# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss Emily Wagener | v | Lancaster Motor Company Limited t/a Lancaster Land Rover Reading |

**Heard**: at Reading **On**: 19 and 20 August 2020

**Before:** Employment Judge Hawksworth
Mrs A E Brown
Ms H Edwards

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Mr S Reyes (solicitor)

## RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaints of direct sex and age discrimination fail and are dismissed.

2. The claimant's complaint of unauthorised deduction from wages in relation to overtime pay fails and is dismissed.

3. The claimant was paid her untaken but accrued annual leave. Her claim for holiday pay fails and is dismissed.

## REASONS

**Claim, hearing and evidence**

1. The claimant was employed by the respondent as a Warranty Administrator from 2 October 2017 until her dismissal on 1 February 2018.

2. In a claim form presented on 1 June 2018 after a period of Acas early conciliation from 23 April 2018 to 8 May 2018, the claimant made complaints of unfair dismissal, sex and age discrimination and for notice pay, holiday pay, arrears of pay and other payments. The respondent

presented its response on 23 August 2018. The respondent defends the claim.

3. There was a preliminary hearing before Employment Judge Vowles on 24 February 2020 at which the complaints were clarified and case management orders were made for the parties to prepare for the final hearing.

4. The final hearing was listed for two days and took place in person at Reading tribunal on 19 and 20 August 2020.

5. None of the orders made by Employment Judge Vowles were complied with as ordered. The tribunal had to take the whole of the first day and part of the second day of the final hearing to deal with case management issues and disputes between the parties as follows:

    5.1 The claimant had not served a schedule of loss by 23 March 2020 as ordered. She brought a schedule of loss with her to the hearing. This referred to without prejudice discussions between the parties. The respondent's representative assisted by making copies of the document with the references to without prejudice discussions redacted.

    5.2 The claimant had not provided any disclosure of documents as ordered. The respondent produced a hearing bundle which included their disclosure. This was sent to the claimant on 14 July 2020. The respondent sent some further documents (payslips) to the claimant on 7 August 2020 and these were added to the hearing bundle.

    5.3 The claimant brought a bundle of papers with her to the hearing. These had not previously been sent to the respondent. The employment judge explained to the claimant the purpose of advance disclosure of documents and the need to avoid unfairness which can arise when documents are produced at the last minute. We asked the claimant to check whether her documents were already included in the hearing bundle. Only one page was already in the hearing bundle. The other documents the claimant said she wanted to rely on were three handwritten witness statements by former colleagues and an exchange of emails between her and her former manager. The tribunal read the handwritten statements and the emails. They did not relate to any of the issues for decision by the tribunal. We told the claimant that the documents were not relevant and so we would not consider them further. We explained what issues we were considering, by reference to the order from the preliminary hearing.

    5.4 Exchange of witness statements had not taken place as ordered. The claimant did not produce a witness statement (despite the case management order expressly saying that witness statements were to be produced for all witnesses including the claimant). The claimant told us that she wanted to rely on the statement she had produced for the hearing of her internal appeal against dismissal (pages 118 to 133 of

the bundle). We allowed this. The respondent had had a copy of that document since the appeal hearing in February 2018.

5.5 The respondent had not sent the claimant its witness statements. It gave the claimant copies of statements for its two witnesses on the morning of the first day of the hearing. The claimant told us that she had prepared questions for these witnesses and that she had sufficient time to read their statements.

5.6 The claimant also brought with her to the hearing two audio recordings of conversations with her line manager Mr Dyer which she had made at work using her phone. She said that Mr Dyer had consented to both recordings being made. The claimant said they were not recordings of the conversations which were the subject of her discrimination complaints, but that she relied on them as background evidence and that they shed light on her discrimination complaints. The respondent had not been sent copies of the recordings and was unaware that they existed. Mr Dyer denied consenting to the making of the recordings. We asked the claimant to send copies of the recordings to the respondent's representative so that he and the respondent could listen to them and consider the respondent's position. The claimant was unable to send copies because of difficulties with internet connection and the size of the files. We ordered the parties to listen to the recordings together on a laptop in the tribunal waiting room, and to produce an agreed transcript of the relevant parts of the recordings for the next day. We also ordered the claimant to provide a digital copy of the recording to the respondent's representative by no later than 10.00pm that evening. The claimant prepared a transcript of the extracts that she wished to rely on from one of the recordings. The respondent added (in red type) other extracts that they wished to rely on. This document with transcripts of the extracts relied on by one or both of the parties was provided to the tribunal on the morning of the second day of the hearing. The respondent's representative also started to make a full transcript of the same recording but there was insufficient time to complete it and in the event the tribunal did not need to refer to that document. The claimant decided not to rely on the other recording at all.

5.7 On the second day of the hearing the claimant asked us to listen to the recording. It would have taken some time to set this up and to listen to the relevant parts. This would have meant that it was not possible to complete the case in the two days which had been allocated to it. We had a transcript of the recording of those parts relied on by one or both of the parties. We decided that in the circumstances it would be disproportionate for there to be a postponement to allow us to listen to the recordings.

5.8 The respondent's representative told us on the second day of the hearing that the respondent was reserving its position as to whether to apply to have Mr Dyer joined as an individual respondent. The tribunal took a short break to allow the respondent to consider this. After the break the respondent's representative said that in the light of the

EAT's decision in Beresford v Sovereign House Estates UKEAT/0405/11/SM, concerning the scope for a respondent to apply to join another respondent, the respondent did not propose to make any application.

5.9 On the afternoon of the second day of the hearing during her questions to one of the respondent's witnesses, the claimant sought to rely on a new document or documents relating to overtime which she had not previously disclosed to the respondent or the tribunal. We did not allow this evidence as it was produced so late in the day. The claimant had not sent it to the respondent in accordance with the case management orders or at any point before the hearing, and had not produced it on the first day of the hearing when the tribunal explained the need for advance disclosure of document and considered the claimant's other late documents.

6. The respondent made an email application on 14 July 2020 for postponement of the final hearing. This was refused by Employment Judge Vowles. At the hearing the respondent made another application to postpone because of the very late disclosure of the recordings. The claimant wanted to proceed and said she was ready to do so. We decided that in light of the overriding objective and in particular the objective of avoiding delay, we should not postpone the hearing. The respondent's representative had had the opportunity to listen to the recording and to consider and add to the claimant's transcript, and would be permitted to ask supplemental questions of the respondent's witnesses about the transcripts.

7. We used the hearing bundle which had been prepared by the respondent and sent to the claimant on 14 July 2020. It had 149 pages, the claimant's schedule of loss was added as pages 150 to 151.

8. During the first day of the hearing we read the claimant's appeal statement, the witness statements of the respondent's witnesses Mr Line-Hayward and Mr Dyer and the documents referred to in the statements.

9. On the second day of the hearing, we heard evidence from the claimant and the respondent's witnesses Mr Line-Hayward and Mr Dyer. Mr Reyes and the claimant both made closing comments to the tribunal.

10. Judgment was reserved.

**The Issues**

11. The issues for us to decide were discussed with the parties and identified at the preliminary hearing on 24 February 2020. They were set out as follows in the case management summary:

12. Direct Age Discrimination – section 13 Equality Act 2010

12.1 The claimant claims that at a meeting in late October/early November 2017 her manager, Mr Simon Dyer, told her that because of her age he did not feel that she had the experience to manage a team.

12.2 The claimant said that she told Mr Matthew Line-Hayward, HR manager, about this comment on 19 January 2018.

13. Direct Sex Discrimination – section 13 Equality Act 2010

13.1 The claimant claims that at a meeting in late October/early November 2017 her manager Mr Simon Dyer said to her, "If you were my wife I wouldn't be happy if you returned home and told me that you had done nothing all day".

13.2 The claimant said that she told Mr Matthew Line-Hayward, HR manager, about this comment on 19 January 2018.

14. Holiday pay – regulation 30 Working Time Regulations 1998

14.1 The claimant claims that she is owed outstanding holiday pay. Details of the amount of holiday pay claimed and the period to which the claim relates shall be included in the claimant's schedule of loss.

14.2 (In her schedule of loss which the claimant produced on the first day of the hearing the claimant set out some questions about the way in which the respondent had calculated holiday pay but she did not say what amount of holiday pay she claimed should have been paid.)

15. Unauthorised deduction from wages – section 13 Employment Rights Act 1996

15.1 The claimant claims that she is owed wages for overtime worked as follows:

15.1.1 October 2017 – 5 hours

15.1.2 November 2017 – 12 hours

15.1.3 December 2017 – 3 hours

15.2 (In her schedule of loss, the claimant said in section 3 – overtime: 'November 2017 I feel has 8 hours 55 minute there or thereabouts missing from my Overtime and approximately 3 hours from December 2017 in Overtime that remains missing and unpaid.' The schedule does not mention any unpaid overtime for October 2017.)

16. At the preliminary hearing the claimant confirmed that she had been paid in lieu of notice and so her complaint about unpaid notice was withdrawn and dismissed. As the claimant did not have the required two years' qualifying employment to make a complaint of unfair dismissal, that was also dismissed.

**Findings of fact**

17. We make the following findings of fact based on the evidence we heard and read.

18. The respondent is a car dealership based in Reading. It is part of a group of dealerships. The claimant began working for the respondent as a temporary worker through an agency. At that time, the respondent had a vacancy for a Warranty Administrator. The claimant did not have any dealership or warranty experience but she showed good organisational skills as a temp and Mr Dyer decided to offer her employment in the role of Warranty Administrator.

19. The claimant's employment began on 2 October 2017. She was given a training programme which included online 'e-modules' and on the job training.

Mr Dyer's comments to the claimant

20. In late October/early November 2017 the claimant had a conversation with Mr Dyer in which she expressed an interest in a role as Warranty Supervisor. This was a more senior role than the claimant's role of Warranty Administrator. Mr Dyer was surprised that the claimant was expressing an interest in this role as she had only just started her role as a Warranty Administrator. The more senior role required considerable skill and expertise in dealing with warranties, and skills in people management. Mr Dyer had seen the claimant's CV and this showed that she had worked in full time positions from September 2012 to September 2016 but that she did not have any people management experience.

21. We find that during this conversation Mr Dyer told the claimant that she did not have enough experience to manage a team. We accept the evidence of Mr Dyer that he did not say this was because of her age. We make this finding because it was accurate to say that the claimant did not have the experience required for the supervisor role. We think it is likely that, bearing in mind her very recent start in the administrator role, the claimant's lack of relevant experience would have been the reason given by Mr Dyer for the claimant not being suitable for the senior role. In making this finding we have also taken into account that the claimant did not make any complaint of age discrimination in her grievance letter or in the grievance meeting (we return to this below).

22. By November 2017 Mr Dyer had concerns about the claimant's performance. She was not processing the number of invoices she was expected to process, and she was often away from her desk. He spoke to her about this on 20 December 2017.

23. On 4 January 2018 Mr Dyer had a meeting with the claimant. The claimant recorded this meeting on her phone and the recording is dated 4 January 2018. We find that the claimant did not seek Mr Dyer's consent to make this recording.

24. We make the following findings about what was said at this meeting, based on the transcript produced by the parties.

25. Near the start of the meeting, Mr Dyer said he would have to formalise things with the claimant and he said he would be having weekly meetings

with her about her performance. He said that despite having a bigger warranty administration team than other locations, the Reading dealership still had the highest levels of debt in the group.

26. Later in the meeting Mr Dyer and the claimant had the following exchange:

> "Mr Dyer: I spend more time with you than I do with my Mrs.
>
> Claimant: hahah
>
> Mr Dyer: alright so I want to be able to have conversations with you which are sensible. I want to be able to have conversations with you which are normal and I would like you say what you are going to do and as per your job description.
>
> Claimant: that's why it is right cause I care about doing
>
> Mr Dyer: and I know you do. I do know that but At the moment I just feel like when I'm walking through the front door, you've gone Dinners in the dog
>
> Claimant: hahahaha
>
> Mr Dyer: and ahh you've said I've done nothing today and I go alright OK you mean you've been home all day and you've done nothing and you've not put the washing on. yeah I know, and I ok where have you been at the neighbours have you? Swanning around with your mates have you? You what, yeah been for a coffee with so and so
>
> Alright OK and so I've just come home from a 14 15 hour day and dinners in the dog. Yeah yeah yeah oh right ok fine so what am I getting out of this relationship. I am kinda paying for everything kinda going overdrawn at bank
>
> Claimant: hahaha
>
> Mr Dyer: spending a lot of money and not bringing anything in as its all sitting in retailer. What do you think I should do with the Mrs. Do you think I should kick her out? Do you think I should kick her out and tell her to get a job?"

27. The claimant laughed and said, "I think you guys need to talk." Mr Dyer replied, "There you go… All make sense?"

28. Mr Dyer said that this was a coaching conversation with the claimant as part of a meeting aiming to help her improve her performance. He wanted to try and relay his requirements, in an easy to understand way, so that the claimant understood what she had to do. Mr Dyer was trying to think of an analogy to help the claimant understand that she was not doing enough work for the salary she was paid. We accept that this was the context of the discussion and Mr Dyer's intention. This is apparent from the references to the claimant's job description, and to money 'sitting in retailer'.

29. The claimant's sex discrimination complaint which she identified at the preliminary hearing was that at a meeting in late October/early November 2017 Mr Dyer said to her, "If you were my wife I wouldn't be happy if you returned home and told me that you had done nothing all day". At the hearing before us we asked the claimant whether she had got the date of this comment wrong, and whether this complaint referred to the conversation she recorded on 4 January 2018. She said that she had not got the date wrong, and that Mr Dyer made this comment in late October/early November 2017 as well as the longer exchange on 4 January 2018 in the meeting that she recorded.

30. We find that there was only one comment. We find that the comment which the claimant alleged took place in late October/early November 2017 did not happen, and that it was the discussion on 4 January 2018 which the claimant had in mind when she set out her complaint at the preliminary hearing. We reach this decision because the claimant did not say at the preliminary hearing that there were two similar comments. She said there was one. She was not sure about the date in October/November. In these circumstances, we find that it is more likely that the claimant got the date of the discussion wrong than that two similar discussions took place.

31. The claimant had a formal probationary review meeting on 5 January 2018. She was told that she would have weekly meetings because of poor performance.

<u>The claimant's grievance</u>

32. On 5 January 2018 the claimant sent an email to the respondent to say that she would like to make a grievance complaint. She sent a detailed letter setting out her grievance on 12 January 2018. She had a grievance meeting with the respondent's HR manager Mr Matthew Line-Hayward. Mr Line-Hayward's handwritten note and the grievance outcome letter both refer to the meeting being on 23 January 2018. We find that this meeting took place on 23 January 2018, not on 19 January 2018 as the claimant said at the preliminary hearing.

33. The claimant's grievance letter is over two pages long. She explains her views about the performance issues which have been raised. The letter does not complain about or make any reference to:

    33.1 age discrimination or the comment by Mr Dyer regarding the claimant's lack of experience for the Warranty Supervisor role;

    33.2 sex discrimination or the comment the claimant alleges was made by Mr Dyer in late October/early November 2017, "If you were my wife I wouldn't be happy if you returned home and told me that you had done nothing all day"; or

    33.3 the similar comment made by Mr Dyer at the meeting on 4 January 2018.

34. We find that in the grievance meeting with Mr Line-Hayward on 23 January 2018 the claimant complained about the exchange which we have found

took place between the claimant and Mr Dyer on 4 January 2018, as Mr Line-Hayward's handwritten note refers to it briefly. He has noted: 'If you were my wife…'. After the grievance meeting, Mr Line-Hayward investigated the claimant's complaint about this comment. He spoke to Mr Dyer and the claimant's other colleagues as part of his investigation.

35. We accept the evidence of Mr Line-Hayward that during the grievance meeting the claimant did not refer to the discussion between her and Mr Dyer about her lack of experience for the Warranty Supervisor role and that she did not make any complaint of age discrimination. We consider that if the claimant had raised this with Mr Line-Hayward, he would have included it in his note and investigated it, as he did with the other comment.

36. The outcome of the claimant's grievance was sent to her in a letter dated 2 March 2018. Mr Line-Hayward said that there were several areas where he had identified actions that had been or would be taken as a result of her complaints, but that he had not found evidence to support that the claimant had been subject to bullying or unfair treatment. In respect of the exchange on 4 January 2018, Mr Line-Hayward said that Mr Dyer did not recall the comment and that in the absence of witnesses he was unable to prove whether the comment had been made.

37. The claimant was told of her right to appeal. She did not appeal.

Overtime

38. The claimant was paid a salary. Her contract of employment said :

> "*Your hours of work will be those required to carry out the responsibilities of your position, however, your normal hours of work will be from 8.00am to 6.00pm Monday to Friday, with time off for lunch in accordance with the needs of the department. You will also be required to work some Saturdays from 8.00am to 1.00pm according to the Service dept rota.*
>
> *You will be expected to work outside your normal hours should the need dictate, however, you do not have to work more than 48 hours per week on average, unless you have agreed to opt out of the maximum weekly working week by signing an opt out agreement."*

39. There was no provision for paid overtime in the claimant's contract of employment. However, in practice the respondent paid overtime to Warranty Administrators where there was a business need for this. An employee had to obtain approval from their manager before working the overtime, and then submit a form at the end of the month setting out how many hours overtime they had done. When Mr Dyer approved overtime he noted in his diary the name of the person and the number of hours he had approved. He then cross-checked the forms submitted at the end of the month with the notes in his diary.

40. The claimant was paid 7 hours of overtime in November 2017, 42.75 hours of overtime in December 2017 and 7.5 hours of overtime in January 2018.

This overtime had been approved by Mr Dyer and recorded in his diary. The claimant's monthly overtime forms were not included in the bundle. Mr Dyer said, and we accept, that any other hours she included on her forms were not pre-approved.

41. The claimant did not mention unpaid overtime in the grievance letter she sent on 12 January 2018. In the grievance meeting with Mr Line-Hayward she said that she had worked 12 hours overtime that had not been paid.

42. As part of his grievance investigation, Mr Line-Hayward investigated the claimant's complaint about overtime. He concluded that the overtime was not authorised or was not worked and that no additional payment for overtime was due.

43. At the preliminary hearing the claimant said that she was owed 5 hours for overtime worked in October 2017, 12 hours for November 2017 and 3 hours for December 2017.

44. In her schedule of loss, the claimant said in section 3 – overtime: 'November 2017 I feel has 8 hours 55 minute there or thereabouts missing from my Overtime and approximately 3 hours from December 2017 in Overtime that remains missing and unpaid.' The schedule does not mention any unpaid overtime for October 2017.

45. At the hearing, the claimant said that the overtime she worked was partly on her day to day tasks and partly on her training. The day to day work she did during overtime hours was inputting claim information. The training was completing e-modules and reading warranty manuals and processes. The claimant said she had a log of the overtime hours she worked. The log was not approved by the respondent. It had not been disclosed to the respondent and was not in the tribunal bundle. The claimant sought to rely on additional disclosure at the end of the hearing but we decided (for reasons set out above) that late disclosure would not be permitted.

Dismissal

46. By the end of January 2018 the respondent's system showed that the claimant had done 7.5 hours of invoicing work for the month. She had completed 25% of her training programme.

47. The claimant had a second probationary review meeting on 1 February 2018. She was dismissed at the meeting for failing to achieve the standards expected within the role. She was paid in lieu of notice.

48. The claimant appealed against her dismissal. Her appeal hearing took place on 20 February 2018. The decision to dismiss was upheld by Mr Varney, Head of Business.

Pay for untaken holiday

49. Under her contract of employment, the claimant was entitled to 30 days holiday per year. The respondent's holiday year was January to December. In 2018 the claimant worked from 1 January 2018 to 1 February 2018.

50. The respondent's leave record showed that the claimant had a day's paid holiday on 1 January 2018.

51. In her final payslip the claimant was paid for 2.5 days untaken holiday.

**The Law**

Direct discrimination because of sex or age

52. Direct discrimination is set out in section 13 of the Equality Act:

> *"(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."*

53. Sex and age are protected characteristics under section 4 of the Equality Act 2010.

54. Section 13(2) says that in a claim of direct discrimination on grounds of age, A does not discriminate:

> *"if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

Burden of proof

55. Sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) This does not apply if A shows that A did not contravene the provision."*

56. This means in a direct discrimination complaint that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of a protected characteristic, the burden of proof shifts to the respondent.

57. In Igen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. The court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

58. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination; "something more" is needed.

59. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required

to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

60. The tribunal must adopt a holistic rather than fragmentary approach. This means looking not only at the detail of the various individual acts but also stepping back and looking at matters in the round.

Time limit in discrimination complaints

61. The time limit for bringing a complaint of discrimination is set out in section 123 of the Equality Act. A complaint may not be brought after the end of:

> *"(a) the period of three months starting with the date of the act to which the complaint relates,*
> *(a) such other period as the employment tribunal thinks just and equitable".*

62. When calculating the end date of the period of three months, time spent in a period of early conciliation is not counted (section 140B of the Equality Act 2010).

63. When considering whether to hear a complaint which is out of time, all relevant factors must be taken into account, and relevance will depend on the facts of the individual case. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that the tribunal may have regard to the factors in section 33 of the Limitation Act 1980. Two factors which are almost always relevant are i) the length of and reasons for the delay, and ii) whether the delay has prejudiced the respondent.

64. Employment tribunals have a wide discretion to extend time under the 'just and equitable' test, but 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA. The onus is on the claimant to persuade the tribunal that it is just and equitable. This does not mean that exceptional circumstances are required; the test is whether an extension of time is just and equitable.

Unauthorised deduction from wages

65. Section 13 of the Employment Rights Act 1996 provides a right not to suffer unauthorised deductions. It states:-

> *(1) "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) (b)the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

66. Wages means any sum payable to the worker in connection with her employment, including overtime pay.

Holiday pay

67. The Working Time Regulations 1998 establish a minimum entitlement to paid annual leave. Under regulations 13 and 13A, the minimum entitlement is to 28 days paid holiday per year. This can include bank holidays.

68. Under Regulation 14 of the Working Time Regulations 1998, a worker who leaves employment mid-way through a leave year is entitled to be paid in lieu of untaken annual leave as provided for in a relevant agreement or in regulation 14(3)(b). Regulation 14(3)(b) provides for the worker to be entitled to the proportion of their full leave entitlement equivalent to the proportion of the leave year they have worked.

**Conclusions**

69. We have applied these legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide.

Direct Age Discrimination

70. We have found that Mr Dyer did not tell the claimant that because of her age he did not feel that she had the experience to manage a team.

71. We have found that there was a conversation between the claimant and Mr Dyer about a Warranty Supervisor role, and that Mr Dyer said that the claimant did not have enough experience to manage a team. It was correct that the claimant did not have any management experience. At the time of

this conversation, the claimant was 28. As set out in her CV, she had worked in various full time roles from September 2012 to September 2016, but she had not worked in any management roles (or in dealership or warranty roles). Telling the claimant that she did not have enough experience was not a proxy for telling her that she was not old enough.

Direct Sex Discrimination

72. We have found that Mr Dyer did not say to the claimant at a meeting in late October/early November 2017, "If you were my wife I wouldn't be happy if you returned home and told me that you had done nothing all day".

73. In light of this finding of fact, the claimant's complaint of direct sex discrimination because of a comment made by Mr Dyer in late October/early November fails.

74. We have found that on 4 January 2018 Mr Dyer used an extended analogy in a conversation with the claimant. He did not use the words, 'If you were my wife' but he drew a comparison between the claimant's performance at work and a wife not getting anything done at home. This later exchange was not said by the claimant to be part of her complaint, but for completeness we have considered whether it amounted to direct sex discrimination.

75. We first considered whether this was less favourable treatment by the respondent compared with the treatment of a real or hypothetical comparator, in other words whether Mr Dyer would have used the same analogy in a coaching conversation with a male employee (where there was no material difference in the circumstances of the claimant and the male employee). The claimant did not rely on an actual male comparator. We considered whether Mr Dyer would have used this analogy in a conversation with a hypothetical underperforming male employee. It was a clumsy analogy, based on traditional or stereotypical gender roles in a family context, but Mr Dyer did not as part of the discussion suggest that traditional gender roles are best, or that they should apply at work, or that the claimant's underperformance at work was because of her gender. He used the analogy as an attempt to explain how a manager feels when faced with an underperforming employee. We conclude that Mr Dyer would have used the same analogy with an underperforming male employee.

76. In light of this conclusion, the claimant was not subject to less favourable treatment compared with the treatment of a comparator, and we do not go on to consider whether the claimant has proved facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of sex. The burden of proof does not shift to the respondent.

77. If the burden had shifted, we would have accepted Mr Dyer's explanation that he used this analogy in an attempt to make the claimant understand what his concerns were and to encourage her to improve her performance, and that this was a non-discriminatory reason for the treatment.

78. Finally, a complaint in relation to the comment on 4 January 2018 would have been out of time. The time limit to present the complaint (3 months

less a day) expired on 3 April 2018. The claimant did not notify Acas for early conciliation until 23 April 2018. This was after the time limit had passed, and so there is no extension of time as a result of Acas early conciliation. The claim was presented on 1 June 2018, almost two months out of time. The claimant did not give any explanation for the delay or any reason why it would be just and equitable to extend time to allow her to make a complaint about the comments made by Mr Dyer on 4 January 2018. We would have found that it was not just and equitable to hear this complaint out of time.

79. For these reasons, a complaint of direct sex discrimination relating to the claimant's conversation with Mr Dyer on 4 January 2018 would also have failed.

Unauthorised deductions from wages

80. In a complaint of unauthorised deduction from wages the onus is on the claimant to satisfy the tribunal that an unauthorised deduction has been made.

81. The respondent paid the claimant for 7 hours of overtime in November 2017, 42.75 hours in December 2017 and 7.5 hours January 2018. This was overtime which had been approved by the respondent before it was worked by the claimant.

82. The claimant's complaint was inconsistent: she gave different figures for number of hours overtime she said she had worked in her grievance meeting, at the preliminary hearing and in her schedule of loss.

83. Further, the claimant's complaint was vague as to the number of hours she had worked. She did not provide any evidence of the hours she had worked but not been paid for In her schedule of loss she said: 'November 2017 I feel has 8 hours 55 minute there or thereabouts missing from my Overtime and approximately 3 hours from December 2017 in Overtime that remains missing and unpaid.'

84. The claimant's complaint was also lacking in detail. She gave us only a generic explanation of what work she had done during the additional time she said she had worked. She did not provide any detail of the dates on which the overtime was worked.

85. The claimant was unable to substantiate her complaint that she had worked any additional hours of overtime which had not been paid for. This complaint fails and is dismissed.

Holiday pay

86. Under the Working Time Regulations 1998 the claimant was entitled to a minimum of 28 days paid annual leave during the 2018 holiday year which ran from January 2018 to December 2018.

87. As the claimant's employment ended during the 2018 holiday year, on 1 February 2018, she was only entitled to 2.5 days annual leave. This is the

proportion of her paid annual leave entitlement for the full year which is equal to the proportion of the year which she worked before dismissal.

88. The claimant was paid for 2.5 days untaken annual leave in her final payslip. She also had one day's paid annual leave on 1 January 2018 (the bank holiday). She has therefore been paid in excess of her annual leave entitlement for the 2018 leave year.

89. (The claimant did not make any complaint about her entitlement to pay for untaken holiday due under her contract in excess of the minimum number of days required by the Working Time Regulations. For completeness, we note that the claimant's 3.5 days paid annual leave and pay in lieu of untaken annual leave was also in excess of the proportion of the contractual annual leave of 30 days to which she was entitled for the part of the 2018 holiday year which she worked.)

90. As the claimant has been paid for more than her entitlement to annual leave under the Working Time Regulations 1998, this complaint fails and is dismissed.

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Employment Judge Hawksworth
Date: 2 September 2020

Judgment and Reasons sent to the parties on:.....

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For the Tribunal Office

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