EMPLOYMENT TRIBUNALS

Claimant: Mrs S Maudsley

Respondent: FP&S Parts And Services Limited

Heard at: Liverpool **On:** 16, 17 & (in chambers) 18 December 2019

Before: Employment Judge Wardle
Mrs A Ramsden
Mrs J C Fletcher

Representation
Claimant: In person
Respondent: Ms Owen - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaints of breach of contract/unlawful deduction of wages, constructive unfair dismissal and of direct discrimination because of the protected characteristic of sex are not well-founded.

REASONS

1. By her claim form the claimant has brought complaints of constructive unfair dismissal, unlawful discrimination on the grounds of sex and that she is owed arrears of pay.

2. At a Preliminary Hearing for case management held on 28 November 2018 the three complaints were summarised by Judge Hill in the following terms. In relation to the money claim it is the claimant's case that she was asked in or around January 2016 to benchmark her salary along with other staff within the company. At the time she was being paid £30,000 per annum and the bench marked figure was £40,000. She says that the respondent's Managing Director (David East) agreed to the increase to be paid in two instalments to £36,000 from 1 March and then to £40,000 in September 2016 but that the second instalment was not paid, which the claimant complains was in breach

of contract and discriminatory of her on the grounds of her sex. In relation to her sex discrimination complaint she complains that she was treated less favourably on the grounds of her sex in the way in which pay rises and bonuses were awarded by the respondent. Specifically she claims that during a conversation that she had with the Managing Director in June/July 2017 she was told that she was not helping herself because she had had a period of sickness and taken annual leave, which meant that she was out of the business due to childcare arrangements and which she believed was a reason why her salary was not increased as promised. Further she claims that in December 2017 whilst discussing the withholding of her pay increase it was said to her that she had a husband at home to support her and that a male colleague's wife had been made redundant and that he needed to be looked after as he was a good guy. In relation to her constructive unfair dismissal complaint her case is that after the meeting in December 2017 she considered that the respondent had breached the term of trust and confidence and that she had been left in limbo thinking that she would not progress any further and that she had been left in the embarrassing position of having to raise the issue of her pay all the time, which left her with no alternative but to look for alternative employment.

3. By its response the respondent has denied the claimant was unfairly constructively dismissed or that she was discriminated against and further avers that there was no concluded agreement that her salary would increase to £40,000.

4. The Tribunal heard evidence from the claimant and on behalf of the respondent from Mr David East, former Managing Director and Mr David Smith, Group Finance Director of BPW Limited the respondent's parent company. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed.

5. We also had before us documents in the form of a bundle contained in a lever-arch file running to 185 pages, which we marked as “R1”.

6. We completed the taking of the evidence and the receipt of the parties' closing submissions late on the close of the second day of hearing and informed the parties that we would be reserving judgment. We subsequently sat in chambers on 18 December 2019, which had been allocated as the third day of hearing when we were able having regard to the evidence, the submissions and the applicable law to reach conclusions on the matters requiring determination by us.

7. Having heard and considered the evidence we found the following facts.

Facts

8. The claimant was employed by the respondent as a Human Resources Manager. She had fulfilled this role from 12 June 2015 until the date of her resignation on notice with effect from 16 March 2018.

9. The respondent company is a factor of commercial vehicle spare parts. It was originally owned by SDC Trailers but was sold by them to BPW Limited (BPW) on 9 December 2015, which company was in parallel undertaking the acquisition of EMS Limited (EMS), a business previously owned by Mr Eammon Malloy, who was installed as Group Managing Director. The respondent operates from a number of sites, including one at Ellesmere Port, where the claimant was based as part of a team of 10 or so employees out of a total of 290 employees across all of the sites.

10. The claimant was interviewed for the post of HR Advisor on 30 April 2015 by Mr David East. The interview took the form of a general discussion about the role and its requirements and the candidate's previous experience. The respondent was looking for a stand-alone HR Generalist/Manager. As well as generalist operational duties the successful candidate was also to be responsible for improving processes, developing new HR initiatives and maintaining a solid HR function to include talent attraction and learning and development. The salary on offer was £30,000 plus a car. Following her interview she was made an offer of employment on 13 May 2015 with a start date of engagement of 15 June 2015. The main terms and conditions on which the offer was based were set out in a letter at pages 46-49 of the bundle.

