Case Number: 1810129/2018

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Dorothy Wood	v	**Anchor Trust**

PRELIMINARY HEARING

Heard at: **Leeds** **On: 13, 14, 15 & 16 May**
In Chambers 8 July 2019

Before: **Employment Judge Wedderspoon**
Members: **Ms L Fawcett**
Mr M Brewer

Appearance:
For the Claimant: **In person**
For the Respondent: **Mr G Price**

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

2. The claim of direct discrimination because of disability by association is not well founded and is dismissed.

3. The claims of indirect discrimination in relation to sex and age are not well founded and are dismissed.

4. The claim of victimisation is not well founded and is dismissed.

5. The claim for breach of contract is well founded and succeeds.

6. There will be a remedy hearing on a date to be fixed.

REASONS

1. The Claimant brought claims of unfair dismissal, direct discrimination because of disability by association, indirect discrimination in relation to age and sex, victimisation and breach of contract.

2. At a Preliminary Hearing held on 4 January 2019, Employment Judge Keevash identified the relevant issues to be determined by the Tribunal at final hearing. This list was amended, by the Respondent and agreed by the Claimant, to provide a more detailed list of issues at the request of the Tribunal.

3. The agreed list of issues are as follows:-

<u>Unfair dismissal</u>

3.1. Did the Respondent breach the contract with the Claimant? Specifically, were the changes requested of the Claimant's working pattern/hours following Lucy Atkinson's return to work in breach of that contract of employment?

3.2. If so, was the breach fundamental?

3.3. Did the Claimant resign because of the breach?

3.4. Did the Claimant unreasonably delay before resigning?

3.5. Was the Respondent permitted to exercise the PILON clause?

3.6. When was the PILON in fact made?

3.7. Had the Claimant worked her contractual notice period would she have the requisite qualifying service?

<u>Disability</u>

3.8. Refer to the list of issues set out by EJ Keevash in the case management summary on 4.1.2019

<u>Direct Discrimination because of disability by association</u>

3.9. Did the Respondent subject the Claimant to less favourable treatment when:

3.9.1. On 31 July 2018 Sarah Aitken told the Claimant she would be subject to disciplinary proceedings if she failed to call the office by 9 a.m. (unless it was an emergency);

3.9.2. On 9.8.2018 the Claimant was not paid for time off to attend to her father during a hospital admission.

3.10. Was this treatment less favourable than it has treated or would have treated others? In particular, with respect to

a. Sean Wilde and with respect to
b. Sarah Aitken.

3.11. Has the Claimant proven the primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was due to disability by association?

3.12. If so, has the Respondent proven a non-discriminatory reason for the proven less favourable treatment?

Direct Discrimination because of disability by association

3.13. Did the Respondent subject the Claimant to less favourable treatment when:

3.13.1. On 31 July 2018 Sarah Aitken told the Claimant she would be subject to disciplinary proceedings if she failed to call the office by 9 a.m. (unless it was an emergency);

3.13.2. On 9.8.2018 the Claimant was not paid for time off to attend to her father during a hospital admission.

3.14. Was this treatment less favourable than it has treated or would have treated others? In particular, with respect to

a. Sean Wilde and with respect to

b. Sarah Aitken.

3.15. Has the Claimant proven the primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was due to disability by association?

3.16. If so, has the Respondent proven a non-discriminatory reason for the proven less favourable treatment?

Indirect discrimination in relation to sex/age

3.17. Did the Respondent agree to a flexible working arrangement with the Claimant and if so what?

3.18. Did the Respondent impose or did the Claimant agree to a change in the working arrangement?

3.19. Was the change -

(a) a requirement to work core hours;

(b) a requirement to give advanced notice of when floating hours would be worked and/or

(c) a requirement to use the timesmart system.

3.20. Were any such changes a PCP?

3.21. Would the application of such a PCP put either other women or other people aged 45 to 55 at a particular disadvantage when compared with persons who do not share that protected characteristic

3.22. Did the application in fact put the Claimant to a particular disadvantage?

3.23. Has the Respondent shown that the PCP was

(a) reasonably necessary

(b) proportionate and

(c) in pursuit of a legitimate aim.

Victimisation

3.24. Did the Claimant carry out a protected act namely:

3.24.1. tell the Respondent on or about 29 April 2018 that withdrawing flexibility was discriminatory;

3.24.2. Raise a grievance on 31 July 2018 that the changes to her working pattern were discriminatory;

3.25. Did the Respondent carry out any treatment amounting to a detriment because of those protected acts namely:

3.25.1. In July 2018 deliberately excluded the Claimant from a notification regarding legionella bacteria in the home.

3.26. Sarah Aitken:

3.26.1. pestered the Claimant for access to the company debit card;

3.26.2. told a colleague that the Claimant did not trust her in the context of not being provided with access to the card;

3.26.3. yelled at the Claimant for failing to get security keys cut;

3.26.4. On 20 July 2018 commented on the Claimant's use of Facebook;

3.26.5. On 27 July 2018 arranged to have a record made on her personnel file regarding not stating work on time despite having worked late the previous day;

3.26.6. On 31 July 2018 threatened the Claimant with disciplinary action if she helped her father in the morning.

3.26.7. Between 31 July 2018 and 13 August 2018 was unfairly and excessively critical

3.26.8. Did the acts/made the statement listed at 1) to 8) of page 29 of the bundle

3.26.9. Deducted the Claimant's pay on 9 August

3.26.10. On 6 and 8 September 2018 telephoned and emailed the Claimant despite the Claimant having arranged to have an alternative point of contact to Sarah Aitken

3.27. Lucy Atkinson

3.27.1. On 17 July 2018 rang and emailed the Claimant to ask why she was not at work during a period of sick leave;

3.27.2. On 23 July 2018 accused the Claimant that money was missing.

Breach of contract

3.28. Did the Respondent fail to calculate the Claimant's holiday pay?

3.29. Did the Respondent fail to pay benefits as part of her PILON?

4. The Respondent also provided a note on the jurisdictional issue: -

4.1. The Claimant claims unfair constructive dismissal;

4.2. The Claimant began employment with the Respondent on 21 November 2016.

4.3. The Claimant gave notice of her resignation on 6 September 2018.

4.4. The Claimant's employment contract states that either party may terminate the contract by giving 8 weeks' notice;

4.5. 8 Weeks from 6 September 2018 is 1 November 2018

4.6. The Respondent understands that the Claimant contends that she has the requisite 2 years qualifying service in order to bring a claim under s.94 ERA 1996 because she would have taken 3 weeks of parental leave at the conclusion of that 8 week period.

4.7. The Respondent contends that the right to take parental leave does not operate so as to extend the notice period. It is either taken during the currency of the contract of employment or it is not.

4.8. Consequently, the Respondent contends that the Claimant has not been continuously employed by it for the requisite period under s.108 ERA 1996 even on the Claimant's case.

The hearing

5. The Tribunal was provided with a 286 page bundle of documents. The Claimant gave evidence and the Tribunal also heard from the Respondent's witnesses Julie Wiseman, Regional Support Manager; Ms. Atkinson, Home Manager; Mary Moran, Head Housekeeper and Sarah Aitken, Deputy/Home manager. At a written representation was provided for Giles Phillips, Senior Reward and Payroll Manager.

6. At the commencement of the hearing the Claimant made an application for further disclosure for emails between Ms. Atkinson and the Claimant. The Claimant was unable to identify the relevance of this material to any of the issues. The Tribunal concluded that the application was a fishing expedition and to make an order for further disclosure of the documents would not be in accordance with the overriding objective. The application was refused.

7. Further, the Respondent initially sought a witness order for the attendance of Ms. Atkinson. On the basis she was willing to attend the Tribunal and anticipated attendance on Thursday of the hearing, the Tribunal concluded a witness order was unnecessary and refused the application.

8. The Respondent also sought to adduce the evidence of Mr. Philips as a written representation. The Claimant did not object to this. The Tribunal allowed this application with the proviso that the witness was not present to be cross examined by the Claimant so that the weight to be attached to the evidence would be minimal.

9. The Respondent made an application to adduce the evidence of Mary Moran. The evidence had been disclosed outside the directions timetable. However, the Tribunal was persuaded that the evidence was relevant to the Respondent's

explanation for the treatment of the Claimant. The Tribunal determined to hear the evidence but allowed the Claimant to have sufficient time to consider the evidence and prepare her cross examination of the witness. The Claimant requested some further documentation be disclosed by the Respondent so that she could deal with Ms. Moran's evidence which the Respondent agreed, to make best efforts to provide. This evidence included the reconciliation of a newspaper bill in July 2018 bank statements for 6 months ending July 2018 and a copy invoice of rooms 22 and 23.

10. The Claimant also added some additional documents to the bundle about her father's claim for attendance allowance. The Respondent did not object to this application.

11. The Claimant clarified at the outset of the hearing that her claim for disability discrimination by association related only to her father's disability. During the course of the hearing the Claimant withdrew the allegation concerning being deliberately excluded from a notification regarding legionella bacteria in the home.

Facts

12. On 21 November 2016, the Claimant commenced her employment with the Respondent as a Home Administrator for 30 hours per week based at Borrage House Care Home, Ripon ("Borrage"). The Claimant is a qualified accountant. The Respondent employs approximately 3,500 people. At Borrage, there are 42 residents. At the commencement of her employment the Claimant worked 9 a.m. until 3 p.m. each day.

13. The Claimant's contract of employment dated 18 November 2016 provided that the Claimant's working hours were 30 hours per week as directed by her manager. It stated that the Claimant's position was flexible and may require the Claimant to work additional hours on occasions.

14. Pursuant to clause 25 of the contract the Claimant's employment was terminated by either side giving to the other 8 weeks' notice in writing at any time. The Respondent reserved the right to make a payment in lieu of notice.

15. The Claimant's contract was subject to a number of policies including the Authorised Leave Policy ("the Policy'). It provided a process of requesting emergency dependent leave. A dependent is defined as a spouse, civil partner, parent or child. Emergency leave could be requested by informing a line manager as soon as the employee became aware emergency dependent leave was needed, giving details of the reason for their absence and how long they expect to be away from work. The policy defined unauthorised absence as a situation where a colleague fails to report their absence as outlined in the policy. In these circumstances a line manager will attempt to make contact with them by telephone and will write asking them to make contact. If contact has not been made by day 4 of their absence the colleague will be invited to a disciplinary hearing.

16. Provision was also made in the Policy for parental leave. Colleagues with over 12 months continuous service are entitled to a total of up to 18 weeks unpaid parental leave for each child born or adopted. Leave can be taken up until the child's 18th birthday.

17. On 3 July 2017 Lucy Atkinson the Home Manager went on maternity leave until 8 April 2018. Jill Wiseman, a Regional Support Manager, covered as Home Manager of Borrage until January 2018. Sarah Aitken, Deputy Manager covered the last few months. Due to the nature of Jill Wiseman's regional role and responsibility for three other homes, she was not in attendance at Borrage all week. Her management style of Borrage was consequently light touch.

18. On 7 August 2017, the Claimant completed a flexible working request form. The Claimant proposed flexi time 30 hours per week between the hours of 9 a.m. to 5 p.m. with core hours of 10 a.m. to 1 p.m. A meeting was arranged for 15 August 2017 to discuss this request. In the meantime, the Claimant wrote on 13 August 2017 that her request was to have some fixed core hours and the remainder to be floating hours. The Claimant proposed she worked as she goes along subject to meeting contracted hours on a weekly basis. She stated that this would give her a better work life balance, would work better with care responsibilities for her children and elderly father who is disabled. Additionally, she stated it would help with meeting the needs of the business in that if she was busy she could stay later. Following this disclosure by the Claimant about her father's disability, the Tribunal finds that the Respondent did have knowledge that the Claimant asserted her father was a disabled person and the Respondent accepted this as a fact.

19. Before the Tribunal the Claimant provided information about the higher rate of attendance allowance claimed by her father. This benefit is paid where help or supervision is required throughout the day and night or where a person is terminally ill. She also relied upon her parent's bank statements. These showed a payment to the Claimant's parent's bank account of the higher rate of attendance allowance. The Claimant gave evidence this benefit was for her father. Further the Claimant relied upon a parking card for disabled people valid for the period 28 June 2016 to 22 August 2019 in the name of her father. The Respondent sensibly conceded that the Claimant's father was disabled.

20. At the meeting on 15 August 2017 Jill Wiseman met with the Claimant and Sarah Aitken, deputy manager, took notes. The Claimant stated that her father needed a lot of care and she would like to assist her mother in his care more in the afternoon. Jill stated the Respondent needed to know when the Claimant was going to be in work. The Claimant agreed to be flexible so to work with the requirements of the business. Jill Wiseman agreed that a trial for a period of six weeks would take place to see if it worked.

21. The agreement to a trial period was confirmed in a letter to the Claimant dated 22 August 2017. The trial began on 29 August and ended on 10 October 2017. The working pattern was agreed as 9.30 to 2pm Monday to Wednesday and 10 a to 1 pm Thursday to Friday. This left 10.5 hours to be worked over 5 days. The Claimant was requested to keep a record of the hours worked. This was to be a

temporary change to the Claimant's contract of employment. A further meeting was to be held on 9 October 2017 to discuss whether the trial had been successful or not.

22. The Claimant kept her own record of times worked and signed this record herself and obtained the signature of another member of staff Sarah to sign it.

23. At the meeting on 11 October 2017 with Jill Wiseman and Sarah Aitken, the Claimant stated she felt that the flexible working was going well. She was recording her hours on the computer and getting them signed off by Sarah. She stated she could concentrate better on her work. Jill felt that it was working well and was happy for it to continue and the Claimant would receive a letter making the changes permanent.

24. By letter dated 11 October 2017, the Respondent confirmed acceptance of the Claimant's flexible working request. The Claimant's new working pattern was to be Monday, Tuesday and Wednesday 9.30 to 14.00 and Thursday and Friday 10 am to 13.00. Further the Claimant's 10.5 hours were "floating" and to be worked over 5 days.

25. On 2 January 2018 Jill Wiseman conducted the Claimant's performance review. The review commented that the flexible working seemed to be going ok but the Claimant had been really busy before Xmas and needed to catch up. In particular the resident's monies account needed to be current. The Claimant was to make a check about resident E who was in debt and did not have a residents account and to speak to J about the writing off from 2008 of a debt.

26. In April 2018 Lucy Atkinson returned from maternity leave to her role as Home Manager. On 20 April 2018 Lucy Atkins conducted the Claimant's supervision. The Claimant acknowledged she had fallen behind with a number of keys tasks and the Claimant questioned whether the workload was distributed appropriately given other Home Administrators worked 7.5 hours more than her. A number of tasks were discussed including time smart (time recording system), DBS checks and staff files. Lucy advised the Claimant to ensure renewals of DBS checks are requested in advance of current ones expiring. Further the content of staff files needed to be in order. Accounts should be set up for residents. The resident's money account had not been reconciled for some time. The Claimant stated she was aware of undertaking the reconciliation of the fund on a monthly basis and would complete the checks going forward.

27. Also in the meeting, they discussed the Claimant's flexible working pattern and issues about managing annual leave and sickness along with the needs of the business. Lucy asked the Claimant to provide a four week rota (monthly) to enable her working pattern to be entered onto time smart. The Claimant objected to this because she felt it failed to provide her the flexibility she required. Lucy discussed the needs and the difficulties of not having advanced warning of the Claimant's floating weekly hours such as resident's families needing to speak to the Claimant about a range of issues and not knowing where the Claimant was.

Lucy reaffirmed that the home was able to be flexible but would require notice of hours. The Claimant requested time to consider what was being asked.

28. The Claimant took advice from the Human Resources Department. On 24 April 2018 the Claimant emailed Lucy Atkinson and stated H.R. advice is that the flexible working arrangement was "set in stone" and could only be altered if there is a new and significant business need and if so there was a process of consultation to follow. Times mart she said was irrelevant. She stated, *"I don't wish to be unreasonable though and I'm happy to work with you to do my best to be available for any meetings you wish me to attend".*

29. On 26 April, Lucy replied to the Claimant's email. She stated that she was not making changes to the Claimant's terms and conditions or her flexible working. She stated '*As discussed you will continue to work your floating hours when you decide however it is required that you inform me in advance of when those hours are to be worked in order for me to able to plan meetings, tasks etc. accordingly. From a Health and Safety aspect I also need to be aware of when you are in the building and when you are not. Moving forwards please ensure that your working hours are included in the rota – a minimum of 2 weeks in advance of the hours. It is appreciated that on occasions there may be the need to change/amend shifts. Please ensure that any changes are discussed with me prior to the change taking place within a reasonable time frame..I believe this to be a reasonable instruction, not to be in contradiction to your working agreement and as such would like this to begin with immediate effect. ..Please be aware that failure to follow a reasonable managerial instruction is regarded as misconduct and would be subject to disciplinary proceedings..".*

30. The Tribunal accepts the evidence of Lucy Atkinson that she did not know where the Claimant was on occasions. This caused difficulties in the business when residents' families wished to attend Borrage and speak to the Claimant.

31. The Tribunal found that the instruction of Lucy was a difference in the way the Claimant was working because it made a difference to the timing as to when the Claimant made a decision as to when she would work floating hours. She had previously been able to make this decision on a daily basis. The instruction required the Claimant to decide at an earlier time her floating hours, give notice and if she sought to change the proposed floating hours she had to discuss this with her manager. Although it was a difference, the Tribunal finds that the Claimant's working arrangements had always been subject to the needs of the business. This was explicit at the start of the trial period and the tribunal find implied at the commencement of the new arrangement. The Tribunal found that the need to give notice was genuinely necessitated because of the needs of the business; requiring a manager to be aware as to the presence/absence of the Claimant to provide a service to residents and families and for health and safety reasons (to know if the Claimant was present in the building or not).

32. A meeting took place between the Claimant and Lucy on or about 30 April 2018. An agreement was reached between the Claimant and Lucy as evidenced in the Claimant's email dated 4 May 2018 whereby she agreed to work 9am to 4pm

Monday to Wednesday and 9am to 1pm Thursday and Friday *"unless I give you 2 weeks' notice to the contrary."*

33. The Tribunal rejects the Claimant's suggestion that she was threatened. The Tribunal finds that on discussion and being provided with an explanation of the needs of the business the Claimant accepted she would produce a schedule of working floating hours every two weeks. Her recollection of events at paragraph 22 of her statement the tribunal finds is likely to be a reconstruction of events in her present anger and inconsistent with the contemporaneous documentation which evidences the Claimant agreeing to the arrangement with no duress.

34. On 3 May 2018 Lucy Atkinson requested that the Claimant provide her PIN for the procurement card. As a trained accountant and in accordance with the Respondent's policy the Claimant was aware that she should not do this. The Claimant was financially responsible for and may be subject to disciplinary action if the card is lost or misused. On 17 May 2018 Lucy Atkinson suggested that the Claimant have sole responsibility for making purchases and the credit limit is £250. She requested the Claimant to purchase some items.

35. On 24 May 2018 Lucy Atkinson conducted the Claimant's performance review. It was noted that the Claimant's performance had been positive but there were a number of outstanding tasks and there were a number of areas which required attention. The staff file task was incomplete and remained unchanged and Lucy confirmed that it was essential that all required information be held at the home. Problems remained about paying the hairdresser. Reconciliation was said to be complete. Lucy expressed a concern that the Claimant contacted H.R. prior to speaking to the home which she considered showed a lack of confidence in the management team. Various further actions were noted including the Claimant completing the monthly reconciliation for the residents monetary account.

36. On 25 May 2018 Lucy Atkinson sought to check at 9.22 a.m. if the Claimant was at the home. On 26 June 2018 Lucy emailed the Claimant at 9.53 am having been informed by Tracy that the Claimant had left the home to attend an appointment. She stated she was unaware that the Claimant had leave today and asked if everything was ok. The Claimant responded at 10.40 am to say she had been to see the G.P, and to the post office to pay in two cheques.

37. On 2 July 2018 the Claimant emailed to say that she had flu and provided a list of work that need to be completed. The Claimant had some sick leave from 2 July 2018 until her return on 9 July 2018 and then from 10 July 2018 to 20 July 2018. By email dated 10 July 2018 the Claimant informed Lucy Atkinson and Sarah Aitken that she had been signed off by her G.P for a week.

38. On 13 July 2018 the Claimant emailed Lucy and Sarah to state that she would like to come back on Monday (prior to the expiry of her sick note). She asked if she could have her employer's approval to do so. Lucy responded that she was happy to agree to the Claimant's return on the basis that the Claimant felt able to return. It would have to be documented that it was the Claimant's choice given

that her sick note runs until 20 July. At this time, the Respondent has not received the Claimant's sick note.

39. The Claimant did not return to work. On 16 July 2018 Lucy emailed the Claimant at 10.03 am stating she had expected the Claimant to be in work. She stated it was now 10 am and the Claimant was not in. She sought an update.

40. On 17 July 2018 the Claimant replied that she did not have a chest infection. However, the coughing is still really bad but she mainly felt exhausted. She said it would be another couple of days before she could return to work and she would keep in touch.

41. On 23 July 2017 a return to work meeting took place between the Claimant and Lucy Atkinson. Lucy expressed concern about the resident's accounts. The Tribunal accepted Lucy's evidence that invoices and files were strewn about the Claimant's office and it was a mess. She had not sorted out the accounts. The Claimant blamed the management systems. The Claimant set out her response in an email dated 24 July 2018 at 8.48 am the next day whereby she failed to acknowledge that the responsibility for sorting out the residents account was hers. She blamed others for the fact that resident's accounts were overdrawn. The Respondent's expectation was that the Claimant would take a proactive role. In her email the Claimant gave notice that she would be starting work at 9.30 am today (with 40 minutes notice). It was noted that on 23 July 2018 the Claimant told the home manager she would be working 9 am to 3pm to the rest of the week. On 26 July 2018 the Claimant stated she was starting late but did not provide a start time and on 31 July 2018 the Claimant arrived late for work. She did not provide an explanation to her employer for this change to her working hours.

42. On 24 July 2018 the Claimant emailed Lucy Atkinson and raised a concern that she thinks she may have been contaminated by the legionnaires disease in the water system. By email 24 July 2018 Lucy Atkinson informed the Claimant that she has contacted the Head of Health and Safety who confirmed that the reading was a low risk count and the chances of the Claimant contracting the illness was minimal.

43. On 25 July 2018 the Claimant emailed to say that she had looked into the newspaper bills. She stated everyone who has a residents account had paid up right to the end of June save for a resident R. She mentioned that resident A's son pays cash because she does not have a resident account. Resident C owes about £8.80 but suggests the newsagents have made a mistake. However, the Tribunal accepts the Respondent's evidence that the accounts were not up to date at all. The Tribunal accepts the evidence of Mary Moran that not all of the invoices were there and it was not possible to make head or tail of them.

44. The Respondent began to more closely monitor the Claimant's work. Mary Moran raised her concerns with Sarah Aitken who asked Mary to make a note. On 25 July it was noted that she had dropped a Santander financial bank statement in the team leader office. On 29 July 2018 the Claimant left a resident's personal

money account statement on a chair in the office upstairs. On 30 July 2018 the Claimant left the staff dinner tin and another cash tin on the desk in Lucy's office.

45. On 26 July 2018 the Claimant emailed at 8.38 to state she would start later today as she had to turn out in the early hours for a child returning from a school trip to France. On 31 July 2018 the Claimant emailed at 9.50 am to say she was meant to be at work at 9.30 am but was a bit late due to roadworks on A61 and a tail back.

46. The Claimant having complied, for a number of weeks with the arrangement of attending work at the agreed time started not to do so. The Tribunal found that this occurred in the context of becoming aware that her work was subject to closer scrutiny by the Respondent.

47. On 31 July 2018 Sarah Aitken had sought advice from H.R. about the Claimant's failure to attend work on time and failure to follow the sickness absence reporting procedure including agreeing a return to work date and then not turning up on time. She was advised to hold a standard setting meeting whereby the working pattern is reiterated and reporting procedures the Claimant be advised that if she fails to meet the expectations this could lead to formal action.

48. At a meeting with the Claimant on 31 July 2018 with Sarah Aitken, Deputy Manager and Mary Moran, deputy manager. The Claimant was asked to describe her understanding of flexible working. The Claimant replied a flexible start up to 9.30 am and to finish up to 4.30 pm on Mondays to Wednesdays and up to a 9.30 am start to finish at 1pm on Thursday and Friday. The Claimant stated she needed more flexi time to help her father in the morning. The Claimant was reminded about the times she had previously agreed to work and agreed to provide two weeks' notice of any changes to meet the needs of the business. The Claimant stated she had only agreed to these to avoid disciplinary action. The Claimant stated she wanted to lodge a formal grievance. Sarah Aitken informed the Claimant that she was not using the proper communication channels to inform management when she would be late or working to a different pattern. The Claimant's failure to return to work in July was discussed. The Claimant stated she was just exploring options about returning early. Sarah Aitken stated that the attendance policy was to contact work by telephone and let people know when you are not in. The Claimant stated that she does her core hours and the rest is flexi. The Claimant stated she was behind. The Respondent had taken tasks away from the Claimant so that she was able to complete her tasks correctly and in time. The Respondent noted that the Claimant had been sticking to the agreed timings but had recently reverted to not informing anyone of her whereabouts and to coming in at 9.30 and not giving the agreed two weeks' notice. Sarah Aitken asked the Claimant to adhere to the timings. The Claimant stated she was not prepared to adhere to this. The Claimant was informed that this would be logged with managers direct.

49. The Claimant raised a grievance that there were attempts to revoke her flexi time arrangements; criticised for not coming back before her sick note expired and

that she had pre-booked holidays and these haven't been added back to her allowance.

50. On 31 July 2018 Sarah Aitken drafted a letter to the Claimant for the H.R. departments' approval. The draft letter recorded that the Claimant had said she was not prepared to agree to the working pattern agreed on 4 May 2018 and it was stated a failure to comply with the request would result in disciplinary action. The HR department agreed the letter and it was sent to the Claimant later that day.

51. On 31 July 2018, the Claimant responded to this stating that it was agreed she could work flexi time; namely certain core hours each week and the remaining 10.5 hours worked on a floating basis without prior notice of working pattern. She stated that this worked well until Lucy returned from maternity leave in April. She said she was threatened with disciplinary action so that she had to commit to a working pattern 2 weeks in advance. She alleged revoking the arrangement amounted to indirect sex discrimination. The Tribunal finds that this is the first time the Claimant raised the issue of discrimination. The Claimant objected to the respondent's comment about her waving her child off on a school trip and the fact that she was required to do the administrators job in 30 hours whereas at other homes administrator work for about 37.5 hours.

52. On 1 August 2018 the Claimant filed an ACAS conciliation certificate.

53. A grievance meeting was set up for 10 August 2018. Jill Wiseman was to hear the grievance accompanied by Jak Ashley as note taker. The Claimant was informed about her right to bring a work colleague or representative.

54. On 6 August 2018 the Claimant emailed Sarah and Jill to state she was unable to collect a prescription for her mother because if she exercises her flexi time she has been threatened with disciplinary action. She stated that this meant her mother would be in pain all day. Sarah Aitken responded that if the Claimant had telephoned she would have agreed for the Claimant to collect her mother's prescription. When the Claimant's hours were discussed it was confirmed emergency requirements would be supported.

55. At the grievance hearing on 10 August 2018 the Claimant was invited to set out her concerns. The Claimant repeated that the change to her hours occurred when Lucy returned from maternity leave and she was threatened with disciplinary action. The Claimant was asked whether doing a two week rota for the 10 floating hours was reasonable. The Claimant said it was. She said no one had refused her to go in an emergency situation. The Claimant accepted that she was asking for core hours and 10.5 hours to take whenever she wanted because that was in her contract and the respondent was changing her flexible working. The Claimant stated she was challenging it now because she felt threatened. She mentioned that the timings of her working hours were indicative hours. She wanted to go back to her original agreement with 10 floating hours and not giving notice. The Claimant alleged indirect sex discrimination and direct discrimination by association. It was agreed by the Claimant that some of her workload had been removed so that this part of the grievance was resolved. The Claimant also

agreed that the other aspects of her grievance were now resolved. The Claimant accepted it would be better to sit down with Sarah and resolve the flexible working pattern.

56. After a 50 minute adjournment, the Claimant was informed about the outcome of her grievance namely that her complaint about the flexible working arrangement was not upheld. The Respondent was asking only for notice of when the Claimant intended to work the hours. The home needed to know when the Claimant was in the building. The Claimant could take the hours when she liked, she just needed to give notice. It was not discrimination. The Claimant was informed about her right to appeal this decision.

57. On 13 August 2018, the Claimant's performance review, was conducted by Sarah Aitken. The Claimant's performance had highlighted some areas of concern regarding her ability to carry out and complete tasks although some progress has been made with outstanding tasks; there remained a number of areas which require attention. The issue of the safe being left with two cash boxes containing cash unattended was raised. The Claimant apologised for this. The Claimant had not completed the staff file task. The Claimant had not managed to get all the residents with no funds accounts topped up and was still chasing up families. The Claimant was to ensure Team Leaders have an up to date list of all residents who have money in their account. As for SMART the aged debt remains on the agenda and the Claimant was working on it. She was requested to provide this on 13 August. The Claimant was instructed to provide monthly reconciliation.

58. The Claimant provided her notes of a 1 to 1 supervision on 13 August (page 173). These were not put to Sarah Aitken in cross examination nor did the Claimant challenge Sarah that any concerns raised about her performance were groundless and in fact amounted to victimisation for raising a grievance.

59. The Claimant's note dated 14 August 2018 whereby detailed she emailed to Sarah to say she would be attending at 9.30 a.m. to assist her father; this again was not put to Sarah. There was no record of that email only an email at 8.53 a.m. on 14 August 2018 stating she would be in at 9.30am. The Tribunal reject the Claimant's assertion that she sent an email on this date in the terms alleged and the Tribunal notes the email sent simply asserts she will be late sent 7 minutes before she was meant to be at work. In so far as the Claimant contends there was a shortfall of payment to her for hours worked, the Tribunal notes that Sarah Aitken on 14 August sort to resolve this in the Claimant's favour.

60. On 16 August 2018 whilst the Claimant was absent from work the Respondent discovered two cheques had been incorrectly drawn; one for £5,867.50 was incorrect because the Claimant had incorrectly completed the request for and another drawn for £3,319.02 should have been £2,548.48. A cheque was also discovered loose from the safe which required payment into the bank.

61. By letter dated 14 August 2018, Jill Wiseman, District Manager, confirmed to the Claimant that her grievance was rejected. It was found it was reasonable to

request the Claimant's floating hours be scheduled two weeks in advance with any changes communicated appropriately with the manager. In emergencies the Claimant could alter her scheduled hours by making contact with her manager. The issue in respect of returning to work early whilst off sick was now resolved because it was found Lucy had misread the Claimant's communication as well as the pre-booked annual leave issue; the leave had now been added back to the leave allowance. As for gossiping about the Claimant being unfit for work but able to send off her daughter on a coach to France, it was recommended that the Home Manager address gossiping within the home. The point that the Claimant was expected to complete a similar workload to an administrator who completed 37 hours whilst working herself only 30 was now resolved. The Claimant was given a right of appeal.

62. On 15 August 2018 the Claimant emailed HR Admin to say she was suffering work induced anxiety owing to victimisation following the hearing of her grievance. She alleged victimisation following the hearing stating that the next working day after her grievance her manager said she was going to launch capability proceedings against her and made spurious allegations against her knowing they or reasonably knowing they were untrue.

63. On 20 August 2018, the Claimant responded to Jill Wiseman's outcome grievance letter stating that she did not accept the letter described the meeting and wanted handwritten notes of the same.

64. On 22 August 2018, Jill Wiseman, provided the Claimant with handwritten notes and informed the Claimant she was on leave and not contactable until 11 September. The Claimant was told she could contact Sarah, or Mary the Deputy or direct to Manager Direct in her absence.

65. On 4 September 2018 despite knowing that Jill Wiseman was away, the Claimant emailed her to notify her of her absence and enquired whether she needed another sick note as she was returning from holiday. The Tribunal found that the Claimant did this deliberately; knowing that Jill was not in work but seeking to demonstrate (if she needed to) she had been in touch with the Respondent.

66. On 5 September Sarah Aitken tried to contact the Claimant by telephone at 10.15am. She spoke to the Claimant's son at 10.15 a.m. who said the Claimant was not at home and he did not know where the Claimant was.

67. On 6 September 2018 the Claimant emailed Jill Wiseman to give notice of her termination of employment with Anchor Trust (last day to be 23 November). The Claimant further emailed later that day to enquire when a sick note should be dated from. She was hoping to return to work soon.

68. On 6 September 2018 Sarah Aitken the Home Manager wrote to the Claimant issuing an unauthorised absence letter. The Claimant had not reported her absence in accordance with the absence procedure and she was notified with effect from 5 September 2018 her absence would be unpaid.

69. On 9 September 2018 the Claimant emailed Manager Direct and Jill Wiseman to state she was currently off sick as a result of "Aitken bullying and harassing me" after raising a grievance for matters including sex discrimination, age and disability discrimination. She stated that this was now the subject to an employment tribunal against Anchor Trust and Aitken. She stated she had called Jill Wiseman on 5 September and left a message.

70. On 10 September 2018 the Claimant emailed Jill Wiseman to state her G.P. appointment was re-arranged for tomorrow and she would be in touch about a return to work. On the same date 10 September 2018, the Claimant submitted an ET1.

71. On Jill Wiseman's return from holiday she emailed the Claimant noting that the Claimant has sent her email correspondence and reminding the Claimant she had invited her on 22 August whilst absent from work to contact others. The home was unaware of the Claimant's contact and that is why the AWOL process was followed. She stated that this had now been rectified and the Claimant was no longer considered as AWOL. She invited the Claimant to meet with her to discuss her absence and resignation.

72. On 11 September 2018 the Claimant stated she had copied in Mary but they came back undeliverable a few days later. By 14 September 2018 Jill Wiseman sent the Claimant a formal invitation to a meeting on 25 September 2018. The Claimant replied by email dated 20 September that as she was suffering from work related anxiety and depression her GP had advised her to avoid any contact with the workplace, *"I believe a meeting would exacerbate her illness which I am sure you don't want".* She was happy to answer any questions by email or letter.

73. By letter dated 21 September 2018 the Respondent acknowledged and accepted the Claimant's notice of resignation. It then stated, *"Usually it would be required to provide 1 months' notice however you provided above and beyond the required period and stated your last working day will be 23 November 2018".* The Respondent accepted the Claimant's resignation and her date of resignation of this date. It went on to state *"Your last working day will be 25 September 2018 and you will be in lieu of notice up until 23 November 2018."*

74. By email 27 September 2018 the Claimant stated she had 3 weeks parental leave for the period of 9 to 23 November which she wanted to tack on as it would make no difference to my actual finishing date but she would accrue holiday, NI credits. The Claimant suggested this even though her son was in fact an adult aged 23 years of age.

75. On 2 October 2018 Jill Wiseman responded to the Claimant stating that Anchor reserved the right to make a payment in lieu of notice which was exercised when the Claimant resigned.

76. By email dated 25 October 2018 the Claimant sought payment in full including holidays and pension contributions up to 23 November 2018.

77. The Claimant provided a document from the Office of National Statistics "Full Story; The Gender Gap in unpaid care provision is there an impact on health and economic position?" dated 16 May 2013. This indicated females were more likely to be unpaid carers than males; 57.7 per cent of unpaid carers were females and 42.3% were males. Further the share of unpaid care provision fell most heavily on women aged 50 to 64. The Claimant also relied upon a policy briefing dated May 2014 from Carers UK which stated one in five people aged 50 to 64 are carers. 58 % of carers are female and 42% are male.

THE LAW

78. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides circumstances in which an employee is dismissed is where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he entitled to terminate it without notice by reason of the employer's conduct..".

79. An employee seeking to establish that he has been constructively dismissed must prove that the employer fundamentally breached the contract of employment and that he resigned in response to the breach **(Western Excavating ECC Limited v Sharp (1978) IRLR 27.** An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

80. If the breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning **Wright v North Ayshire Council (2014) IRLR 4.**

81. In respect of a payment in lieu of notice in the Supreme Court case of **Geys v Societe Generale** it was held that the employee's contract was not terminated until Geys had been notified that the payment to him was a PILON that is on the deemed date of receipt of the letter informing the Claimant he had been paid his PILON. The Claimant was employed until the date on which he was deemed to have received unequivocal communication of his employer's decision to properly exercise its contractual right to summarily dismiss him by making a PILON. The Court clarified that if notice is given after the payment has been made the contract of employment will terminate on the date of the notice.

82. In **Cosmeceuticals Limited v Parkin,** the EAT considered the issue of the effective date of termination. The EAT held that when the employer made clear to the employee that her existing contract of employment had ended, that is the effective date of termination. The effective date of termination is a statutory concept and it is not open to the parties to agree an alternative one.

83. Section 13 (1) of the Equality Act 2010 provides (1)A person A discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others. Section 23 (1) of the EqA provides on a comparison of cases for the purposes of section there must be no material difference between the circumstances relating to each case.

84. Direct discrimination can occur when an employer treats an employee less favourably because of a protected characteristic that the employee does not personally possess. Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) UKHL 11**, updated to reflect the language of the EqA.

85. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason.

86. Section 136 of the EqA applies to any proceedings relating to a contravention of EqA. By section 136 (2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision.

87. In the case of **Igen v Wong (2005) EWCA Civ 142**, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:
    (1) ..It is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude in the absence of an adequate explanation that the Respondent has committed an act of discrimination ..These are referred to below as "such facts"
    (2) If the Claimant does not prove such facts he or she will fail
    (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of ..discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in."
    (4) In deciding whether the Claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal;
    (5) It is important to note the word "could" in section 63A (2). At this stage the tribunal does not have to reach a definitive determination that such facts

would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation to those facts;

(7) These inferences can include in appropriate cases any inferences that it is just and equitable to draw ..from an evasive or equivocal reply to a statutory questionnaire;

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent;

(10) It is then for the respondent to prove that he did not commit or as the case may be is not to be treated as having committed that act;

(11) To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex since no discrimination whatsoever is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

88. The initial burden of proof is on the claimant; **Ayodele v City Link Limited (2017) EWCA Civ 1913.**

89. It is good practice to follow the two-stage approach to the burden of proof in accordance with the guidance in **Igen v Wong** but a tribunal will not fall into error if in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation; **Geller v Yeshrun Hebrew Congregation (2016) UKEAT 0190/15.**

90. Under section 19 (1) of the Equality Act 2010 indirect discrimination is defined as occurring when:

"A person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's."

91. A PCP has this effect if established :-
    (1) A applies or would apply the PCP to persons with whom B does not share the relevant protected characteristic.
    (2) The PCP puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic;
    (3) The PCP puts or would put B at that disadvantage; and
    (4) A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

92. It is for the Claimant to show that the PCP puts persons with whom B shares the relevant protected characteristic at a particular disadvantage when compared with persons with whom B does not share it and puts or would put B at that disadvantage.

93. It is for the employer to objectively justify the PCP is the Claimant overcomes the other hurdles.

94. Section 27 (1) of the Equality Act 2010 states that A person victimises another person (B) if A subjects B to a detriment because –
    (a) B does a protected act or
    (b) A believes that B has done or may do a protected act.

95. A protected act for the purposes of section 27 (1) are :
    - Bringing proceedings under the Equality Act;
    - Giving evidence or information in connection with proceedings under the Equality Act
    - Doing any other thing for the purposes of or in connection with the Equality Act
    - Making an allegation whether or not express that A or another person has contravened the Equality Act.

96. It needs to be established that the protected act comes within the definition then that the Claimant was subjected to a detriment of less favourable treatment and finally that her detriment of less favourable treatment was because the claimant had done a protected act or because the employer believed he or she had done or might do a protected act.

<u>Submissions</u>

97. The Respondent provided a written submission. It submitted that there was change to the Claimant's contract on 11 October 2017 where the Claimant was permitted to choose her floating hours but that such a change did require the

Claimant to work consistently with the needs of the business. Any request by Lucy Atkinson to provide advance notice of the floating hours to be worked did not constitute any change to the Claimant's terms and conditions because it was consistent with her pre-existing terms to work consistently with the needs of the business. In any event the Claimant agreed to this (not under duress) as indicated in her email dated page 106 when she gave a schedule of likely working hours. Any change did not go to the root of the contract because the Claimant's flexible working arrangement remained entirely in tact save for its practical operation and the advance notice requirement operated to ensure that the Respondent could reasonably anticipate the Claimant's attendance which was itself a central tenet of the employment contract. The Respondent submitted that the Claimant resigned due to her perception that she was being victimised by Sarah Aitken and her anxiety around returning to work following the performance review meeting on 13 August 2018. It was submitted that the Claimant delayed unreasonably before resigning because the alleged breach took place on 4 May 2018 and the Claimant did not resign until 6 September 2018.

98. The Respondent submitted that the Respondent exercised the PILON clause on 26 October 2018.

99. The Respondent conceded that the Claimant's father was disabled from 4 May 2018 but denies knowledge of the same. It submitted that the Claimant was not subject to direct discrimination because of disability by association on 31 July 2018 when Sarah Aitken told the Claimant she would be subject to disciplinary proceedings if she failed to call the office by 9 am unless it was an emergency because the Claimant did not state she was late due to helping her father. She told the Respondent she was held up in traffic. The Respondent had warned the Claimant that late attendance required advance notice.

100. On 9 August 2018 the Claimant was not subject to less favourable treatment when not paid for time off to attend a hospital admission. The Claimant did not inform the respondent that she took time off to attend to her father so as to assist taking him to hospital. The Respondent did not pay the Claimant because there was no reason for the Respondent to consider exercising its discretion under the emergency leave policy to pay the Claimant. In respect of Sean Wilde, it was submitted that the Sarah Aitken's evidence is that he was known to have a problem and was spoke n to about this. The Claimant cannot show less favourable treatment. Sarah Aitken, the Respondent contends there is no evidence that the Respondent treated Sarah Aitken more favourably than the Claimant with respect to paying for time taken to attend hospital. There was no evidence to conclude that the difference in treatment was due to disability by association.

101. The Respondent submitted that the Respondent agreed to a flexible working arrangement with the Claimant but merely sought a change to the operation of that arrangement by providing advanced notice of when floating hours would be worked. It was disputed that the provision of occasional assistance with care could still be achieved with the advance notice requirement; it did not constitute a denial, barrier, deterrent or exclusion from the work place and the provision of

care is only one reason why flexible working arrangements are requested or would be put in place. Any disadvantage is trivial. The statistical evidence does not support the Claimant's contention. It shows the provision of care falls most heavily on those older than the Claimant. Statistical evidence does not show that the requirement to provide advance notice poses an obstacle or disadvantage to women or those aged 45 to 55. It rejected any particular disadvantage to the Claimant. She merely disliked having to give account of her planned working hours. Advance notice was required because causing significant difficulties for R and was undermining the efficient operation business was accepted. The Respondent's needs for efficient operation and avoidance of reputational damage were serious and the comparative disadvantage to the Claimant was minimal. The Respondent's business needs and operation would be improved by advance notice of when the Claimant would likely be at work.

102. The Respondent submitted that the Claimant did not inform the Respondent on 29 April 2018 that withdrawing her flexibility was discriminatory. The contemporaneous documents should be preferred and evidence of Lucy Atkinson. The Claimant did allege her working pattern was discriminator in her email dated 31 July 2018. In so far as any matters pre-dated 31 July 2018 the Respondent's actions could not have been a detriment as the Claimant had not committed a protected act before that time. In respect of issues, the performance review 13 August appropriately identified them. It was submitted that the Claimant's pay was properly deducted on 9 August 2018 because there was no explanation for her absence. As a subordinate, Sarah Aitken properly contacted the Clamant on 6 and 8 September 2018 when she did not attend work; she was expected to be in work. Lucy Atkinson was entitled to contact the Claimant when she failed to arrive for work on 15 July 2018. Lucy Atkinson appropriately confronted the Claimant regarding the RPM accounts that were not balanced.

103. The Respondent contended that it had calculated the Claimant's holiday pay correctly. If the EDT is found to be 26 October the sum owing to the Claimant was £109.94.

104. The Claimant did not want to make oral submissions but wished to rely upon the evidence she had given.

CONCLUSIONS

105. The Tribunal found that the Claimant was a qualified accountant and played a vital role in the administration of the home. She was part of the key personnel there. As a manager she needed to be available for families to sort out any difficulties with monies of residents or any other enquiries and she was the only person in the office to do this. The Tribunal finds that the respondent did need to know where the Claimant was for health and safety reasons and to make plans to meet and discuss issues with resident's families and it simply did not know when the Claimant was going to be in work or not going to be in work outside core working hours.

106. The Tribunal also found that the Claimant was unhappy with being challenged by people she perceived to have less expertise than herself. She did not enjoy being

managed but preferred to work in a way she wanted. Lucy Atkinson had a more "hands on" style of management of the Claimant in comparison to Ms. Wiseman's light touch approach and Ms. Atkinson was present in the home day to day. The Claimant was not on the time smart system so there was no record as to when the Claimant was actually in the office.

107. The Tribunal deals with the issues in turn.

108. <u>Did the Respondent breach the contract with the Claimant? Specifically, were the changes requested of the Claimant's working pattern/hours following Lucy Atkinson's return to work in breach of that contract of employment?</u>

108.1. The Tribunal finds that the request of the Respondent to have advance notice of the timing of the Claimant's floating hours was a change to her contract. Prior to this request the Claimant could chose day to day which hours that she wished to work without the requirement to inform the Respondent about the floating hours to be worked that day. However, the Tribunal finds that it was clear to the Claimant from the commencement of the flexible working trial that any floating hours had to be undertaken in accordance with the needs of the business. This was explicit during the trial period and the Tribunal find implicit following the change to the Claimant's contract.

108.2. The Tribunal finds that the Claimant although initially unhappy to be requested to provide to the Respondent advance notice of her floating hours, she did agree to this variation. The Claimant in fact stated candidly that in her email on 27 April 2018 she nearly always worked the same pattern anyway. The Tribunal finds that the need to give two weeks' notice of envisaged floating hours was a change to the Claimant's contract which she ultimately agreed to (not by duress) because the Tribunal finds the Claimant recognised the fact it was a business need. It was a variation to the way the contract operated which the Claimant had agreed to. She worked with this change successfully for many weeks. It did not prevent the Claimant from seeking emergency need or further flexibility (if discussed with her manager) if she needed this.

109. <u>If so, was the breach fundamental ?</u>

109.1. The Tribunal do not consider that there was any breach, repudiatory or otherwise. The Claimant agreed to the variation and there were no issues raised with this arrangement by the Claimant until the Respondent began to question the performance of the Claimant.

110. <u>Did the Claimant resign because of the breach ?</u>

110.1. The Tribunal find that the Claimant resigned because she was not happy with the challenge by her manager to her performance in the work place. This is evidenced the Tribunal find by the fact that the change/variation worked well until the Respondent started to challenge

the Claimant in terms of her work and that she was behind in certain tasks. The Claimant felt she was being monitored, which she was, justifiably and the Claimant did not like it.

111. Did the Claimant unreasonably delay before resigning?

111.1. There was no breach as indicated above but if the Tribunal had found so, there was a significant delay in claiming that there had been one. In particular in the way the Claimant had expressly agreed the change/variation to her contract and worked well within the new arrangement for some weeks without any difficulties or complaints.

112. Was the Respondent permitted to exercise the PILON clause?

112.1. Pursuant to the Claimant's contract dated 18 November 2016 at Clause 25 the contract could be terminated by either side giving the other 8 weeks' notice. The Respondent reserved the right to make a payment in lieu of notice. When the Claimant tendered her resignation by email dated 6 September 2018, she indicated her last working day would be 23 November 2018. The Claimant gave more notice than required; 8 weeks would have ended on 1 November 2018. By letter dated 21 September 2018 the Respondent stated incorrectly that the Claimant only had to give one month's notice and indicated the Claimant's last working day would be 25 September 2018. It then stated, *"you will be paid in lieu of notice up until 23 November 2018."*

112.2. The Tribunal finds that the Respondent agreed that the Claimant's contract terminated on 23 November 2018 and that she would be paid up until that date. The Respondent was entitled to exercise the PILON but having agreed to a termination date of 23 November 2018, and to pay the Claimant until that date, the Respondent agreed to this and the Claimant is therefore entitled to any sums due for the whole of this period (up until 23 November 2018).

113. When was the PILON in fact made?

113.1. The Tribunal refers to its findings above.

114. Had the Claimant worked her contractual notice period would she have the requisite qualifying service?

114.1. On the basis that the Tribunal has found that the parties agreed a termination date of the employment contract of 23 November 2018 and that the Claimant would be paid up until this date, the Tribunal finds that the Claimant did have the necessary two years' service to bring an unfair dismissal claim.

114.2. The Claimant's unfair dismissal claim has been based only on the alleged breach of her term concerning working pattern and hours. On the basis that the Tribunal reject there was any such breach and no constructive dismissal can be established, the Claimant resigned and her unfair dismissal claim fails.

115. Direct Discrimination because of disability by association

115.1. Did the Respondent subject the Claimant to less favourable treatment when :

(a) On 31 July 2018 Sarah Aitken told the Claimant she would be subject to disciplinary proceedings if she failed to call the office by 9 a.m. (unless it was an emergency);

(b) On 9.8.2018 the Claimant was not paid for time off to attend to her father during a hospital admission.

116. The Respondent has conceded that the Claimant's father was disabled. The Tribunal finds that the Respondent did know and should have known the Claimant's father was disabled by the fact that the Claimant told them about this in her letter dated 13 August 2017 and in the meeting on 15 August 2017 with Jill Wiseman. The Claimant had agreed to provide advance notice of her hours and as indicated in her email dated 27 April 2018 and these included a 9 a.m. start on all working days. The Tribunal did not find that Sarah Aitken told the Claimant she would be subject to disciplinary proceedings if she failed to call the office by 9a.m. unless it was an emergency. The Tribunal finds that Miss. Aitken told the Claimant she was expected to use the correct/proper communication channels to inform management when she would be late or working a different pattern from the one agreed. The Claimant's refusal to comply with the agreed variation was noted by Ms. Aitken as a matter to be raised with Manager Direct the HR system which could result in disciplinary action. Ms. Aitken was entitled as the Claimant's manager to expect the Claimant to attend work at the agreed time and communicate with her manager if she was unable to do so.

117. The Tribunal did not find that this was less favourable treatment; employees are expected to attend at the times of their scheduled work and comply with reporting procedures.

118. The Tribunal finds that at the meeting on 31 July 2018 the Claimant said she needed more flexibility to help her father. However, her email on 31 July 2018 gives an explanation for her lateness due to roadworks on the A61 and a tailback (page 332). The Tribunal finds even if the Claimant could establish less favourable treatment there is no evidence to establish that her inability to call had anything to do with her disabled father.

119. In respect of not being paid for 9.8.2018 when she attended hospital for her father, the Tribunal found the Claimant's evidence on this vague. She was unable to inform the Tribunal who she spoke. The Tribunal was not satisfied that the Claimant had attended hospital on this date because of her father or at all. In the circumstances the Tribunal rejected the Claimant's contention that she was treated less favourably because of her father's disability.

120. Was this treatment less favourable than it has treated or would have treated others? In particular, with respect to (a) Sean Wilde and with respect to (b). Sarah Aitken.

120.1. The evidence about Sean Wilde is that he was a cook who was reprimanded for attending a domestic situation and he corrected his conduct going forward. The Claimant was failing to comply with the agreed arrangement from 23 July onwards. She did not correct her conduct. In any case the Tribunal concludes that the Claimant on the evidence cannot establish a connection between the incidents and her father's disability. In respect of Sarah Aitken, the evidence was that her husband was ill and was rushed into hospital. She was paid for time off. However due to the vagueness of the Claimant's evidence the Tribunal finds that the Claimant cannot establish that Sarah Aitken was a comparator namely in the same or similar circumstances.

121. <u>Has the Claimant proven the primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was due to disability by association?</u>

121.1. For the reasons set out above, the Tribunal finds that the Claimant has failed to establish facts from which the Tribunal could properly and fairly conclude that the difference in treatment was due to disability by association.

122. <u>Indirect discrimination in relation to sex/age</u>

122.1. Did the Respondent agree to a flexible working arrangement with the Claimant and if so what? The Respondent did agree to a flexible working pattern so that the Claimant was able to work core hours and then take floating hours when it suited her but always with the needs of the business in mind.

123. <u>Did the Respondent impose or did the Claimant agree to a change in the working arrangement?</u>

123.1. The Respondent and the Claimant agreed to vary the arrangement fixed following the trial so that the Claimant worked core hours and gave notice of her floating hours (2 weeks in advance; otherwise she needed to consult her manager). The operation of this new arrangement required the Claimant to provide 2 weeks' notice of her floating hours rather than the Claimant simply deciding on the day. This again was in keeping with the needs of the business. This did not prevent the Claimant from taking emergency leave where required or changing the proposed arrangement provided she gave notice to her employer. This again was in keeping with the needs of the business. The Tribunal did not find the Claimant was required to use timesmart.

124. <u>Was the change (a)a requirement to work core hours; (b)a requirement to give advanced notice of when floating hours would be worked and/or(d)a requirement to use the timesmart system.</u>

124.1. The Claimant was always required to work core hours; the change was how the floating hours operated; the Claimant had to give notice of the timings of her floating hours. There was no specific requirement to use timesmart

125. <u>Were any such changes a PCP?</u>

125.1. The Tribunal finds the need to work core hours and provide notice of floating hours were applicable to the Claimant alone and not to any other person in the organisation. The nature of the flexible arrangement the Claimant had reached with her employer meant that the employer imposed these requirements on the Claimant.

126. Would the application of such a PCP put either other women or other people aged 45 to 55 at a particular disadvantage when compared with persons who do not share that protected characteristic.

126.1. The evidence provided by the Claimant states that females were more likely to be unpaid carers than males; 57.7 per cent of unpaid carers were females and 42.3% were males. Further the share of unpaid care provision fell most heavily on women aged 50 to 64. The Claimant also relied upon a policy briefing dated May 2014 from Carers UK which stated one in five people aged 50 to 64 are carers. 58 % of carers are female and 42% are male.

126.2. Potentially the Claimant as a woman and because of her age was likely to be a carer. The appropriate pool would be men and/or those not aged 45 to 55 years of age who worked under a flexible working arrangement with floating hours. The Tribunal conclude that women or people aged 45 to 55 would not be put at a particular disadvantage by having to give notice of when the floating hours would be taken compared to the pool of men or those not aged 45 to 55 in the circumstances that occasional care is likely to be achievable using advanced notice; it would not mean exclusion from the workplace and provision of care is not the only reason why employees request flexible working arrangements.

127. Did the application in fact put the Claimant to a particular disadvantage.

127.1. Even if the Tribunal is wrong about that in emergency situations, the Respondent permitted the Claimant to alter the arrangement. There was no particular disadvantage to the Claimant. Further the Claimant assisted in caring for her father in a way which was not unexpected; assisting him to get out of bed. She also used floating hours for reasons other than caring for her father.

128. Has the Respondent shown that the PCP was (a)reasonably necessary (b) proportionate and (c)in pursuit of a legitimate aim.

128.1. The Tribunal is satisfied that the Respondent needed to know as a key member of personnel when the Claimant was going to be in work for the needs of the business in ensuring that the Claimant was present to meet and discuss issues with resident's families and for health and safety reasons. The Tribunal considers the arrangement was proportionate because the Claimant continued to retain some flexibility and could change her floating hours having given notice if she consulted her managers. She could also take emergency leave as set out in the employer's policies. On the basis of the evidence of Lucy Atkinson and Sarah Aitken that the lack of knowledge of when the Claimant was in work caused difficulties for the business the Tribunal is persuaded that the Respondent was pursuing a legitimate aim.

129. Victimisation

129.1. Did the Claimant carry out a protected act namely :

(a) tell the Respondent on or about 29 April 2018 that withdrawing flexibility was discriminatory;
The Tribunal rejects the Claimant's evidence that she told the Respondent on or about 29 April 2018 that withdrawing her flexibility was discriminatory. The contemporaneous documentation does not support this. The Tribunal has already found that the first time when the Claimant alleges that she is being discriminated against is on 31 July.

(b) Raise a grievance on 31 July 2018 that the changes to her working pattern were discriminatory;
The Tribunal accepts that the Claimant raised a grievance that changes to her working pattern were discriminatory. This was set out in her email at page 141 and not during the meeting on the morning of 31st July.

129.2. Did the Respondent carry out any treatment amounting to a detriment because of those protected acts namely:

129.3. (a) In July 2018 deliberately excluded the Claimant from a notification regarding legionella bacteria in the home.
The Claimant withdrew this allegation at the hearing.

130. On this basis, the allegations of victimisation occurring prior to 31 July 2018 the Tribunal rejects. The Tribunal only considers the acts post 31 July 2018 when a protected act took place. The Tribunal deals with the allegations which are left.

131. In respect of the allegation that on 31 July 2018 the Respondent threatened the Claimant with disciplinary action if she helped her father in the morning. The Claimant did not at the time state she had helped her father. She stated she was late because of traffic. The Claimant was not adhering to the agreed schedule and in the circumstances the Respondent was entitled to raise this with the Claimant (page 139). The Claimant raises her written grievance 2 hours later (page141); there is no causal in respect of the allegation that on 31 July 2018 the Respondent threatened the Claimant with disciplinary action if she helped her father in the morning. The Claimant was not adhering to the agreed schedule and in the circumstances the Respondent was entitled to raise this with the Claimant (page 139). The Claimant raises her written grievance 2 hours later (page141); there is no causal connection between this allegation and the protected act of the same date.

132. The Tribunal reject the allegation that between 31 July 2018 and 13 August 2018 the Respondent was unfairly and excessively critical. In the Claimant's performance review on 13 August conducted by Sarah Aitken, a number of performance issues were raised. Some of these matters had been raised with the Claimant before as far back as January 2018. The Tribunal accepted Mary Moran's evidence in preference to the Claimant's that the RPM account was not in order in July 2018. This had been an ongoing issue and the Tribunal do not consider that it was overly critical to raise it with the Claimant who had responsibility along with other administrative tasks to ensure it was completed.

133. The Tribunal finds that the Claimant's pay was deducted on 9 August because she failed to follow the correct reporting procedures and did not provide an explanation for her absence, this had nothing to do with the Claimant's committing a protected act. Further the Tribunal accepted that on 6 and 8 September 2018 Sarah Aitken contacted telephoned the Claimant because she did not attend work. She was unaware that the Claimant had informed Jill Wiseman by email and she would not have known because Jill Wiseman was on holiday (as the Claimant well knew). The Respondent's contact had nothing to do with the Claimant committing a protected act.

134. <u>Breach of contract</u>

134.1. <u>Did the Respondent fail to calculate the Claimant's holiday pay?</u>

On the basis that the Respondent has taken the wrong date of termination as opposed to 23 November 2018 (the agreed date of termination) there will be some additional money owed to the Claimant. The parties are expected to agree this sum. If not a remedy hearing will be required to assess the correct sum.

134.2. <u>Did the Respondent fail to pay benefits as part of her PILON?</u>

On the basis that the Respondent has again taken the wrong date of termination as opposed to the correct agreed date of 23 November 2018, the Claimant has not been paid correctly. Even with the sum paid 26 February 2019, the Claimant will be owed some money. The parties are expected to agree this sum. If not, a remedy hearing will be required to assess the correct sum.

135. A remedy hearing will be held to determine the outstanding sums.

Employment Judge Wedderspoon

Sent to the parties on:

13 August 2019

For the Tribunal: