's case was that she had not been told that she had to have the duty manager's approval if arriving late or leaving early (although we note that in her witness statement the Claimant says that she was told by Mr Dubas that there was no problem with lateness as long as it was reported to the duty manager). She maintained that she had told Mr Cowie and HR previously about the family and childcare reasons why she needed to leave early on occasions. The Claimant said that she had been trained that weekly completion of timesheets was acceptable, she had done that for the week of 23 May, as did everybody else. The Claimant discussed the effects of ill-health which she, her husband and father-in-law were experiencing and referred to the discussion with Mr Cowie in April 2016 and her belief that this was a personal issue raised by Mr Dubas as an act of retaliation. Ms Wieland was sympathetic but explained that the Respondent needed its employees to perform their duties.

15 At the conclusion of the meeting, the Claimant accepted that she had been wrong in being late. In evidence, the Claimant said that this was because she trusted Ms Wieland and had been assured by her that she would receive only a warning if she did not contest the allegations. There was no record of such comments in the notes of the hearing, it is not alleged in the claim form nor identified in the list of issues. On balance, we do not accept the Claimant's evidence not least as she did contest the falsification allegation. We consider that the Claimant voluntarily admitted her lateness and explained the reasons for it; she was not put under any undue pressure to do so.

16 By letter dated 20 June 2016, the Claimant was given a written warning to remain on her file for 12 months. Ms Wieland accepted the Claimant's explanation that it was normal practice to complete the time sheet at the end of the working week. The only allegation upheld was in respect of timekeeping.

17 The Claimant had raised serious concerns about her working relationship with Mr Dubas and his conduct towards her on two occasions: to Mr Cowie on 24 April 2016 and in the disciplinary process. On 21 June 2016, Mr Cowie conducted a mediation meeting between the Claimant and Mr Dubas. Both were able to discuss their concerns with regard to the working relationship. The evidence of Mr Dubas was that they left the meeting on good terms. The Claimant did not address the mediation meeting in her written statement but in oral evidence confirmed that there had been no further problems with Mr Dubas between October 2016 and November 2017.

18 In July 2016, the Claimant wrote to Ms Janet Roberts, Culture Coach, complaining about issues in her working relationship with Mr Adonis and raising the previous problems in her working relationship with Mr Dubas, including that he had not been disciplined for lateness where she had. The Claimant said that she was subject to offensive comments in the workplace, making her feel threatened, depressed and humiliated. She accused Mr Adonis of plotting against her. The Claimant's complaint about Mr Adonis had been prompted by an email sent by Mr Adonis to Mr Dubas on the Respondent's system making a religiously offensive joke about the sexuality of Jesus.

19 Ms Roberts met the Claimant to discuss her concerns on 5 July 2016 and consequently held a mediation meeting with the Claimant and Mr Adonis on 18 July 2016. Ms Roberts' email the next day recording the agreed outcomes was provided to the Claimant and Mr Adonis. In her witness statement, the Claimant said she had not noticed any improvement or follow up from HR or management. However, in her oral evidence the Claimant confirmed and she had had no problems with Mr Adonis after this meeting. This is consistent with the fact that she made no further complaint about Mr Adonis during her employment.

20 The Respondent awards quarterly bonuses to employees who meet their key performance targets in that quarter. The Claimant did not receive a bonus in the quarter ending July 2016 as she had not reached her targets. One such target was to achieve a specified number of Trip Adviser reviews although there is no requirement that those be reviews of any particular star rating.

21 In October 2016, Mr Dubas was promoted to Rooms Division Manager responsible for both Staybridge Suites and Holiday Inn and tasked with integrating them into a single business unit following the departure of the Front Office Manager at Holiday Inn. The Claimant's evidence is that she was required to absorb Mr Dubas' duties as Operations Manager yet was not promoted or given a pay rise. She accepted that she was given more staff after Mr Dubas' promotion. Mr Cowie's evidence was that at the time of Mr Dubas's promotion, his former duties were shared between a number of managers, that he made a number of staffing changes to reflect this and that there was no vacancy into which the Claimant could be promoted. In particular, he provided the Claimant and the Food and Beverage Manager with additional supervisors and team members and co-located the reservations teams for Holiday Inn and Staybridge Suites in the same office for efficiency. Mr Dubas gave evidence about the transfer of his former responsibilities after his promotion. Management of the kitchen transferred to the Food and Beverage Manager. Management of reservations transferred to the Revenue Manager. The Claimant continued to manage reception at Staybridge Suites.

22 Ms Davidoaia's evidence was consistent with that of Mr Dubas and Mr Cowie. There was no vacancy for an operations manager; the role was not advertised or

approved for recruitment. She confirmed that after Mr Dubas was promoted, each head of department, including the Claimant, undertook additional duties. Ms Davidoaia regarded this as inherent in the nature of hospitality work. Since the Claimant's departure, her role has been replaced but there is still no operations manager.

23 On balance, we find that Mr Dubas' promotion did lead to some additional duties for the Claimant, just as it did for the other managers who had reported to him. This was offset by additional support within the team of each of those managers. Each manager was treated in the same way. The Claimant was not required to undertake all, or even most, of the duties previously discharged by Mr Dubas, simply to take her share as did her fellow managers. The Claimant's cross-examination of Mr Dubas made clear her belief that she had not only been doing his job but indeed had been better at it. If he deserved promotion, then so did she. The Claimant suggested more than once that Mr Dubas was jealous of her greater ability and this was the part of the reason for the way in which he treated her. On balance, the Tribunal found it more likely that the Claimant was jealous of Mr Dubas who had been promoted when she held his ability in low esteem. This belief in her own superiority is why the Claimant believed that she had taken on his job, and was better at it.

24 In November 2016, Mr Dubas offered the Claimant the job of Front of House Manager at Holiday Inn. The Claimant said that she did not want the job and it was externally advertised. She then changed her mind, applied but was unsuccessful at interview. The Claimant's case was that this job offer was part of Mr Dubas' desire to get rid of her. Mr Dubas' evidence was that it was made because the job had better pay and better hours which would enable the Claimant to work the shift pattern she desired. On balance we prefer the evidence of Mr Dubas. The job offer moved the Claimant from one job under his management to another job under his management, it did not remove her. If Mr Dubas had wanted to get rid of the Claimant, he would not have moved her to another job under his management.

25 On 10 January 2017 the Claimant was informed that her salary had been reviewed and would increase from £20,000 to £22,000.

26 On 2 May 2017, the Claimant emailed Ms Roberts asking to meet with her to discuss possibilities of promotion and future career opportunities. The Claimant concluded her email with: "**If we can see each other anytime soon, this would be great, if not I just wanted to pass my thoughts to you as well and hope for something good to happen.**" The Claimant's evidence is that she had an initial discussion with Ms Roberts who promised to make time for a meeting, however this did not happen. There is no evidence that there was any further discussion or formal meeting and we accept that it did not take place. Nor, however, is there any evidence of the Claimant chasing Ms Roberts to arrange the meeting.

27 Towards the end of May 2017, the Claimant's 8-year old daughter was hospitalised for approximately 7 days. The Claimant wished to care for her daughter and took four days off work although she continued to send emails and conduct some work for the Respondent whilst at the hospital. The contract of employment provides that sick pay is at the discretion of the General Manager but Mr Wasiluk, HR Manager, told the Claimant that all employees in similar situations had been paid. Mr Wasiluk resigned at about this time and was replaced by Ms Davidoaia. Ms Davidoaia then told the Claimant that she would not in fact be paid for the four days absence as the employee handbook

said that the Respondent did not pay sick pay for dependent's absence. The Claimant was naturally upset and challenged the decision, not least as it affected her end of month pay at very short notice. Initially, the Respondent agreed to make a salary advance of £240 to the Claimant to avoid any cashflow problems. Mr Cowie then intervened to exercise his discretion as General Manager and the Claimant was in fact paid in full. The deduction was made in the June payslip, the salary advance was made on 4 July 2017 and the July 2017 payslip confirms that the sick pay had been paid in full by that date.

28 The Claimant was paid a bonus of £525 on 24 July 2017.

29 On 5 October 2017, the Claimant was in the lift with a colleague called Charlie who kissed her on the cheeks. Charlie described it as a sort of air kiss given as a good morning greeting. The Claimant, however, felt very uncomfortable and was shocked and scared by what had happened. Her account in writing some days later was that Charlie had assured her that this was a normal way of greeting in Holiday Inn and the Claimant had made clear that it was unwanted to her and that he should not do this again.

30 The Claimant spoke with Ms Davidoaia on 10 October 2017. Ms Davidoaia spoke to Charlie the same day. Contemporaneous notes of the conversation are in the bundle. Charlie was clear that he had greeted the Claimant in a way consistent with his Portuguese culture, Ms Davidoaia was equally clear that the Claimant had not wanted such a greeting, felt uncomfortable with it and that her feelings must be respected. Ms Davidoaia told Charlie that he must apologise, that a simple "good morning" or "good afternoon" would be enough, should try to avoid the Claimant and not find himself in a position in an enclosed space on his own with her. Ms Davidoaia made clear that Charlie must respect Claimant's feelings. The meeting ended with Charlie saying that he had to go and apologise to the Claimant.

31 Charlie went straight from that meeting to see the Claimant who was sitting alone on the front desk. The Claimant's evidence was that this approach made her feel fearful, concerned and let down as she could see Ms Davidoaia waiting in the hallway without interfering. The Claimant said that she felt that this may be a plot and she did not know how to react. Ms Davidoaia's evidence was that she had passed by the desk, saw Charlie and the Claimant speaking, laughing and chatting in what appeared to be a friendly and relaxed conversation and so had not intervened. Ms Davidoaia accepted that the Claimant had come back to her office the same day, saying that she still felt frightened and was upset that he had come to the front desk and was so close to her. The Claimant had wanted the meeting in private and that Charlie be given some form of warning in writing so that it would not happen again. The Tribunal found Ms Davidoaia to be a credible and truthful witness and accept that she genuinely believed that the Claimant was comfortable in her conversation with Charlie at the desk.

32 The Claimant made a written complaint on 11 October 2017, making clear that she wanted the Respondent to take serious action and ensure that no further incidents took place. The same day, the Claimant's husband came to the hotel. The Claimant called Charlie to the 12th floor to meet her husband and some discussion followed. Upon hearing of this, Ms Davidoaia was concerned that it may have inflamed the situation. She invited the Claimant to a meeting on 12 October 2017.

33 At that meeting, the Claimant repeated her concerns about Charlie's behaviour in the lift and at the front desk. Ms Davidoaia asked the Claimant what she would like the

Respondent to do in order to make her feel comfortable again. Whilst Ms Davidoaia believed that Charlie's behaviour was borne of a bubbly and outgoing personality rather than sexual harassment, but expressly acknowledged that the Claimant felt otherwise and that this was her right. Again, she asked what the Claimant wanted to be done and what result was required to make her feel comfortable and safe again. The Claimant did not know. Ms Davidoaia made some proposals aimed at removing contact between Charlie and the Claimant and possible disciplinary action. The Claimant said that she had called Charlie to meet her husband because she felt that the Respondent was not helping her. Her husband had felt offended and wanted to protect her. Ms Davidoaia was concerned that she had been given only three days to investigate and no time to do anything to address the Claimant's concerns and that the involvement of the Claimant's husband may exacerbate matters. The Claimant said that she now understood that her husband could not become involved. The meeting concluded with Ms Davidoaia again asking what the Claimant would like to happen, including the possibility of a mediation meeting. The Claimant said that she needed to think about whether she wanted mediation or disciplinary action but would let Ms Davidoaia know her decision.

34 In the meantime, Ms Davidoaia met Charlie on 16 October 2017 and made clear that he should not have approached the Claimant directly at the reception desk. Charlie was unhappy as he had simply been trying to clear his name. He was also unhappy that the Claimant had called in her husband to speak to him. Ms Davidoaia gave Charlie a verbal warning for not following her earlier instructions to keep his distance from the Claimant. She told him that he must not approach the Claimant in any way.

35 Ms Davidoaia's evidence was that shortly after the meeting, the Claimant told her that she did not want mediation and would like to drop her complaint. The Claimant denies this and says that she was waiting for Ms Davidoaia to act. On balance, the Tribunal preferred the evidence of Ms Davidoaia whom we found to be a reliable and truthful witness. Her evidence was consistent with an email exchange on 3 January 2018. The Claimant had emailed Ms Davidoaia complaining that there had been no resolution to the incident with Charlie. It is clear from the email that there had been no further discussion between the Claimant and Ms Davidoaia since the 12 October 2017. Ms Davidoaia's immediate was that this was because the Claimant had said that she wanted to drop the complaint. We accept that it was a genuine response setting out Ms Davoidoaia's understanding of the position. Even if the Claimant did not believe that the matter had concluded, Ms Davidoaia did. That is the reason why meeting minutes had not been provided, no further meeting was arranged or further action taken on the sexual harassment complaint.

36 From November 2017, Mr Dubas again started to work more closely with the Claimant. In the list of issues, the Claimant refers to two emails on 14 December 2017 between herself and Mr Dubas about additional tasks for which she was not paid extra. No such emails were included in the bundle. In her witness statement, the Claimant dates the email exchange as 14 November 2017 and refers to documents of that date, albeit with different times. We accept that there is an error in the list of issues and have proceeded on the basis of the evidence in the Claimant's witness statements.

37 The context to the emails on 14 and 15 November 2017 was a dispute about the Claimant's rota. The Respondent operates four shifts: early, middle, late and night. The rotas attached to the emails date from October 2017 and show male and female staff working a mixture of early and late shifts. For some considerable time since summer

2016, the Claimant had worked almost exclusively the early shift which started at 7am and ended at 3.30pm. In early November, Mr Dubas had asked the Claimant to reschedule her shifts on the rota to start later on one or two days of the week; in other words, to work the middle shift. The Claimant did not do so. Mr Dubas pressed the point in his email on 14 November 2017, saying that it was necessary to train staff due to heavily dwindling customer satisfaction. The Claimant was unhappy with this intervention. In her reply sent on 15 November 2017, copied to Ms Davidoaia, the Claimant said that her shift pattern had not previously caused difficulties, either in her or her team's performance, and explained why the early shifts were necessary due to her childcare commitments. The Claimant requested a formal meeting to consider a request for flexible working. Ms Davidoaia helped the Claimant draft this email in support of flexible working.

38 Mr Dubas asked that in advance of a formal meeting, the Claimant set out a case addressing how she would manage her hours to ensure that her duties were completed and how the proposal would affect (or not affect) the business. The Claimant pointed out that she was asking to do the same shifts that she had been doing for the previous two years, during which she had achieved great results. The Claimant went on to provide additional detail as to how she would be flexible to discharge her duties and balance her family life.

39 The Claimant's request for flexible working was discussed at a meeting with Mr Dubas on 28 December 2017. Ms Davidoaia was also present and notes were taken. Ms Davidoaia confirmed the Claimant's current shift pattern of all earlies, with Friday and Saturday off. Ms Davidoaia told the Claimant that Mr Dubas and Mr Cowie believed that the business needed her in the evening as well as standards had dropped in the preceding three months and this could be due to lack of training and leaving new staff alone without supervision. The Claimant did not accept that this was a valid concern; she and Mr Dubas disagreed about whether standards had declined.

40 On balance, we prefer the evidence of the Respondent and find that Mr Cowie and Mr Dubas were concerned that standards had dropped and that they required the Claimant to be present to manage staff working after 3.30pm for at least part of the week. It is not plausible that Ms Davidoaia would have supported the Respondent's case on this point were it not true given her assistance to the Claimant in drafting the application in the first case. At the appeal hearing, the Claimant referred to poor TripAdvisor reviews and guest complaints. Whilst she blamed Mr Dubas, and we refer to comments above about the Claimant's views on his ability, this reference is consistent with the Respondent's case that standards had dropped and complaints had been received.

41 The Claimant expressed concern about a lack of progression and training opportunities in her role; she did not attend Head of Department training as they were arranged on her day off. Mr Dubas noted that the Claimant had full control over her rota and did not schedule herself to work on the days of the monthly Head of Department meetings. Mr Dubas and the Claimant discussed her application for the job of Operations Manager at another hotel in the same group. This job required full flexibility but the Claimant believed that she could do this as the increased salary would cover childcare costs. In conclusion, Mr Dubas proposed a three-month trial period in which the Claimant would work two early shifts, one social (11.30am to 8.30pm) and two middle shifts, including occasional Fridays and Sundays. This was confirmed in writing by letter dated 29 December 2017.

42 The Claimant had referred to lack of training during that meeting. The Tribunal do not find that the Claimant was unfairly deprived of training opportunities. The Claimant had been undertaking the "Leading Others" training provided to all managers and had completed three of its six modules. The Claimant's certificate of completion for the Leading Others – Great Teams course is dated 5 February 2018. Whilst the Claimant may have wanted more training, the Tribunal accepted the evidence of Ms Davidoaia that Heads of Department training did not only take place on Fridays but was also arranged for other days of the week and the Claimant had the same opportunities to attend as her managerial colleagues.

43 The Claimant appealed the flexible working decision. At an appeal hearing before Mr Cowie on 9 January 2018, the Claimant explained her reasons for requiring flexible working and Mr Cowie explained the business' need for her to be present over a broader range of hours to train the two recently appointed supervisors. As the meeting progressed, the Claimant raised the ongoing difficulties in her working relationship with Mr Dubas. Mr Cowie was concerned that the Claimant was raising matters from before the previous mediation, such as the single night shift rota from when she was first appointed. Mr Cowie said that the issues had to stop, that Mr Dubas was her line manager and that there would come a point where either she or Mr Dubas would "**need to make that decision**". The Claimant said: "**I am not going away from here, he should be the one to go.**" Mr Cowie referred to Mr Dubas' attempts to accommodate the Claimant including by giving up his own days off to cover her. The Claimant went on to accuse Mr Dubas of "**messing up the TripAdvisor, messing up the office and people**", suggesting that staff were resigning and guests complaining because of his behaviour. When Mr Cowie said that Mr Dubas had not been the subject of a complaint in his five years of employment, the Claimant replied: "**I will ask everyone to come and complain.**" In the course of this discussion, the Claimant referred to the hotel receiving poor TripAdviser reviews but blamed them on Mr Dubas. This is inconsistent with the Claimant's earlier stance that there had been no decline in standards.

44 This part of the discussion lasted some time and Mr Cowie suggested that the meeting be adjourned as it was clear that the Claimant had more issues than just the flexible working request. Mr Cowie said:

> "**with the amount of issues you and Nicolas have we will have to come to a point that one of you will have to make a decision, or I will make the decision because it is not work. I cannot have the business suffering because of it**."

The Claimant replied with further complaints about Mr Dubas making her have a disciplinary for not coming to work on time. This is the disciplinary action which led to Ms Wieland imposing a written warning in June 2016. As the Claimant continued to voice complaints about Mr Dubas, Mr Cowie said:

> **"I want to put a stop to these issues. If we need to do mediation between you and Nicolas, I am happy to arrange a professional one because I cannot have this going. After doing all I can in my power to work this out if it still does not work, we will have re-evaluated to decide one person go. I cannot have a department where 2 main managers bicker and fight with each other."**

The Claimant continued to assert that the problems were caused by Mr Dubas and not her.

45 When asked about these comments in cross-examination, Mr Cowie referred to the "bombardment" of issues which the Claimant had had with Mr Dubas and his belief that at some point he would need to move one of them. Although there were no plans to do so at that time, he felt that this was a decision which he would have to make in the future. The Tribunal considered Mr Cowie to be a plausible and truthful witness. His evidence and the tone of the note of the appeal hearing are consistent; he was not seeking to blame the Claimant alone or threatening to move or dismiss her specifically. Quite the contrary; Mr Cowie wanted to end the constant raising of issues, he was prepared to do so by way of professional mediation but was being clear that if this were not successful, the situation could not continue indefinitely and either the Claimant or Mr Dubas would have to be moved. Given that the earlier mediation in 2016 had not been successful, this was not an unreasonable warning for Mr Cowie to give in such an even-handed manner.

46 The outcome of the meeting was recorded in a letter of 10 January 2018. Mr Cowie did not believe that the role of Guest Services Manager could be properly performed on a fixed rota due to business requirements and the need to meet service demands. He repeated the trial arrangement of shifts previously proposed. The Claimant was unhappy with the decision. As she said in evidence, the only acceptable outcome for her would be to stay on regular early shifts providing only occasional, ad hoc cover for the other shifts (not including the night shift).

47 In January 2018, the Claimant did not receive a pay rise. The Respondent gives pay rises in either January or April of any given year based upon an appraisal of the employee's performance across the whole year. This appraisal was not simply a question of whether the employee had met the KPIs for bonuses. Entitlement to a pay rise was not automatic and where a pay rise had been received within the preceding 12 months, the next pay rise would be awarded in April and not January. The Claimant had received her last pay rise in January 2017. We accepted Ms Davidoaia's evidence that the Claimant would have received her next pay rise in April. The Claimant agreed that she was not the only employee not to receive a pay rise in January 2018, naming one other female employee.

48 By February 2018, the Claimant had secured an offer of employment with Deloitte. It was a better job, at an increased salary and with a start date of 5 March 2018. On 8 February 2018 she resigned from her job with the Respondent on one month's notice. In her letter of resignation, the Claimant stated that Staybridge Suites had provided her with wonderful opportunities to learn and grow professionally and personally for which she was thankful. The Claimant said that it was with difficulty that she submitted her resignation and thanked Mr Cowie personally for his support. In her oral evidence, however, the Claimant said that she had resigned because of the working hours, sexual harassment by Charlie, feeling unsupported and problems at home. She said that the final straw was the comments by Mr Cowie in the appeal hearing that one person would need to go.

49 Ms Davidoaia acknowledged the Claimant's resignation and confirmed her last working day as 8 March 2018, with her final payslip including sums for unused and accrued holiday. The Claimant contacted Mr Dubas advising him that she wished to take some accrued leave at the end of her notice period, in other words that her last day at work would be Sunday 4 March 2018. In her email, the Claimant thanked Mr Dubas for all of his support, understanding and for being such a great mentor.

50 Mr Dubas declined the Claimant's leave request as he would be absent from 3 March 2018. Later that day, Mr Dubas confirmed that his leave was in fact in April. He wanted to advertise her position as soon as possible. In oral evidence, Mr Dubas explained that three other employees had resigned that week and he needed to ensure that there were sufficient people covering the hotel during the recruitment process. We accepted this evidence as truthful as it was consistent with his email on 10 February 2016 informing the Claimant that if there were worthy candidates, her request would be fine. Moreover, Mr Dubas was able spontaneously to name the employees who had resigned.

51 On 14 February 2018, the Claimant asked for help from Mr John Wagner, the Chief Executive Officer. In her email, the Claimant said that she had resigned after Mr Cowie had discriminated against her so many times that she had had to look for another job. The Claimant said that the business did not need her and she just wanted to leave peacefully and take care of her children, ending her email: "**I desperately need you help, ask them both to let me go please!**". The Claimant's email was passed to Ms Roberts, who replied on 15 February 2018 confirming her understanding that the Claimant wished to leave as soon as she could and that Mr Dubas and Mr Cowie would meet her to discuss her final day at work. The Claimant had not told Mr Dubas, Mr Cowie or Mr Wagner that her intended start date at her new job was 5 March 2018.

52 On 16 February 2018, Mr Cowie and Mr Dubas told the Claimant that her final date of service would be 16 February 2018 with a payment in lieu of the balance of the notice period and annual leave. The Claimant was unhappy that her termination date had been brought forward when she had wanted to leave on 4 March 2018. Her case is that the decision was borne of a deliberate desire to jeopardise her application for permanent residence in the UK by depriving her of the continuity of employment which she believed was required. Mr Dubas and Mr Cowie's evidence was that they believed that she wanted to leave early in order to spend time with her children before starting her new job.

53 On balance, we prefer the evidence of Mr Dubas and Mr Cowie to that of the Claimant. Her email to Mr Wagner suggests a desire to leave as soon as possible and Ms Roberts' email to the Claimant in response demonstrates that she understood it in that way. The Claimant did not correct Ms Roberts in her reply. Mr Cowie organised a leaving party for the Claimant and there is no evidence of animosity towards the Claimant on his part. Indeed, even after the end of her employment and after she started work at Deloittes, the Claimant and Mr Cowie continued to exchange cordial text messages which are inconsistent with the Claimant's case that the choice of her termination date was a malicious act by Mr Cowie to harm her immigration status.

54 Mr Dubas completed a leavers questionnaire on 16 February 2018 using information provided by the Claimant. In evidence, the Claimant accepted that she had made the comments recorded in the questionnaire. The answers are positive about the Claimant's time at the Respondent, suggesting that she was leaving because she had found a better job which paid a higher salary. The Claimant referred to great training from her line manager who had shown fair treatment, and good communication with her manager although it could be improved with fewer emails and more face to face contact. In her negative comments, the Claimant said that her salary had been too low and she would not recommend the Respondent because she felt that there were insufficient progression opportunities for management. The Claimant said that she would have wished to stay in the alternative position of Operations Manager or a guest focused role.

55 On her last day, Mr Cooper (Revenue Assistant Manager) complained to Mr Cowie about the Claimant's conduct. He described her as being "on a rampage" and making improper allegations about a junior colleague. Mr Cowie and Mr Dubas spoke to the Claimant and asked her to behave professionally and keep a composed demeanour until she left. In her oral evidence, the Claimant accepted that she had been emotional on her last day and had behaved in the manner described. We do not accept the Claimant's evidence that she was treated like an intruder and watched throughout her shift. The Tribunal finds that the reference to being intimidated by Mr Cowie and Mr Dubas relates to the conversation in which they spoke to her about her behaviour on her last day.

Law

Constructive Dismissal

56 Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

57 The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

58 The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The question of fundamental breach is not to be judged by a range of reasonable responses test. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position.

59 In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

Discrimination

60 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Sex and sexual orientation are both a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

61 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

62 The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

63 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Conclusions

64 As set out at the outset of this Judgment, the Tribunal have used the Schedule of Issues produced by the Claimant. This was expressed in terms of factual rather than legal issues and so we first determined which of the issues had occurred in whole or in part. The Tribunal then considered whether any treatment was less favourable because of a protected characteristic and, finally, whether it was conduct capable of breaching, alone or cumulatively, the implied term of trust and confidence.

Issue 1

65 Based upon our findings of fact at paragraph 8, we do not accept that no effort had been made to integrate the Claimant into the reception team. The email referred to

concerns office arrangements. The Claimant had been sharing an office with Mr Dubas, as did her predecessor Guest Services Manager and other members of staff. She was unhappy with the arrangement and had then been provided a desk and computer in a different office, albeit she remained unhappy with this alternative arrangement too. It is not that "no effort" was made to integrate the Claimant, simply that she did not get exactly what she wanted, when she wanted it. The office arrangements applied to all, including Mr Dubas. It had nothing whatsoever to do with her sex or her sexual orientation and was for reasonable and proper cause.

66 Also raised in this first issue is the initial inclusion by Mr Dubas of the Claimant on the rota to work a night shift before discussing it with her. This is dealt with at paragraph 7 of our findings of fact. The Claimant was included on the night shift rota on one occasion, there was no prior discussion, she objected, was removed and the issue did not arise again in the further two years of her employment. The Tribunal regarded this as a trivial issue and one where the Claimant had failed to prove any primary findings of fact from which we could conclude that it could be an act of discrimination so as to require proper explanation. Nor was it conduct of a sort capable of amounting or contributing to a repudiatory breach of the implied term of trust and confidence.

Issue 2

67 It is not in doubt that the Claimant sent the email on 27 April 2016; it is in the bundle. The real issue appears to be about the shift pattern worked by the Claimant and whether it was discriminatory because of her childcare commitments. As we have found, Mr Cowie met with the Claimant, discussed her concerns and asked her to set out in writing what she wanted the Respondent to do. The Claimant did not do so nor, it appears, did issue of this particular shift pattern arise again. Indeed, the Claimant's case in connection with her flexible working request in December 2017 was that she wanted to remain on the pattern of all early shifts which she had worked for the preceding two years. On balance, any problem with the shift pattern in April 2016 was short-lived and had long been resolved before the Claimant's resignation. The rotas for October 2017, attached to the November emails about shift pattern, show male and female members of staff working a mix of early and late shifts. There is no evidence that this shift pattern was because of sex or sexual orientation. It was not conduct which individually or cumulatively amount to a breach of the implied term of trust and confidence.

Issue 3

68 The Claimant's witness statement and the issue refer to Mr Dubas training her on completion of time sheets and saying that there was no problem with lateness as long as reported to the duty manager. As we found at paragraph 14, the Claimant's case at the disciplinary hearing in June 2016 was that she had *not* been told that she had to have the duty manager's approval. Ms Wieland accepted that the Claimant had followed the normal practice in completing her time sheet at the end of the week. There was objective evidence that the Claimant had arrived late or left early on each of five days in the week commencing 23 May 2016, not least her own admission during the disciplinary hearing that she had been wrong in being late. We have found that admission to have been offered voluntarily and as part of her explanation of the reasons for her poor time-keeping. There is no evidence before the Tribunal of any other employee with similar time-keeping issues on five consecutive days nor any were we taken to any instances of poor time-keeping by Mr Dubas. In the absence of a "real" comparator who was treated differently,

the Tribunal carefully considered the reason why the Claimant was investigated and disciplined. We are satisfied that it was entirely due to a genuine conduct issue which was properly investigated and dealt with in a proportionate manner. It was not in any sense whatsoever due to sex or sexual orientation, it was for reasonable and proper cause.

Issues 4 and 5

69 These factual issues concern the Claimant's complaint to Ms Roberts about the conduct of Mr Adonis and the action taken by the Respondent to address the same. The Tribunal accepted that there was evidence that Mr Adonis had behaved in appropriately and that the Claimant had been offended, both in terms of his use of coarse language and the religiously offensive joke. This is not a religious discrimination complaint and, in any event, the email was sent in July 2016, almost two years before the ET1 was presented. However, the Tribunal do not accept the Claimant's case that no action was taken to support her. The Respondent dealt with the Claimant's complaint informally in management mediation and sent her the agreed outcomes on the very next day. The Claimant accepted she had no further problems with Mr Adonis thereafter and that the mediation had changed his behaviour. In other words, the problem was successfully addressed and resolved. There was no need for any follow up.

Issue 6

70 The Tribunal has found that the email of 2 May 2017 was sent to Ms Roberts and that there was no meeting to discuss its contents. The Claimant is an ambitious, hard-working and motivated person. She was naturally keen to develop her career and hoped to do so in the employment of the Respondent. It would have been better if a meeting had been arranged as the Claimant may ultimately not have become as disillusioned as she clearly did: believing herself to be doing the additional duties of an Operations Manager but without the commensurate pay (an issue to which we will return below). However, the tone of the Claimant's email, her apparent anticipation that there may not be a meeting and her lack of follow up with Ms Roberts all indicate that a meeting was not regarded as essential. It is for this reason, we infer, that it did not take place. The Claimant had a good working relationship with Ms Roberts and had been supported by her in the previous mediations. The failure to hold a meeting was not in any way due to sex or sexual orientation nor was it conduct which amounted or contributed to a breach of the implied term of trust and confidence.

Issues 7, 8, 9 and 10

71 The Tribunal has found as a fact that Mr Wasiluk did promise to pay the Claimant for her absence, that Ms Davidoaia was newly appointed to the position of HR manager and did tell the Claimant that she would not be paid for her absence, that monies were deducted from the June payslip, that the Claimant complained to Mr Cowie and that payment was subsequently made. We have also found that Ms Davidoaia's decision was because of her belief that the absence did not attract sick pay based upon her interpretation of the employee handbook. The Claimant's case is that this was an act of direct discrimination because of sex and/or sexual orientation. We disagree. It was a genuine misunderstanding by Ms Davidoaia and was swiftly remedied by Mr Cowie's intervention. Moreover, the issue about the sick pay is indicative of supportive management from Mr Cowie which is inconsistent with the Claimant's case that he was acting with malicious intent when dealing with her flexible working request, his comments

at the appeal and subsequent decision to bring forward the end of her notice period to 16 February 2018.

72 Whilst is was undoubtedly distressing for the Claimant to believe that she might lose her pay in the circumstances, the speed with which the issue was resolved and entirely in her favour leads us to conclude that it is not conduct capable of amounting or contributing to a breach of the implied term of trust and confidence. The Claimant's case on this issue is indicative of the subjective nature of her criticisms generally of the Respondent. As with the office complaint in issue 1, the Claimant is subjectively aggrieved when she does not get all that she wants at the moment that she asks for it. The conduct of the employer must be considered from the standpoint of a reasonable person in the Claimant's position. We do not think that in the circumstances such a person could conclude that the employer had acted in a way which damaged the relationship; quite the reverse.

Issues 11 and 16

73 The claim of sexual harassment based upon the conduct of Charlie on 5 October 2017 was not pursued. The Tribunal have therefore dismissed this claim upon withdrawal.

74 The Claimant does maintain that the way in which her complaint was handled by the Respondent was an act of sex discrimination as well as part of the conduct which caused her ultimately to resign. Referring to the chronology as found in our facts, the incident was on 5 October 2017. It was brought to Ms Davidoaia's attention on 10 October 2017. Ms Davidoaia spoke to Charlie the same day and made clear that the Claimant's feelings must be respected and that he should apologise and moderate his behaviour. The Claimant complained later that day to Ms Davidoaia that Charlie had approached her at the desk. The Claimant's written complaint was 11 October 2017. Ms Davidoaia arranged a meeting on 12 October 2017 but in the meantime the Claimant had called Charlie to meet her husband in the workplace. At the meeting on 12 October 2017, Ms Davidoaoia explored the Claimant's desire outcome, including mediation. Ms Davidoaia gave Charlie a verbal warning on 16 October 2017 and instructed him not to approach the Claimant. We have found that shortly after the meeting on 12 October 2017, the Claimant told Ms Davidoaia that she did not want to have mediation but wanted to drop her complaint. The Claimant did not raise the matter again until 3 January 2018, Ms Davidoaia believed that the matter had concluded some months earlier and so no further action was taken.

75 The Claimant has not adduced any evidence that a male employee in the same or not materially different circumstances would have been treated differently. There is nothing in our primary findings of fact, summarised above, to conclude that they would. Ms Davidoaia dealt with the complaint swiftly, decisively and properly taking into account the Claimant's desired outcome. The Claimant's involvement of her husband was inappropriate and risked escalating matters. In her oral evidence to the Tribunal, the Claimant could not see that this was inappropriate. This was in our view a further example of the Claimant's tendency to view things entirely from the subjective perspective of what she wanted, or at least now says she wanted, to happen. Whilst Ms Davidoaia could have told Charlie not to approach the Claimant on the desk and to provide a safe environment for both in which the apology would be given, we have accepted her evidence that she genuinely believed that the Claimant was comfortable when seen in conversation with Charlie at the desk. This was not an act of discrimination nor was it

conduct which amounted or contributed to a breach of the implied term of trust and confidence.

Issues 12 and 13

76 At the heart of the Claimant's case, and her discontent in the latter stages of her employment, was her belief that she had been doing Mr Dubas' job of Operations Manager since his promotion in October 2016 but was not being paid for her extra duties. As we have found at paragraphs 21 to 23, this was following an internal restructure and there was no vacancy for the Operations Manager. Moreover, we have found that the Claimant took on some additional duties but so did other managers, male and female. There was no evidence as to the sexual orientation of these other managers. The Claimant was not required to undertake all or even most of Mr Dubas' duties, only her share as did her colleagues. There is no evidence that the Claimant's workload was excessive; her leavers' questionnaire refers to it as "manageable".

77 The Tribunal considered the Claimant to be a hard-working and ambitious individual with considerable commitment both to her work and to her home life. This is greatly to be commended but it does not give rise to an automatic right to promotion, far less to a vacancy which does not in fact exist. The distinct impression given in the Claimant's evidence was that she did not respect Mr Dubas and believed that not only she could do his job, she was better at it. Far from Mr Dubas undermining the Claimant, he made attempts to support her. For example, his offer of the job of Front of House Manager in November 2016 would have allowed the Claimant the shift pattern she desired and better pay. The Claimant equivocated and lost the opportunity. It is telling that the Claimant now describes this as an attempt to remove her rather than seeing it for what the Tribunal consider it was, an attempt to support her in her career. We have found that it was the Claimant who was jealous of Mr Dubas and believed her abilities superior to his. This was the root of friction in the working relationship, not the Claimant's sex or sexual orientation.

Issues 14 and 15

78 As we have found, from about summer 2016 the Claimant had been working almost exclusively the early shift which fit in with her childcare commitments. Mr Dubas asked her to change this arrangement in or about November 2017 and the Claimant then made a flexible working request. The fact that Ms Davidoaia supported the Claimant in drafting her request is not consistent with the Claimant's case that she discriminated against her because of sex (childcare responsibilities) in connection with the earlier sick pay when looking after her daughter in hospital. The Tribunal considered Ms Davidoaia's assistance was intended to help the Claimant put forward her request in the most persuasive way possible to increase its chances of success whilst mindful of the balance to be struck with the needs of the business.

79 The Respondent properly considered the Claimant's request. It sought to understand more fully the impact on the business, as evidenced by Mr Dubas' request for more detail. The Respondent held a meeting and discussed with her the reasons why her attendance was required later in the day for some of her shifts. The Tribunal has accepted that Mr Cowie and Mr Dubas were genuinely concerned about declining standards and that the requirement to work a more varied shift pattern was caused by the needs of the business. There is no evidence from which we could find that a male

manager with new employees and a decline in standards in their department would have been allowed to work only early shifts.

80 The Claimant's case was that Mr Dubas and Mr Cowie, as men without a family, did not want her as an employee because she was a female with childcare responsibilities. In other words, that their conduct was an act of direct sex discrimination. We have no hesitation in finding that it was not for the reasons set out above. This was a decision taken for business reasons and sex or sexual orientation played no part at all in it. There was reasonable and proper cause for the decision to change the Claimant's shift pattern in this way.

81 The Claimant was acting in person and at times her case seemed to be expressed as an inability to work varying shifts because of her childcare commitments, in other words more akin to an indirect discrimination claim. In fairness to her, we therefore also considered whether the requirement to work a varied shift pattern was a proportionate means of achieving a legitimate aim. We consider that it was. The Claimant's case was that the only option which she would have accepted was permission to work only early shifts and with permanent, immediate effect. The Respondent's case was that this was not possible due to performance concerns which required greater management presence on reception later in the day, for this reason they proposed an alternative on a trial basis to try to strike a balance between the needs of the business and the Claimant's needs. The Tribunal did not consider the proposed three-month trial period as unduly long and it gave the Claimant sufficient certainty to be able to arrange her childcare commitments. It also afforded the Claimant and the Respondent a chance to see whether their respective concerns were well-founded.

Issue 17

82 In this issue, the Claimant has quoted two specific comments made by Mr Cowie during the appeal hearing. These comments were made, as set out in the findings of fact above. However, they must be seen in context. This was a hearing to consider the Claimant's flexible working request. The Claimant used it as an opportunity to make a number of complaints about Mr Dubas, many of which pre-dated the mediation in July 2016 and which could reasonably be considered resolved. Despite Mr Cowie trying to focus the hearing on the flexible working request, the Claimant continued with her complaints about Mr Dubas. Mr Cowie's comments referred to "one person" needing to go if the conflict could not be resolved. He did not say that it would be the Claimant. He proposed professional mediation to avoid such a situation arising and the impact upon the business of what he regarded as bickering between two main managers. We have accepted Mr Cowie's evidence that he was not seeking to blame the Claimant but rather to resolve a difficult situation which could not go on indefinitely. There was reasonable and proper cause for his comments. They applied equally to Mr Dubas, a gay man. There was no less favourable treatment because of sex or sexual orientation.

83 The Claimant relies upon Mr Cowie's words as the last straw, causing her to resign due to the cumulative effect of the earlier alleged conduct. The Tribunal accepts that by early 2018, the Claimant was unhappy at work and was looking to find an alternative job. This was due to her belief that she was not being paid enough money for the work that she was doing and the change to her shift pattern, even on a trial basis. This is consistent with her answers in the leavers' questionnaire that the reason for resignation was she had found a better job on a higher salary and that she would have

stayed in the alternative position of Operations Manager. The Claimant's case in these proceedings is that she resigned because of the sexual harassment by Charlie, the change in working hours and feeling unsupported. In evidence, she described the conduct of Mr Dubas and Mr Cowie as part of a plot to get rid of an employee who they never wanted. This case is not consistent with her email sent shortly after resignation in which she thanked Mr Dubas for all of his support, understanding and for being such a great mentor. It is not consistent with her comments in the leavers questionnaire that she received great training from Mr Dubas and that he had shown fair treatment. Nor is it consistent with her letter of resignation which thanked Mr Cowie for his support.

84 The Tribunal noted that the Claimant did allege discrimination by Mr Cowie in her email to Mr Wagner on 14 February 2018 asking to be released early from her employment after Mr Dubas had refused her request to take leave. The Tribunal is aware that employees may be reluctant to set out in full their real reasons for resignation whilst still dependent upon the former employer for a good reference. Here, the Claimant gave mixed messages: in her letter of resignation, Mr Cowie was supportive of her; in her email to Mr Wagner, Mr Cowie had discriminated against her. Overall, the Tribunal concluded that the resignation letter was the more accurate reflection of the Claimant's state of mind at the time. If she had truly believed Mr Cowie to have discriminated against her repeatedly over a long time, it is frankly implausible that she would have voluntarily maintained a cordial texting relationship with him, months after her employment had ended and when she was already working for Deloittes. Such conduct is more consistent with an employee who has enjoyed a previously good working relationship, has left but wishes to keep in touch with her former colleague.

85 For these reasons, we do not accept that the comments made by Mr Cowie at the appeal hearing were the last straw. Nor do we accept that the Respondent's conduct as found to have occurred was without reasonable and proper cause or, objectively considered, had the purpose or effect of destroying or seriously damaging the implied term of trust and confidence.

Issues 18 and 19

86 As a matter of fact, the Claimant had received bonuses during the year but did not get a pay rise in January 2018. The issue is why this was the case. The Tribunal has found that the reason was because the Claimant had received a pay rise in January 2017 and therefore would be considered in April 2018 and that the performance for pay rises was assessed based upon an annual appraisal and not achievement of KPIs. They were different measures of performance for different financial reward. The Claimant was not the only employee who did not get a pay rise in January 2018. The wording of issue 19 links the pay rise with the Claimant's belief that she was underpaid for the work that she was doing. This, we consider, is her mistaken view that she was not being properly remunerated for taking on Mr Dubas' previous tasks as Operations Manager. The Claimant has not proved primary facts from which we could conclude that the absence of a pay rise was due to her gender or sexual orientation. We prefer the Respondent's case and find that her protected characteristics had nothing to do with it at all. There was no contractual entitlement to a pay rise in January 2018 and the Respondent's decision to delay until April 2018 was objectively for reasonable and proper cause.

Issues 20 to 24

87 The final five issues relate to the effective date of termination following the Claimant's resignation. We refer to our findings of fact. The Claimant had a new job which started on 5 March 2018; her last day of service with the Respondent was 8 March 2018. Her request to take annual leave from 4 March 2018 was refused. She asked Mr Wagner to be allowed to leave sooner in terms which were understood by the Respondent to be a request to leave as soon as she could. This was accepted by Mr Cowie who believed that the Claimant wanted to leave early to spend time with her children before starting her new job. The Claimant's reaction is again indicative of a tendency to see things entirely from her own perspective; she wanted a specific leaving date to fit in with her plans even though she had not in fact told the Respondent that the need to use leave was because her start date at Deloittes was before the end of her notice period. We have not accepted that Mr Dubas and Mr Cowie behaved in the manner described by the Claimant in issue number 24.

Overview of the discrimination allegations

88 As set out in our legal summary, the Tribunal recognises that where there are multiple allegations of discrimination, it must also take a step back and look at the overall conduct and the explanations given by the Respondent. Inferences may be drawn from the totality of the evidence and the eloquence of the cumulative effect of primary facts.

89 The Claimant's broad case was that she was treated less favourably than Mr Dubas and that this was because she was not gay. He was protected, where she was not, for example on the disciplinary action for timekeeping. Although he was more senior to the Claimant, she regarded him as an appropriate comparator as he was not achieving the good results that she was. The Tribunal disagrees. Mr Dubas was not only more senior but the nature of the job which he performed was different in significant ways from the role of the Claimant. He was responsible for multiple functions over both Staybridge Suites and Holiday Inn, including reception; the Claimant managed reception in Staybridge Suites only and reported to Mr Dubas.

90 The Claimant referred often to male gay managers working as a unit against her. These managers included Mr Cowie, Mr Dubas and the former HR manager. These arguments lacked internal coherence as may be seen from the following examples:

- In a competitive recruitment exercise, Mr Dubas and Mr Cowie (both gay, male) preferred the Claimant (not gay, female) over Mr Adonis (gay, male).
- The former HR manager (gay, male) had agreed to pay the sick pay in June 2017; Ms Davidaoia (not gay, female) refused and Mr Cowie (gay, male) took the final decision that it would be paid.
- Ms Wieland (female, no evidence as to sexual orientation) decided to take disciplinary action after the Claimant admitted wrongdoing. There was no evidence of similar levels of lateness by Mr Dubas, far less disciplinary action to be decided upon by Ms Wieland.
- Mr Dubas offered the Claimant a job under his management which would offer better pay and hours to help with childcare commitments.

91 Both the Claimant and Mr Hoyle made a number of criticisms of each other's case and raised disputes of fact which were expressed in forceful terms. The Tribunal

considered it unhelpful for the Claimant to be challenged on matters such as the cause of her weight loss (not relevant to the issues), accused of forging her time sheets (not upheld by Ms Wieland at the disciplinary) or even of using her children and husband's health "when it suits". The Claimant naturally was distressed by such an approach and the Tribunal did not consider the familiar response that these matters "went to credibility" to be sufficient justification. Similarly, it was unhelpful for the Respondent's witnesses to be accused of allowing an employee to work illegally (no evidence, not relevant to the issues) or improperly removing bad TripAdvisor reviews (not relevant to the issues). The Tribunal have made no findings of fact on such disputes as it is not necessary for us to do so.

92 Where in our findings of fact we have accepted one party's evidence over that of another, it is not on the basis that any witness has knowingly told us something which is untrue. Witness recollection is inevitably clouded by time and subjectively impressions and interpretations change with the process of hindsight. We have largely based our findings of fact upon contemporaneous documents and consistency with oral evidence. Nor were the Tribunal greatly assisted by what might be described as pleading points as neither the ET1 nor the ET3 was entirely consistent with the case advanced in evidence. The Tribunal's experience is that this is not unusual and there was no inconsistency of sufficient magnitude for us safely to be able to rely upon it when resolving disputes of evidence.

93 With all of this in mind, and considering the totality of the evidence, we do not accept that the Claimant was treated less favourably because of her sex or her sexual orientation. She has not pursued a claim of sexual harassment. Nor did the Respondent's conduct entitle her to resign and treat herself as dismissed. All claims are dismissed.

Employment Judge Russell

Date : 10 July 2019