11. On the claimant's evidence following a successful probationary review at the end of August 2015 Mr East agreed to look at her salary as this had been promised by her dotted line report, Jane Millar Head of HR at SDC Trailers, upon completion of her probationary period. Whilst it was not accepted by Mr East that he had any discussion with the claimant about reviewing her salary at this point in time he acknowledged in line with her evidence that he asked her in or around the third quarter of 2015 to benchmark a number of salaries, including her and own and those of the Managing Director and the Operations Director explaining that it was the impending takeover by BPW which had prompted this in order to get a rough guide as to where salaries would go in the future.

12. According to the claimant Mr East requested her to invest in a benchmarking tool, which she did after contacting her previous line manager for a recommendation, which led her to an organisation called XpertHR. Using the tool purchased from them it was her evidence that she sent the results for the roles that he had requested, including her own, to Mr East in advance of September 2015, at which time he visited the Ellesmere Port branch, where she was based to discuss the impending buy out by BPW, which he had not been able to do earlier because of confidentiality issues and told her that the benchmarking would have to be put on hold as priority was to be given to the due diligence paperwork in respect of the buy out. As referred to above this was finalised on 9 December 2015 and it was common ground that the claimant telephoned Mr East following this in January 2016 to discuss a pay rise. During this conversation Mr East asked to be provided with the benchmarking documentation for the role of HR Manager and the claimant downloaded this on 8 January 2016 at pages 172-3 and sent it to him by email. This gave a base salary of £40,479 for the lower decile.

13. On the claimant's evidence conversations continued between them over the succeeding weeks until on 27 January 2016 during a telephone conversation Mr East agreed that that the minimum salary for the HR Manager role that she was employed to do was £40,000 minimum. His contrary evidence was that the claimant indicated to him that she was looking for a salary in this amount and that in response he said that he had no problem with trying to get her there but that she needed to show him the journey stating that he had a very clear idea of what he wanted from the role namely for it to include learning and development and that during their conversation on this date he asked her for a proposal for a salary increase explaining that he was looking for a commitment along the lines of "I will deliver X and Y" in terms of L&D.

14. Later that day the claimant emailed Mr East saying 'As per our discussion this morning I have debated with myself and taken into consideration where the company stands today. I think we both agree the minimum salary based on role and responsibilities would/should be 40k therefore I propose 6k increase followed by a further 4k in 6 months' time. 6k now means that our projected wage bill will not increase from where we are today, taking the savings from accounts. In 6 months' time we will see the revenue from the new wins and will be in a position to re-invest'. Shortly thereafter Mr East replied saying 'Effective 1st March increase your salary to £36k and Ian's (Ian Scott, Operations Director) to £50k. Both are worthy of higher increases but we all accept that the business cannot support them at this stage. I do acknowledge however that you were made a promise by Jane Millar that your salary would be increased upon completion of your probationary period and that period has now passed'. In response to which communication the claimant simply emailed him to say 'Thank you, much appreciated'.

15. Subsequently the claimant prepared a new contract of employment for herself, an unsigned version of which was to be found at pages 52-62 of the bundle. The document in question was one that had been produced by external legal advisers and was being issued to new starters in the business at the time that her salary increase took effect. Clause 4.1 of the contract provided that her basic salary was £36,000 per year and clause 4.2 provided that her salary may be increased from time to time at the company's discretion without affecting the other terms of her employment and that there was no obligation to award an increase. In addition clause 23.1 provided that this agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter and clause 23.2 provided that each party acknowledges that in entering into this agreement it does not rely on and shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement.

16. On the claimant's case the second instalment of her salary increase in the amount of £4,000 was due to be paid with effect from 1 September 2016 and it was her evidence that Mr East visited the Ellesmere Port branch in August

2016 but that he left before she had chance to speak with him about putting through the second part of her pay rise, in respect of which she needed his authorisation, which led her to send him a text requesting the same, in response to which Mr East withheld permission and asked her not to text him with such requests again adding that he would speak to her upon his return from holiday. For his part Mr East remembered receiving a text message from the claimant on a Thursday evening along the lines of 'I'm doing payroll, it's been six months am I okay to put through the additional £4,000 increase that was agreed' and stated that having been with her that afternoon when she had the opportunity to speak to him directly he was shocked to have received such a text thinking that such a topic was inappropriate for a text conversation and replied to her to express his displeasure and to inform her that they would further discuss the matter face to face.

17. On the claimant's evidence she next met with Mr East on 6 September 2016 for the purpose of discussing ongoing HR projects across the business and next steps, when she says he asked to address 'the elephant in the room', which he clarified as relating to the text that she had sent him in relation to the pay rise before expressing his disappointment that she had texted him rather than spoken to him, which led her to explain that she had tried to follow him out of the building but that it was too late as he had already left and that she had then tried to call him but there had been no answer, which then saw him saying that he needed her to do some more strategic HR surrounding the learning and development project. She stated that she became emotional and tearful at this point and told Mr East that she was upset as this was not a moving goal post the rise had already been agreed but that he insisted she needed to complete the L&D project, which gave her no option but to leave it there. It was her further evidence that Mr East gave her a deadline of 13 January 2017 to provide him with the work he had requested in relation to the L&D project, which she emailed to him on 12 January 2017 only to be informed that the project had been put on hold due to new priorities with the new owners BWP Limited before confirming that until the additional responsibilities for L&D were in place he could not process her rise.

18. On Mr East's account of this meeting the claimant requested a further salary increase to £40,000 and he acknowledged that she became tearful, which led him to say to her " Where have I said to you that your salary would increase to £40,000?", or words to that effect before adding "I don't disagree with wanting to get you there, but as I have said all along, I need to see more from you in terms of the L&D project. I can arrange for my wife to give you the support. You need to get me details of the project". He also accepted that he did ask her to carry out some HR work around the project and that he confirmed that the company could not consider a salary increase until it was in place and she took on L&D responsibilities.

19. As matters turned out according to Mr East, whilst the claimant produced some elements of the project, it was never entirely completed due to business reasons in the nature of the company suffering massive losses and other more important operational matters such as the changing of IT systems and part numbers taking precedence.

20. On 5 June 2017 the claimant and Mr East met at the Manchester branch, when she says that she again raised the subject of her salary, when he again declined to put a rise through and that when asked for reasons he raised concerns around her absence from the business elaborating that it concerned the way in which she had taken annual leave. On her account this related to her opting to take leave during the school holidays to make her working weeks shorter to maximise her time off with the children and to support child care arrangements and that she pointed out to him that the holidays had been authorised by him, which saw him referring to a period of sickness absence, which appeared to have immediately preceded the holiday absence over the half-term and informing her that this had not helped her case. She says further that she pointed out that her sickness absence had been supported by a sick note from her GP and that it was of no relevance before going on to explain to him how upsetting the issue of her salary rise was and that having to keep asking for something that was already agreed was distressing, which had caused her to feel that he was discriminating against her as a woman and a mother as other pay raises and bonuses were being paid within the business in a way which was neither consistent nor fair, at which point she says that he informed her that it was not him who had remarked about her absence but Mr Malloy, the Group Managing Director.

21. On Mr East's version of the meeting, the purpose of which he believed to be a general catch up he stated that during it he asked the claimant to ensure that there was adequate cover was in place if she was on leave as the business had no HR support in her absence, which was a concern, he said, that had been raised by Mr Malloy due to an incident that had arisen where the business did not have access to paperwork needed urgently in a recruitment situation because the claimant was away. He did though acknowledge that he did comment about her period of absence not helping her but claimed that this was purely with reference to her working relationship with Mr Malloy, who did not understand the important role that HR played but emphasised that this played no part in the consideration given to her level of salary as Mr Malloy had no involvement with this and nor did the manner in which she had chosen to take her leave to tie in with her childcare commitments.

22. The next event that the claimant refers to in support of her complaints is her attendance at a training event on people development to be run by Clare East, the wife of Mr East, in respect of which she says that she was asked to head down to Banbury Best Western Hotel a day earlier than the rest of the leadership team on 19 December 2017 in order to prepare for the event. That evening the claimant met up with Mr East and his wife for dinner and on her evidence Mr East whilst discussing the training event referred to her rise and said that once they had done the course and shown BPW the need for learning and development she would need to put a proposal together for her salary and the additional L&D responsibilities. She said further in evidence that she became very defensive at this point and that she felt upset that he had raised the issue in the presence of his wife before going on to ask Mr East why she had to jump through more hoops to get a rise that was already agreed when Paul Thompson (National Sales Manager) had received a

significant payrise over the last 12 months for no additional responsibilities or additional revenue, in response to which he said that Paul's a good guy; we need to look after him and that he had had a tough year with his wife being made redundant, at which point she told him that she thought it best if they left the conversation there.

23. It was Mr East's evidence that he did not recall their having a conversation about her salary on this occasion but that if it had been brought up it would have been led by the claimant. He did though recall her querying why Mr Thompson had received a pay rise and his confirming to her that he had been given a pay increase together with other staff members both male and female adding that Mr Thompson's work had justified the increases by meeting his KPIs and taking on added responsibilities and that he was responsible for the company's three highest billing clients and instrumental in their tender for the renewal of those contracts leading him to assert that his role was in no way comparable to that of the claimant. It was his belief that Mr Thompson had received a payrise of £4,000 in April 2016, which represented an increase of just over 11% of his salary at the time, prior to which he had been on a salary of £36,000. He may well have been mistaken in this belief having regard to the respondent's branch payroll report at pages 163-171 containing salary details from July 2015 until March 2018. This showed that Mr Thompson had a monthly salary of £2,654.48 in July 2015 giving a yearly salary of £31,853.76, which suggested that the 11% increase of £4,000 would have taken him to circa £36,000. It was the case though that by March 2018 his salary had further risen to £42,000 per year, which represented an increase of just over 31% of his July 2015 salary. In this regard it was though pointed out by Mr Smith that the company had during 2018 taken on a female sales manager to support Mr Thompson on the same salary. Mr East also denied that he said to the claimant that Mr Thompson was a good guy that needed looking after or that he had had a tough year and he refuted the claimant's claim that he had referred to his wife having been made redundant, which he said was simply not true.

24. On the claimant's case this conversation was pivotal in her decision to seek other employment stating that following a conversation with her husband that night she felt that she had put her view across time and time again; that if she had been a male employee she would have received more than the agreed figure and that things were not going to change. In her evidence to us she stated that over the Christmas break she began to look at alternative employment opportunities and that she had people coming back to her through January before securing interviews with Cott Beverages in Wrexham and Blue Machinery in Northwich at the end of that month and into the early part of February 2018, which resulted in a verbal offer of employment of Group HR Manager with the latter organisation later confirmed in writing shortly before she tendered her resignation in a letter dated 16 February 2018 to Mr East at page 149 having previously agreed with him that she would work one month's notice rather than the three months that her contract provided for.

25. In cross-examination the claimant accepted that her resignation letter was effusive and gave no hint that it had been precipitated by any conduct on the

part of the respondent in repudiatory breach of her contract of employment. Her explanation for the positive tone of the letter was that she knew it needed to be worded carefully in order to get Mr East to agree to let her work a shorter notice period albeit that she had already secured his agreement before it was written.

26. During her notice period the claimant emailed Mr Smith on 4 March 2018 at page 146 of the bundle, in which she asked him to review the details around her salary commenting that as he was aware this had been a subject of concern for some time and that following many conversations with Mr East it was agreed that her salary should be £40,000. She continued that he had advised her that she needed to come up with a proposal, which she had in writing referring to the email sent to Mr East on 27 January 2016 detailing a two stage payrise of an initial £6,000 and a further £4,000 in six months' time, which he had agreed to only for him to withhold consent to payment of the second stage and to require her instead to work on the L&D project to justify the salary increase, which she did despite this being a moving goal post, which upset her and caused her to discuss her dismay with him. She also referred to the events of 5 June and 19 December 2017 as set out above at paragraphs 20 and 22 relating respectively to it being said that her absence from the business was not helping her case and the goal posts being moved again in relation to her coming forward with a proposal based on her taking on additional L&D responsibilities. She concluded by saying that she had reviewed the reasons for her payrise being delayed and found them completely unfounded and that once a term such as annual salary is increased by an implied (oral) agreement, then any subsequent withholding of the extra pay was not only a breach of contract but also an unlawful deduction of wages properly due and payable before asking for this to be rectified in her final salary.

27. Mr Smith on his evidence did not consider that there was anything in the email to Mr East, which the claimant had forwarded which suggested that he had agreed to her proposal, which he claimed was based on a very limited benchmarking exercise undertaken by her at Mr East's request whereby she benchmarked the salaries of three team members comprising Mr East, Mr Scott and herself and in circumstances where the company did not act on the exercise' results. In contradiction of this claim it was the claimant's evidence in answer to our questions that the whole business had been benchmarked with the document at page 172 being just a snippet and both Mr Scott's salary and that of the claimant had been increased based on the results. It was his further evidence that he discussed her email with Mr East as her direct line manager as it was something that he was unaware of and that he met with her on 9 March 2018 when he says that he explained to her that the business was not ready to change its HR function but that he wanted to understand what they could do to persuade her to stay as she was considered to be a good worker and part of the management team. In response he says she requested a higher salary, more responsibility/control and an HR Assistant and that whilst this was in excess of what the business could justify and support they decided that it was better to consider these options at a time when they were merging the company with another group company (EMS),

which involved a vast amount of HR input and he offered her a higher salary (circa £42,000) on the basis that she would have more responsibility for the merging company and at BPW but also to develop the skills of the L&D role. According to Mr Smith they agreed that she would consider their discussion and return to him with her views. In terms of his account of the discussion the claimant in her evidence denied that she asked for more responsibility but rather that she asked for the barriers between EMS and the respondent to be lifted and that she be given full control due to the errors that were being made by EMS and that she needed to report directly to him due to the issues with Mr East, which he indicated might be difficult but that a dotted reporting line could be agreed.

28. On 12 March 2018 the claimed emailed Mr Smith at page 146 thanking him for his offer but stating that she must decline it as it was too late in one respect, which she explained in answer to our questions as relating to the issues over time of which Mr Smith was aware and asking him to get back to her regarding her email of 4 March 2018, which she chased with him by a further email sent on 15 March 2018 the penultimate day of her employment, which he responded to the next day advising that as he understood it the business had not agreed to increase her salary but to review it and potentially increase it when the business was able to do so, which it was never able to do and that should she want to take the matter further she had the opportunity to raise a formal grievance.

29. The claimant responded to Mr Smith's email by an undated text at page 161 to say that she had just read it and that she had already raised a formal grievance referring to her email of 4 March 20i8 and that it had not been dealt with in line with company policy and that she would like to understand how the business had not been in a position to review her salary when it had already been reviewed and agreed at £40k. Her employment then terminated on 16 March 2018 upon expiry of her notice period.

30. Following her resignation a claim to the Employment Tribunals was subsequently presented by the claimant on 16 April 2018 after an Early Conciliation (EC) request was made on 16 March 2018 and an EC Certificate was issued on 16 April 2018, which was responded to by the respondent within the prescribed period.

Law

31. In regard to the claimant's breach of contract claim jurisdiction is given to employment tribunals to hear certain types of contractual claims by virtue of the Employment Tribunals Act 1996 (ETA) and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Under section 3(2) ETA and Article 3 of the Order it is provided that for a tribunal to be able to hear a contractual claim brought by an employee that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following: (i) damages for breach of a contract of employment or any other contract connected with employment (ii) the recovery of a sum due under such a contract (iii) the recovery of a sum in pursuance of any

enactment relating to the terms or performance of such a contract.

32. In regard to the unlawful deduction from wages complaint the relevant law is to be found in the Employment Rights Act 1996 (ERA). Section 13(1) dealing with the right not to suffer unauthorised deductions provides that an employer shall not make a deduction from wages of a worker employed by him unless - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction and section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated.... as a deduction made by the employer from the worker's wages on that occasion.

33. In regard to the constructive unfair dismissal complaint the relevant law is to be found in the Employment Rights Act 1996 (ERA). Section 95 (1)(c) provides that an employee is dismissed by his employer 'if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct'. The conduct of an employer giving rise to a constructive dismissal must involve a repudiatory breach of contract i.e. a serious breach going to the root of the contract of employment which shows an intention no longer to be bound by one or more essential terms of that contract.

34. Individual actions by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining trust and confidence. In this claim the claimant relies upon this implied term as having been breached. In this regard a fundamental breach of contract will occur if the employer, without reasonable and proper cause, conducts itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. In assessing whether there has been a breach of this implied term the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

35. In order to claim constructive unfair dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning so that he did not affirm the contract and lose the right to claim constructive dismissal.

36. The relevant law for the purposes of the discrimination complaint is to be found in the Equality Act 2010 (EqA). Section 4 lists 'sex' as being among the protected characteristics.

37. Section 13(1) defines direct discrimination as follows: '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.' It therefore involves the requirement for a real or hypothetical comparator to whom the relevant protected characteristic does not apply and for the purposes of the comparison, pursuant to section 23(1), there must be 'no material difference between the circumstances relating to each case'.

38. Section 123(1)(a) provides that a complaint of work-related discrimination must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of. However, there is not an absolute bar on claims being presented outside this time limit as section 123(1)(b) allows for a claim to be brought within 'such other period as the employment tribunal thinks just and equitable'. In addition section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period. Section 140B dealing with the extension of time limits to facilitate conciliation before the institution of proceedings provides that in working out when the time limit set by section 123(1)(a) expires the period beginning with the day after the Early Conciliation (EC) notification is made and ending with the issue of the EC certificate is not to be counted.

39. Section 136(2) and (3) dealing with the burden of proof provides that, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, unless A shows that he or she did not contravene the provision.

Conclusions

40. Applying the law to the facts as found the Tribunal considered first of all the claimant's breach of contract claim. Her contention in this regard is that Mr East orally agreed during a telephone conversation with her on 27 January 2016 that the minimum salary for the HR Manager role, which she was employed to do was £40,000 based on the benchmarking exercise that she had undertaken at his request and that he agreed to increase her salary to this figure from £30,000 but that this would need to be done in two stages as he could not issue a £10,000 pay rise at once before asking for a proposal from her to increase her salary to the agreed figure, which alleged agreement she referred to as an "implied (oral) agreement" in the email that she sent to Mr Smith on 4 March 2018 asking him to review the details surrounding her salary. For Mr East's part any such 'agreement' was denied with his position being that in response to her expressed wish for a salary of £40,000 he told her that he had no problem with trying to get her there but that she needed to show him the journey in the sense that he wanted the position to include Learning and Development (L&D), in respect of which role he was aware that the claimant did not have the full skill set and that in asking her for a proposal he was looking for a commitment along the lines of ' I will deliver X and Y in terms of L&D'.

41. In relation to this conflict we preferred the evidence of the claimant for the reason that the follow-up email sent by her to Mr East later that day better

fitted her account of the earlier conversation in that it proposed a two stage increase of her salary with £6,000 to be paid immediately and a further £4,000 in six months time which was not contingent on any commitment by her to expand her post's responsibilities to include L&D. Furthermore we considered that had Mr East made it clear that any increase was to be tied in with an expansion of her role in this way he would have said as much in the email response he provided to her authorising the initial immediate salary increase to £36,000. We also considered that the claimant's persistence in seeking the implementation of the second stage of her salary increase was indicative of her genuine belief that she had obtained from Mr East an in principle agreement to a two stage salary increase of £10,000, albeit that the time of payment of the second stage was less clear cut than the first having regard to her reference to seeing the revenue from the company's new wins and it being in a position to re-invest.

42. However, that having been said such events occurred ahead of the claimant issuing herself with a new contract of employment, which stated her basic salary to be £36,000, and which pursuant to clause 23 is an entire agreement, whereby under sub-clause 23.2 each party acknowledged that in entering into the agreement it did not rely on and had no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that was not set out in the agreement. In the light of the effect of this entire agreement clause it is regrettably the case for the claimant, as acknowledged by her in cross-examination that she cannot place reliance on any discussions pre-dating the contract in relation to any representations as to her terms and conditions meaning that she cannot rely on either her conversation with Mr East or the email exchange on 27 January 2016 as producing a contractual agreement as it is not included in the contract. In the absence of evidence of any written and signed variation of the contract increasing her salary from £36,000 to £40,000 we accordingly concluded that her breach of contract claim based on the above-stated contention is not well-founded and must fail.

43. We next considered her complaint that the respondent had by failing to award her the second instalment of her yearly salary increase in the sum of £4,000 with effect from 1 September 2016 made a deduction from her wages in contravention of section 13 ERA. In order to ground such a complaint pursuant to section 13(3) the deduction has to be from wages which are "properly payable". Such phrase has been judicially interpreted as requiring a legal entitlement arising from the worker's contract of employment. In view of our finding in respect of the claimant's breach of contract claim relating to this very sum that her contract of employment did not provide for it and having regard to the fact that we agreed that the exchange of emails of 27 January 2016 could not constitute an agreement bearing in mind that they represent the making of a proposal by her, which is in part accepted as regards the £6,000 increase but silent in respect of the second instalment we further concluded that absent a legal entitlement such complaint also is not well-founded and must fail.

44. Turning to the complaint of direct sex discrimination we considered first of all

our jurisdiction to hear it. The claimant's case is that she was treated less favourably on the grounds of her sex in the way that pay rises and bonuses were awarded beginning with Mr East's refusal to implement the second part of her salary increase in September 2016 followed by his telling her in June 2017 that she was not helping herself because she had had a period of sickness and taken some annual leave in the succeeding half-term week due to childcare arrangements and his then telling her on 19 December 2017 when discussing the withholding of her pay increase that she had a husband at home to support her and that Mr Thompson's wife had been made redundant and that he needed to be looked after because he was a good guy. As stated the general rule is that a complaint of work-related discrimination must be presented to the employment tribunal within three months beginning with the date of the act complained of. In this case the claimant's claim has an early conciliation notification date of 16 March 2018, which it is submitted by the respondent means that any act occurring prior to 17 December 2017 is prima facie out of time. We considered however that the acts complained of by the claimant extending from September 2016 to 19 December 2017 were, having regard to the fact that they all flowed from the claimant's attempts to get Mr East to give effect to the second part of what she perceived as an agreed salary increase, capable of being viewed as a continuing state of affairs leading us to conclude that the state of affairs complained of was to be treated as done on 19 December 2017 with the result that her claim in so far as it relates to matters prior to this date was within our jurisdiction.

45. In order for such a claim to succeed there has to be less favourable treatment as compared to others not sharing the claimant's protected characteristic and who are not in materially different circumstances from her. Her witness evidence in relation to the withholding of the second part of her agreed salary increase amounting to less favourable treatment of her only references Mr Thompson as a comparator in terms that unlike her he did not have to jump through hoops to get a rise that had already been agreed. Having considered matters in this regard we could not accept that Mr Thompson was an appropriate comparator for the reasons set out in the respondent's closing submissions namely that the claimant and he held entirely different roles in the respondent's organisation and in his role as National Sales Manager he was responsible for obtaining and retaining nearly 50% of the respondent's annual turnover from three major clients TIP, Pullmans and Ford and that without him there was a significant risk of losing the business of TIP and Pullmans, which made his retention a priority. We therefore considered that the claimant was in some difficulty in relying on him as, whilst he did not share the claimant's protected characteristic of her sex there was a material difference between their responsibilities as employees and their value to the company with the consequence for her that any complaint based on him as an actual comparator is misconceived and has to fail.

46. Given that the claimant uniquely held the role of HR Manager meaning that there was no helpful actual comparator in the case we proceeded to consider how a hypothetical male comparator occupying such a role and with similar experience and length of service would have been treated in respect of their pay. Noting that this was a company with considerable financial difficulties,

which had suffered losses in the order of £1million in both 2016 and 2017 causing it to prioritise investment in its customer facing staff as evidenced by the Branch Payroll Report at pages 163-171 we did not consider that there was any evidence from which we could draw an inference that a male HR Manager joining the company in July 2015 with around 3 years' experience would have fared better than the claimant in receiving a pay increase in excess of the 20% that she received over the course of her employment.

47. Turning to the second limb of the claimant's complaint involving Mr East telling her in June 2017 that she was not helping herself regarding her pay rise in circumstances where she had followed a period of sickness absence with the taking of some annual leave during half-term to be with her children, whilst he accepted that he said words to this effect Mr East in his evidence did not accept that he did so in connection with her pay but rather that the phrase was used in reference to her not helping herself in her working relationship with Mr Malloy, the Group Managing Director. In the light of the evidence that this conversation resulted from an issue arising during the claimant's absence where a requisite job offer template could not be located in an urgent recruitment situation and the claimant's acceptance in cross-examination that Mr Malloy did not appreciate the importance of the HR function we considered that any HR Manager, whether male or female, would have been treated in the same way and that the fact that the claimant happened to be off on account of childcare arrangements was entirely coincidental.

48. Dealing finally with the third aspect of this complaint involving the conversation of 19 December 2017 when Mr East allegedly told her when discussing the withholding of her pay increase that she had a husband at home to support her and that Mr Thompson's wife had been made redundant and that he needed to be looked after because he was a good guy we noted that the claimant failed to mention in her witness statement that the first of these comments was made meaning that there was no evidence of it adduced at the hearing, whilst in relation to the second comment, leaving aside the respondent's denial of Mr Thompson's wife redundancy, there was no evidence to suggest that had a female employee's husband been made redundant that a similar remark would not have been made by Mr East leading us to conclude that there was nothing said in this conversation that could be held to be discriminatory of the claimant.

49. Accordingly we concluded that her complaint of direct discrimination on the grounds of the protected characteristic of sex was not well-founded.

50. We next considered her complaint of constructive unfair dismissal. As stated this was based on an alleged breach of the implied term of mutual trust and confidence. Her case in this regard as set out in the Case Management Order is that (a) the respondent failed to increase her salary to £40,000 in accordance with an agreement reached with Mr East and that despite continued discussions he failed to increase it as at the date she resigned (b) the respondent refused her salary increase on the basis that she was a woman and had taken annual leave during the summer of 2016 (sic) due to child care commitments (c) Mr East had made her text him if she was unable

to take telephone calls and no one else was required to do this (d) she considered that she was stuck in the middle of a battle at the top and that Mr East had said this was a reason why he could not put through her pay rise (e) she could no longer work under the direct report of Mr East and he had made comments about her having a husband to support her and that these events individually or cumulatively amounted to such a breach.

51. Taking these events in turn we concluded as follows. As regards (a) and the respondent's failure to pay her the £4,000 salary increase in the absence of a concluded agreement between the parties that such payment would be made effective from 1 September 2016 we did not accept that the respondent was in breach of the claimant's contract by exercising its discretion to limit her increase to the first instalment of £6,000. As regards (b) and the refusal of her salary increase because she was a woman and had taken holiday due to child care commitments noting the circumstances in which Mr East's comment about the claimant not helping herself came to be made, which suggested that the problem which occurred in accessing template documents would have occurred whether the HR Manager was male or female being down to the unavailability of the sole HR professional because of leave, which coincidentally had been taken at half-term and the respondent's case that the comment was made to give the claimant a heads-up regarding relationships with Mr Malloy and not as a reason to deny her the £4,000 we did not accept that this alleged breach had been made out. As regards (c) and Mr East requiring the claimant alone to text him if she was unable to take his calls noting that she was the only HR employee and accepting that there would be occasions when Mr East operating at a different location might require urgent HR advice we did not consider that this arrangement of her being required to text to say when she would be available was an unreasonable one and based on the limited evidence that we had of the arrangement in practice at pages 155-59 showing that it was conducted politely and professionally we again did not accept that the requirement amounted to a breach of her contract. As regards (d) and the claimant considering that she was stuck in the middle of a battle at the top noting that such an expression of feeling was not referenced in her witness statement and that she did not contend that this battle or power struggle between Mr East and Mr Malloy was the reason why her £4,000 salary increase was not implemented we did not consider that there was any evidence before us to enable us to conclude that she had suffered detrimentally as a result of it. As regards (e) and the claimant feeling that she could no longer work under the direct report of Mr East and his having made comments about her having a husband to support her, dealing with the second alleged event first as observed above such alleged comments do not feature in the claimant's witness statement and in the absence of evidence thereof we were compelled to conclude that this part of the alleged breach was not made out. As for the first aspect as was submitted by the respondent in closing submissions such allegation is at odds with the claimant delaying her resignation until 16 February 2018 when the last straw event for her was the conversation that she had with Mr East on 19 December 2017. Leaving aside the question of whether such period of delay gives rise to the claimant having in any event affirmed her contract we were not satisfied on the evidence having regard particularly to the tone of her letter of resignation that

her working relationship with Mr East had deteriorated to the extent alleged.

52. We were therefore unable to accept that these events, which she says triggered her resignation were calculated or likely to destroy or seriously damage the relationship of confidence and trust between her and the respondent. Establishing the same is, a very high threshold to be surmounted by an employee and we did not consider on the evidence before us that the claimant had surmounted it.

53. We therefore concluded that she had failed to establish that she was constructively dismissed and that her complaint in this regard is not well-founded.

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Employment Judge Wardle

Date: 14 January 2020

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

23 January 2020

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS