EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C Hatton	v	James Woollard Polyethene UK Limited

Heard at: Reading **On**: 8, 9 and 10 September 2020

Before: Employment Judge Hawksworth
Members: Mrs C Baggs
Mrs J Beard

Appearances:
For the Claimant: In person
For the Respondent: Mr A Williams (solicitor)

JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's complaint of unfair dismissal is well-founded and succeeds.

2. The claimant's complaint that her dismissal was less favourable treatment of a part-time worker is well-founded and succeeds.

3. The claimant's other complaints of less favourable treatment of a part-time worker and her complaints of direct sex discrimination and victimisation fail and are dismissed.

4. The respondent is ordered to pay the claimant:

    4.1. a basic award of £4,318; and
    4.2. a compensatory award of £7,813.95.
    4.3. The total award to the claimant is £12,131.95.

REASONS

Claim, hearing and evidence

1. The claimant was employed by the respondent from August 2009 to 31 August 2018. She worked in sales.

2. In a claim form presented on 28 October 2018 after a period of Acas early conciliation from 12 September 2018 to 12 October 2018 the claimant brought complaints of unfair dismissal, less favourable treatment of a part-time worker, direct sex discrimination and victimisation.

3. There was a preliminary hearing on 5 September 2019 at which the complaints were clarified and case management orders were made.

4. The hearing took place in person at Reading employment tribunal. It was listed to start on 7 September 2020 but started on 8 September 2020 instead, because of availability of judicial resources. There was sufficient time to conclude the hearing by 10 September 2019.

5. There was an agreed bundle of 430 pages. Page references in this judgment are to the agreed bundle.

6. After preliminary matters had been dealt with, we took some time on the first day for reading. We heard the claimant's evidence on the first day. On the second day we heard from the respondent's witnesses, Ms Arnold and Mr Woodall. All the witnesses had exchanged witness statements. The claimant and Mr Williams made closing comments on 9 September 2020.

7. We gave judgment on liability with reasons on 10 September 2020. The claimant then gave further evidence on remedy and after deliberating we gave judgment on remedy with reasons, also on 10 September 2020. The parties requested written reasons.

Issues

8. The issues for determination by the tribunal were set out in the preliminary hearing record (pages 50-52) and in the further information provided by the claimant about her complaint of victimisation (page 53) and are as follows:

<u>Jurisdictional Issue</u>

i. Was each allegation of sex discrimination and less favourable treatment of a part-time worker presented to the Tribunal within three months of the alleged acts or omissions relied on?

ii. If not, were the alleged acts and omissions continuous discrimination or a series of acts that extended over a period of time?

iii. If so, did that bring the claim in time?

iv. If not, would it be just and equitable to extend the time limit allowed?

Unfair Dismissal

v. What was the reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

   a. The Claimant asserts that the reason for her dismissal was because she worked part-time and could not increase her hours;

   b. The respondent asserts that the reason for dismissal was for some other substantial reason, namely, because the Claimant was working at another company without obtaining permission from the Respondent and therefore in breach of the Respondent's policy in respect of other employment.

vi. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Unfair dismissal remedy

vii. If the claimant was unfairly dismissed and the remedy is compensation:

   a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? (See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; 1W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604]);

   b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

   c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Direct Sex Discrimination

viii. Did the Respondent treat the Claimant less favourably than it treated or would have treated a comparator in not materially different circumstances? More specifically, by;

   a. Giving males more opportunities in terms of customer leads;
   b. Giving males more praise;

c. Removing the Claimant's remote access to the Respondent's system in 2016 so that the Claimant could not work from home.

ix. The Claimant identifies the following comparators in relation to each of the above:

d. Kevin Lewis, James Woollard, Jason Mayhew and Jack Mungall;
e. Kevin Lewis, Jason Mayhew, Jack Mungall and Thomas Matthews;
f. Kevin Lewis, Tony Hirst and Nick [surname unknown to the claimant]

x. Was any less favourable treatment because of the Claimant's sex?

Victimisation

xi. It is accepted that the claimant's employment tribunal claim presented on 28 October 2018 was a protected act.

xii. Were the following detriments to which the claimant was subjected by the respondent because she had done that protected act:

a. a telephone call by Mr Woollard to the claimant's new employer on 8 November 2018; and
b. a letter sent by the respondent to the claimant and her new employer on 16 January 2019.

Less Favourable Treatment to Part Time Workers

xiii. Did the Respondent treat the Claimant less favourably than it treated a comparable full-time worker? More specifically, by;

a. Adding £400 per calendar month to the Claimant's sales target to cover work being done on days when she was not at work;
b. At the disciplinary meetings on 20 August 2018 and 29 August 2018 and the appeal hearing on 11 September 2018, asking the Claimant whether she could do more hours, why her family could not look after her children more so that she could do more hours, and whether she thought it was fair to her employer and colleagues to work part-time.
c. At the meeting on 11 September 2018, Mr Woollard saying that it was not fair and unacceptable that he had to do the Claimant's work when she was not at work;
d. Not allowing the claimant to work in other employment without needing to request authority; and
e. Dismissing the Claimant for being part-time.

xiv. The Claimant relies on the following full-time comparable workers in relation to a, b, c and e above: full time sales staff including Donna Rivera, Ryan King, Kevin Lewis, Jack Mungall, Rachel Lungerdon, Jason Mayhew

xv. The Claimant relies on the following full-time comparable workers in relation to d above: Kevin Lewis and Amanda Toma.

xvi. Can the Respondent show that any less favourable treatment is justified on objective grounds?

Discrimination/less favourable treatment of a part time worker remedy

xvii. If any of the complaints succeed, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation, will decide how much should be awarded.

Findings of fact

9. In August 2009 the claimant began working for the respondent in sales. She was a high performer and always met her targets.

10. The claimant's partner runs a business called Windrush Flooring and was doing so before the claimant began working for the respondent. The claimant helped her partner out with his business on an informal basis with administration, invoicing and so on.

11. In October 2012 the claimant returned from a period of maternity leave and began working part-time. Her hours were reduced again when she came back from another period of maternity leave.

12. At some point after the claimant became part-time, she had £400 added to her target to reflect the fact that she would more administrative support than full-time staff, because of the days when she was not in the office.

13. On 4 January 2017, the claimant signed a new statement of terms of employment (pages 79 and 84) and a restrictive covenant agreement (pages 75 and 83). Her part-time working arrangement was reflected in her contract of employment which set out her reduced hours of work as 17 hours per week. At the time the claimant was working three days a week, two shorter days on Mondays and Tuesdays and a full day on Wednesdays.

14. In April 2017, the claimant signed a receipt for a new Staff Handbook which included a requirement that employees request permission from the employer to work in other employment. This requirement was not expressly drawn to the attention of the claimant.

15. In January 2018, the claimant returned to work after a third period of maternity leave. Her hours reduced to two days a week. She worked full days on Mondays and Thursdays (pages 170 and 82).

16. From January 2018 the claimant became formally employed by Windrush Flooring, on a salary. She did not seek the permission of the respondent to undertake other employment. She did not think that she had to.

17. In the week of 13 August 2018, Ms Arnold, who is the respondent's Operations Manager, was told by someone that the claimant had been behaving suspiciously because she was dropping off her children at nursery. The claimant went in to work for the respondent on Monday 13 August 2018, but only for a short time as she was not feeling well. She was given permission to leave to go to the doctors. She visited her doctor on the same day. After her doctor's appointment she told the respondent that she was likely to be off for the rest of the week. The only other day that the claimant was due to work for the respondent that week was Thursday).

18. The claimant was unwell on Tuesday 14 August 2018. This was not a day she was expected to be at work for the respondent. She did not go into her partner's business on that day.

19. On Wednesday 15 August 2018 Ms Arnold made two calls. This was also not one of the claimant's working days for the respondent. The first call was to Windrush Flooring. The claimant answered the phone. The second call which was around 15 minutes later, was to the claimant on her mobile. We had an agreed transcript of the second call.

20. During the second call the claimant was suspended for gross breach of trust. The respondent said there was no issue with her performance but an investigation needed to be carried out into her conduct. During this call Ms Arnold did not tell the claimant why she was being investigated.

21. Later on 15 August 2018 the claimant was sent a letter formally telling her that she was being suspended. The letter gave no details of the allegation other than to say it was to allow an investigation to take place into allegations of a gross breach of trust.

22. Ms Arnold had an investigatory meeting with the claimant on 20 August 2018 (page 217). Ms Arnold asked the claimant why she thought she had been suspended for gross breach of trust and the claimant said she thought it was because the respondent did not think she was ill.

23. Ms Arnold asked the claimant questions about Windrush Flooring. She asked "Have you been working anywhere else other than for Polythene UK? Do you work for Windrush Flooring"? This was the first time that the claimant had been asked about other employment. She immediately accepted that she did work for Windrush Flooring when she was not in work for the respondent. That was the first opportunity she had been given to answer a question about working for someone else.

24. Ms Arnold also asked the claimant about her working days. Ms Arnold said, "You told me that you could only work two days for Polythene UK as that is all the childcare you could arrange or afford. Do you agree that more of your work is done by me and admin than by you?". She also asked, "If you were able to work additional hours, why didn't you work those hours for Polythene UK as we continue to pay you a full time salary and support what hours you could do", and "Do you feel it's fair on your employer and colleagues that you've been working at Windrush Flooring shop?".

25. The claimant said that on a day when she is not working for the respondent she was able to work at Windrush Flooring as she would take her children with her and no extra childcare was needed. The claimant gave the respondent a doctor's note and offered to provide nursery bills.

26. On 24 August 2018 the claimant submitted a grievance. She said that her previous manager knew that she worked for her partner outside her working hours with the respondent. The grievance meeting took place on 29 August 2018 with Ms Arnold. She found the grievance unsubstantiated (page 253).

27. Ms Arnold decided that the disciplinary investigation into the claimant should proceed to a disciplinary hearing. The invitation letter to the disciplinary hearing said that the matters of concern were that the claimant had allegedly taken other employment at Windrush Flooring without permission.

28. The disciplinary hearing also took place on 29 August 2018, with Mr Jack Mungall (page 249). Mr Mungall did not give evidence before us. In the meeting the claimant was asked a number of questions about childcare and her hours of work including, "Could you work more hours?", "Are you working regularly on a Tuesday and Wednesday at Windrush Flooring?", "Couldn't you work for [the respondent] on a Tuesday morning?". The claimant was also questioned about whether her family members and her partner's family members could look after her children. She was asked to give details of her childcare arrangements.

29. The claimant said that she was not aware that there was a problem with working for her partner. She said that said she was at home when Ms Arnold called her a second time on 15 August 2018.

30. The outcome of the disciplinary hearing was sent to the claimant on 31 August 2018 (page 257). The claimant was dismissed with immediate effect but paid in lieu of notice.

31. The matters of concern set out in the dismissal letter were the same as in the invitation namely, there had been a gross breach of trust as the claimant had taken other employment at Windrush Flooring without permission. The dismissal letter also said

> "Y*ou were working for [your partner's] company whilst on reduced working hours as a gesture from the company because you have young children allowing you to spent more time with them whilst still receiving full company pay. This causes me to lose faith and integrity in you and your role in this company and the relationship between us has broken down irretrievably.*
>
> *Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship."*

32. The claimant appealed against dismissal; the appeal was considered by Mr Woollard at a meeting on 11 August 2018 (page 279).

33. Mr Woollard considered the claimant's grounds of appeal that her previous manager knew she worked at Windrush Flooring because she had helped the respondent to ordered flooring for the office. Mr Woollard concluded that the claimant had not been able to produce any new evidence to support that claim. He said all the evidence he had seen, along with the investigation notes, suggested the claimant had only recently been in regular paid employment with Windrush Flooring.

34. Mr Woollard said to the claimant, 'When you're not here I am doing your work, so is Jacqui and others, it's not acceptable."

35. The decision to dismiss was upheld (page 283). Mr Woollard felt that the relationship between the claimant and the respondent had been irrevocably destroyed. He said that this had been further compounded by the claimant's actions since being suspended, in particular, comments had been made on social media attempting to damage the respondent's reputation, and text messages sent to colleagues questioning the respondent's integrity.

36. During the appeal meeting, Mr Woollard said he would not have allowed the claimant to work at Windrush Flooring if she had asked. He described her working at Windrush Flooring as moonlighting The reason he gave us in evidence for that was because he felt that if the claimant was able to work additional extra hours, she ought to have worked those hours for the respondent. Also in his evidence to us, Mr Woollard said that part of the reason for upholding the dismissal was because the claimant was supposed to be at work for the respondent on the day when she was called at Windrush Flooring. That was not correct. The telephone call to Windrush Flooring which was answered by the claimant was made on a day when she was not due to be at work for the respondent, as it was a Wednesday and she did not work on Wednesdays.

37. After she was dismissed, the claimant found new employment. Mr Woollard knew the director of the claimant's new employer.

38. On 8 November 2018, Mr Woollard called the claimant's new employer to tell him about the restricted covenants in the claimant's terms and conditions. The claimant had some email correspondence with the respondent about the restrictive covenants.

39. On 3 January 2019, the employment tribunal sent the respondent formal notice of the claimant's claim. The respondent received it on 4 January 2019. This was the first that the respondent knew about the claimant's employment tribunal claim.

40. On 16 January 2019, an employee of the respondent told Mr Woollard that a client had reported that after leaving the respondent, the claimant had tried to contact him a few times (page 307). Ms Arnold sent a letter to the

claimant and her new employer on 16 January 2019 reiterating points about the restrictive covenant.

41. The claimant had another period of maternity leave with her new employer and left her new employer in May 2019 for health reasons.

42. There was evidence before us of two other employees of the respondent who had employment outside their work for the respondent. They were Mr Lewis and Ms Toma. Both worked for the respondent in sales, like the claimant.

43. Mr Lewis had a mobile food business. He was aware of the disciplinary proceedings against the claimant and was a note taker in one of the meetings. He sought permission from the respondent to carry out this business on 16 August 2016, the day after the respondent's concerns about the claimant arose. Ms Arnold accepted that Mr Lewis's request was likely to have been prompted by him becoming aware of the respondent's concerns about the claimant. Mr Lewis was given permission for his mobile food business. No questions were asked of him as to how long that business had been operating or how long he had been involved with it.

44. Mr Lewis also had a recycling business. He requested permission for this business in an email of 2 January 2013 (page 128). In his email, Mr Lewis explained that his involvement with that business started the previous year and that he had already paid someone to make cold calls and built up a database of companies. There is some correspondence between Mr Lewis and the respondent. The respondent did not ask any questions about how long Mr Lewis had been operating the business. The respondent gave Mr Lewis permission for this business.

45. Ms Toma provided the claimant with a written witness statement which was not challenged by the respondent. She worked as a Body Shop representative and sold products to colleagues including Ms Arnold while at work for the respondent. She said that she was never aware that she needed permission to do that. Ms Arnold accepted that she had relied on Ms Toma's manager to ensure that the appropriate permission had been obtained, and that Ms Arnold was not aware of whether it had been.

46. Ms Toma also proposed to start a jewellery business. In January 2019, after the claimant's dismissal, Ms Toma was told by a manager that she should request permission for this. She sought permission from the respondent (page 304). The response to Ms Toma's request about the proposed jewellery business was that generally speaking, if the other work was not in the respondent's normal office hours, the respondent 'would certainly consider it'.

47. The claimant said that the respondent gave males more praise and more opportunities in terms of customer leads. The claimant raised this in a review meeting with the respondent (page 327). We did not have sufficient evidence to make a finding about whether this did happen.

48. The claimant also complained about remote access to the respondent's systems to allow home working. We find that the respondent had to remove remote access from all employees because of security issues in 2016 (page 324). In 2017, shortly before her return from maternity leave, the claimant was told by Ms Arnold that her remote access would be reinstated once she was back.

The law

Unfair dismissal

49. Where an employee has the right not to be unfairly dismissed, they may only be dismissed for a potentially fair reason as set out in the Employment Rights Act 1996. The tribunal must decide what was the reason for dismissal (or if more than one, the principal reason). Potentially fair reasons include:

    49.1 'some other substantial reason' (section 98(1)); and
    49.2 a reason that 'relates to the conduct of the employee' (section 98(2)(b)).

50. Loss of trust and confidence can amount to some other substantial reason under section 98. However, care is needed when using this terminology, not least because it often overlaps with reasons relating to the conduct of the employee.

51. In McFarlane v Relate [2010] IRLR 196 Lord Justice Underhill noted that referring to 'loss of trust and confidence' had complicated the analysis, saying:

> *"We think it unhelpful. Although in almost any case where an employee has acted in such a way that the employer is entitled to dismiss him the employer will have lost confidence in the employee (either generally or in some specific respect), it is more helpful to focus on the specific conduct rather than to resort to general language of this kind."*

52. In a case where an employer is relying on breach of trust leading to irretrievable breakdown of the working relationship, it is important to identify what the conduct is and why the employer considers it impossible to continue to employ the employee. In Leach v Office Communications, [2012] IRLR 839, the Court of Appeal said that breakdown of trust and confidence is:

> *"Not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate."*

53. There is an important distinction between dismissing an employee for their conduct which caused the breakdown of a working relationship, (a conduct

dismissal) and dismissing an employee for the fact that the relationship has broken down (potentially a dismissal for 'some other substantial reason'). Attaching the label of breach of trust to a conduct matter does not make it 'some other substantial reason' justifying dismissal.

54. Where there is a potentially fair reason for dismissal, the tribunal has to go on to consider (under section 98(4) of the Employment Rights Act 1996):

> "*whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal."*

55. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer. The tribunal must not substitute its own view of the appropriate penalty for that of the employer.

56. In a complaint of unfair dismissal where the reason for the dismissal is a reason related to conduct, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Guidance set out in British Home Stores v Burchell requires the tribunal to consider a three stage test:

    56.1 whether, at the time of dismissal, the employer believed the employee to be guilty of misconduct;
    56.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    56.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

Direct discrimination and victimisation

57. Direct discrimination is prohibited by section 13 of the Equality Act 2010:

> *"(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."*

58. Sex is a protected characteristic under section 4 of the Equality Act.

59. Victimisation is also prohibited under the Equality Act. Under section 27:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because*
>
> *(a) B does a protected act…"*

60. A protected act is defined in section 27(2) and includes:

"(a) bringing proceedings under this Act;"

Burden of proof under the Equality Act

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

62. "(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."

63. 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.

64. 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.

65. 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.

66. 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.

Part-Time Workers (Prevention of Less Favourable Treatment)

67. Under regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000:

"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker-

(a) as regards the terms of his contract; or
(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if –

(c) the treatment is on the ground that the worker is a part-time worker, and

(d) the treatment is not justified on objective grounds."

68. There are conflicting authorities on the test which should be applied when considering whether treatment is 'on the ground' that the worker is a part-time worker. In Sharma v Manchester City Council 2008 IRLR 336, EAT, and Carl v University of Sheffield 2009 IRLR 616, EAT the EAT said that part-time work must be the 'effective and predominant cause' of the less favourable treatment complained of, but need not be the only cause.

69. A different approach was taken in Scotland in Gibson v Scottish Ambulance Service EATS 0052/04 and McMenemy v Capita Business Services Ltd 2007 IRLR 400, Ct Sess (Inner House) where the EAT and the Court of Session held that part-time status must be the sole reason for the less favourable treatment complained of. This was based on the wording used in clause 4 of Framework Agreement to the Part-Time Workers Directive, which says that part-time workers shall not be treated less favourably than comparable workers 'solely' because they work part time.

70. In Engel v Ministry of Justice 2017 ICR 277, EAT, the EAT in England and Wales followed the approach taken in the two Scottish cases. The conflicting authorities were noted by the EAT in Ministry of Justice v Blackford 2018 IRLR 688, EAT. The tribunal had found that part-time worker status was a 'significant, material, effective ground' for the difference in treatment, and the EAT observed that this was consistent with the approach taken in Carl v University of Sheffield.

71. As to remedy, regulation 8 provides that a worker may present a complaint to a tribunal that the employer has infringed a right conferred on him by regulation 5 and that where a complaint is well-founded, the tribunal may order the employer to pay compensation to the complainant. Regulation 8(5) says:

> *"Compensation in respect of treating a worker in a manner which infringes the right conferred on him by regulation 5 shall not include compensation for injury to feelings."*

Conclusions on liability

72. We have applied the relevant legal principles to our findings of fact to reach our conclusions on each of the issues which we have to determine (as set out above).

Unfair dismissal

73. We need to ask ourselves two central questions:

    73.1 what was the reason for the dismissal? and
    73.2 was the dismissal fair in all the circumstances? That means asking: did the respondent act fairly and reasonably in treating that reason as a sufficient reason for dismissing the employee?

74. The claimant asserted that the reason for her dismissal was because she worked part-time and could not increase her hours. The burden of proof in relation to the reason for dismissal is on the respondent. The respondent gave different reasons for the dismissal at various points in the process.

75. The dismissal letter referred to:

    75.1 'gross breach of trust' because of taking other employment without permission;
    75.2 loss of faith and integrity and irretrievable breakdown in the relationship caused by the claimant working for another company whilst on reduced hours;
    75.3 the claimant's conduct resulting in a fundamental breach of her contractual terms which irrevocably destroys trust and confidence.

76. The respondent did not explain why it believed that the failure to seek permission to work in the family business made it impossible to continue to employ the claimant, in other words, why this amounted to a breach of trust rather than a conduct matter.

77. Ms Arnold gave a different reason for the dismissal. In her witness statement, she focussed on the information she was given by the claimant about her health and the claimant's honesty. Ms Arnold said the claimant had falsely claimed to have been ill, had falsely pretended to be on her sofa at home and had taken time off to work at her partner's shop. She said these were the reasons why the employer's trust was broken.

78. Ms Arnold's reason contrasted with the respondent's position at the disciplinary hearing, where Mr Mungul (who did not give evidence before us) focussed on the failure to seek permission to work at Windrush Flooring and did not mention any issue of honesty.

79. The reasons given by Mr Woollard for the decision to uphold the dismissal at appeal stage were different again. He included social media issues. Importantly, in the evidence he gave us, he said his decision was because the claimant was due to be working at the respondent on the day when she answered the phone at Windrush Flooring. This was factually incorrect.

80. The respondent's position at the preliminary hearing as recorded in the list of issues was that the reason for dismissal was some other substantial reason namely because the claimant was working at another company without obtaining permission. At the hearing before us the respondent's representative clarified that this was coupled with the breach in trust as evidenced by the telephone call on 15 August in which the claimant misrepresented where she was.

81. We find, based on the evidence of the dismissal letter that the principal reason for Mr Mungall's decision to dismiss the claimant was that the claimant was a part-time employee who was also working for Windrush Flooring. We conclude from the dismissal letter that it was the fact of the claimant working elsewhere when she had a part-time working arrangement

which the respondent objected to, not the fact of the claimant failing to seek permission. The respondent felt that, because she was part-time, the claimant should increase her hours working for the respondent if she could, rather than work elsewhere.

82. We conclude that this was a conduct matter rather than some other substantial reason. We do not consider that the respondent has established that there was a breach of trust which was sufficient to amount to some other substantial reason for dismissal. The claimant was dismissed because of what she did. It was a conduct dismissal rather than a dismissal for some other substantial reason.

83. As conduct is a potentially fair reason for dismissal, we go on to consider whether the dismissal was fair in all the circumstances. We conclude that the respondent genuinely believed that the claimant had worked in another job without permission, and that it had grounds to do so.

84. However, we have concluded that the investigation carried out by the respondent and the decision to dismiss the claimant were not within the range of reasonable responses, for the following reasons.

85. First of all, there was a failure by the respondent to be clear about the allegations against the claimant. The reasons given in the course of the proceedings from the initial suspension, investigation, disciplinary hearing and appeal shifted and changed. This led to a failure to investigate some matters which were then relied on as part of the reasons for dismissal or for upholding the dismissal.

86. Between the preliminary hearing and the main hearing, the respondent's reason for dismissal also changed. It was accepted on behalf of the respondent in submissions that one instance of misbehaviour for working outside the company boundaries may not be a sufficient reason for dismissal, but it was said that, coupled with the breach in trust, as evidenced by the phone call in which the claimant misrepresented where she was, it did come within the band of reasonable responses.

87. However, the allegation of the breach of trust in respect of misrepresentation by the claimant was never fully investigated or put to the claimant. The respondent assumed that she was not at home by the time of the second call, and did not take reasonable steps to investigate this further. We conclude that there was a failure to properly investigate the question of where the claimant was on 15 August and that, if that was to be relied on as a ground for dismissal, it was unreasonable to do so without fully investigating it.

88. In addition, new issues were introduced at appeal stage (the social media matters). These formed part of the appeal decision to uphold the dismissal decision but had not been properly put to the claimant or investigated. There was a further issue with the appeal decision in that it was based on a misunderstanding of the facts, namely that the claimant should have been at

work for the respondent on 15 August 2018 when she was not due back in work until Thursday 16 August 2018.

89. The second reason for our decision that the respondent's decision to dismiss was not within the band of reasonable responses is that there was inconsistency of treatment between the claimant and other employees. We have found that two other employees had other jobs and (in Ms Toma's case) did not seek permission or (in Mr Lewis's case) sought permission only after they started working in another job. In particular, Mr Lewis had no disciplinary steps taken against him even though it is clear that he twice sought permission for other work that he had already been doing but the respondent seemed uninterested in whether and for how long he had been carrying out additional work without permission. His second request was prompted by the matters raised in respect of the claimant.

90. We have found that the inconsistency of treatment was because of the claimant's part-time status. We return to this below.

91. Thirdly, we take into account that the requirement to seek permission for other work was set out in the Staff Handbook in 2017, which was introduced eight years after the claimant joined, and that the respondent did not specifically draw her attention to that requirement. The claimant thought the respondent knew about her involvement with Windrush Flooring. Mr Woollard accepted that people thought she worked or helped out there on an odd occasion. In those circumstances, it was not within the range of reasonable responses to dismiss someone with the claimant's length of service for a first offence where no warnings had been given.

92. We have concluded that the claimant was unfairly dismissed.

Direct sex discrimination

93. In a complaint of direct sex discrimination the burden of proof is initially on the claimant to satisfy the tribunal that there is evidence from which we could conclude that the claimant was less favourably treated than a comparator was or would have been treated, and that the less favourable treatment was because of sex. If the claimant is able to do that, the burden shifts to the respondent to provide cogent evidence that any less favourable treatment was not because of sex.

94. In this case, there is not sufficient evidence before us from which we could conclude that the respondent gave males more praise or more opportunities in terms of customer leads or gave males. The claimant has not met the burden of proof on this.

95. In relation to the complaint about remote access, the claimant says that remote access was taken from her because of her sex. However, we have found that the respondent had to remove remote access from all employees because of security issues. In 2017 the claimant was told by Ms Arnold that her remote access would be reinstated when she was back from maternity leave.

96. In those circumstances, we have concluded that there is insufficient evidence before us from which we could reach a conclusion that the claimant was less favourably treated because of her sex. The complaint of direct sex discrimination fails.

97. For completeness, we record that the complaint about the removal of remote access in 2016 was presented considerably outside the three month time period, and we were not provided with any evidence from which we could have concluded that it was just and equitable to extend time.

Less favourable treatment as a part-time worker

98. To decide this complaint, we have first considered, whether each of the matters the claimant said amounted to less favourable treatment on the ground of her part-time status occurred as alleged. Our conclusions are:

    a) adding £400 per calendar month to the Sales Target: that was accepted by the respondent as factually correct;
    b) and c) comments made to the claimant about her childcare arrangements and working part-time during the meetings on 20 August, 29 August and 11 September: we have found that comments were made as set out in paragraphs 24, 28 and 34 above;
    c) (as above)
    d) not allowing the claimant to work in other employment without needing to request authority: that treatment was applied to the claimant;
    e) dismissing the claimant because of her part-time working status. There is no dispute that the claimant was actually dismissed.

99. The next issue we need to consider here is whether the treatment that we have found proven was less favourable than a full-time comparable employee.

100. The respondent accepted that all the employees named by the claimant in the list of issues were appropriate full-time comparators. We have considered the case of Mr Lewis in particular. He was a full-time employee of the respondent who, like the claimant, worked in sales and did the same, or broadly similar work, to the claimant. We conclude that he was an appropriate comparator.

101. As to whether Mr Lewis was treated more favourably than the claimant:

    a) he was not required to have an additional £400 added to his target because he was full-time;
    b) and c) we did not have evidence before us as to whether he was subject to questions or comments about childcare or hours of work;
    c) (as above);
    d) he sought authority from the respondent for his other employment (as the claimant was required to do);
    e) he was not dismissed for having undertaken additional work outside the respondent.

102. We have found that the claimant was treated less favourably than Mr Lewis, a comparable full-time worker, in respect of the £400 which was added to her target and in respect of her dismissal for having undertaking additional work. We do not have sufficient evidence to make a conclusion about whether Mr Lewis was subject to comments about childcare or hours of work. However, we have considered the comments which were made to the claimant and which expressly referred to childcare and part-time status as matters going to any question of inference, which we will come back to shortly.

103. Next we need to consider whether the less favourable treatment that we have found was on the ground that the claimant is a part-time worker.

104. We considered the conflict in the authorities as to whether this requires us to conclude that the less favourable treatment was solely because of part-time status, or that part-time status was the effective and predominant cause of the treatment. We prefer the authorities that adopt the latter test.

105. We reach this conclusion because the wording used in regulation 5 ('on the ground that') reflects the wording of the discrimination legislation which preceded the Equality Act 2010 and which was in force at the time the Part-Time Workers Regulations were made (for example the Sex Discrimination Act 1975, which used the words 'on the ground of her sex'). As very similar wording is used, the similar wider interpretation applied in complaints of discrimination should also apply in complaints under regulation 5.

106. Further, the authorities which suggest that part-time status should be the sole reason for the treatment base this conclusion largely on wording from the European framework agreement. However, EU law provides minimum guarantees; it does not prevent a member state from conferring a wider right.

107. We have therefore asked ourselves whether the effective and predominant cause of i) the claimant's increased target and ii) her dismissal, was her part-time status.

108. In relation to the increased target, the claimant's part-time status was the effective and predominant cause. Full-time employees' targets were not subject to an additional £400 in respect of administrative support.

109. In relation to the claimant's dismissal, we have taken into account:

    109.1 the questions that were put to the claimant in the investigation, disciplinary and appeal meetings about her childcare arrangements and her hours of work;
    109.2 the reference to part-time working in the dismissal letter;
    109.3 Mr Woollard's comment in the appeal hearing that if the claimant had sought permission to work at Windrush Flooring he would not have granted it, because it was not fair on her colleagues to be doing her work;

109.4 our finding that the reason for the claimant's dismissal the principal reason for the dismissal was that the claimant was a part-time employee who was also working for Windrush Flooring.

110. We conclude from these factors that the claimant's part-time status was the effective and predominant cause of her dismissal.

111. Finally, we need to consider whether the less favourable treatment which we have found to have been on the ground of the claimant's part-time status was objectively justified.

112. We find that in respect of the £400 it was legitimate to address the need for additional administration support provided to part-time workers in this way, by including a contribution for additional administrative costs as part of the target. That complaint therefore fails.

113. The respondent did not put forward any objective justification for dismissing the claimant in circumstance where a full-time employee was not dismissed for having other employment. The respondent saw the claimant as a full-time employee whose hours had been reduced as it said, as a gesture, and who therefore owed them all the time she was able to work during the respondent's normal office hours. However, this was not an accurate reflection of the contractual position. Contractually, the claimant was a part-time worker who worked on Mondays and Thursdays only. She was not obliged to increase her hours if she had, or could have obtained, additional childcare, as the respondent seemed to suggest. We conclude that the claimant's dismissal was not objectively justified.

114. The claim was presented in time as it was presented within three months of the claimant's dismissal.

115. We conclude that the claim of less favourable treatment on grounds of part-time status in relation to the claimant's dismissal is well-founded and succeeds.

116. The other complaints of less-favourable treatment ((a) to (d)) do not succeed, for the reasons set out.

<u>Victimisation</u>

117. The claimant's claim which she presented on 28 October 2018 was a protected act within the meaning of section 27 of the Equality Act. That was not disputed by the respondent. The tribunal sent the notice of claim to the respondent on 3 January 2019.

118. The claimant's complaint of victimisation was set out in further particulars (page 53). The claimant alleged two detriments:

118.1 the phone call by Mr Woollard to her new employer on 8 November 2018; and

118.2 the letter sent by the respondent to the claimant and her new employer on 16 January 2019.

119. On 8 November 2018 the respondent was not aware of the claimant's claim. The telephone call cannot have been made because of a claim which had yet to be presented. We conclude that the protected act did not play any part in the respondent's decision to call the claimant's new employer.

120. As to the letter of 16 January 2019, we have found that that was prompted by a client telling one of the respondent's employees that the claimant had been in contact with him. We conclude that the claimant's claim did not play a part in the decision to send the letter.

121. For those reasons, the complaints of victimisation fail and are dismissed.

Additional findings and conclusions on remedy

122. In respect of her unfair dismissal, the claimant is entitled to a basic award and a compensatory award.

123. The basic award is calculated by reference to the claimant having 9 years' service and being aged 30 at the date of dismissal. In 2018 when the claim was presented the weekly pay was subject to a statutory maximum of £508. (The statutory maximum of £525, which was on the claimant's schedule of loss, did not come into force until April 2019. As the claim was presented in October 2018, it is the £508 rate that applies.)

124. As the claimant was aged 21 in the first year of her employment, she receives half a week's pay for that year, and then a week's pay for each of the following years when she was over 21. The basic award is therefore 8.5 weeks x £508, which is £4,318.

125. The compensatory award is to compensate the claimant for losses arising from the dismissal.

126. The claimant was given pay in lieu of notice for 9 weeks from 1 September 2018. She was therefore paid by the respondent (in the form of notice pay) up to 5 November 2018, so she had no loss of earnings before that date. Therefore, no compensation is payable for the period from 1 September 2018 to 5 November 2018.

127. The 5 November 2018 was also the date on which the claimant started in new employment. After starting her new employment the claimant had continuing losses because her salary in the new employment was less than her salary in her employment with the respondent. We have accepted the figure from the claimant's schedule (which was not challenged) that the average loss of pay per week was £237. We have concluded, from looking at the pay slips and from the claimant's evidence that she was assisted with her schedule of loss by the CAB, that this average figure for weekly loss is more likely to be a net figure.

128. The period for which the claimant was suffering a loss of salary was from 5 November 2018 to 31 May 2019 when she left her new employment, that is a period of 29.6 weeks. A weekly loss of £237 for 29.6 weeks is £237 x 29.6 = £7,015.20: that is the total loss of salary for the period 5 November 2018 to 31 May 2019.

129. The claimant also suffered loss of pension contributions. The respondent made a monthly employer's pension contribution of £51.25 (not £93 as the claimant's schedule said, because that figures includes the employee contribution as well).

130. The pension loss is more complicated than loss of salary because there are 2 different periods. During the first 3 months of the claimant's new employment (November 2018 to January 2019), her new employer did not make any pension contributions. During those first three months, the claimant's monthly pension loss was £51.25 x 3 which is £153.75.

131. For the following 4 months of the claimant's employment with her new employer (February to May 2019) the loss is less because the new employer was paying a monthly pension contribution of £15. In these months therefore, the claimant's pension loss was £36.25, which for 4 months is £145.

132. The total pension loss is £153.75 + £145 = £298.75.

133. We award £500 in respect of loss of statutory rights.

134. The total loss of salary, pension and statutory rights gives a compensatory award of £7,015.20 + £298.75 + £500 = £7,813.95.

135. The total award to the claimant is £4,318 (basic award) + £7,813.95 (compensatory award) which is £12,131.95.

136. We do not make any award for loss of salary or pension after 31 May 2019. The claimant left her new employment for health reasons, then had time off with her new baby and then set up a new business. We conclude that the claimant would have done the same if she had still been employed by the respondent on 31 May 2019.

137. We have not made any award in respect of the claimant's maternity bonus for two reasons. First, the claimant's evidence about the way the maternity bonus scheme operated was that it was dependent on performance (page 166). The bonus was paid for accrued performance and we do not have any evidence as to what the claimant's performance would have been had she remained in employment with the respondent. Secondly, the maternity bonus was conditional on the employee returning to work and it was paid in each of the first three months after the return to work. As the claimant did not return to work for her new employer after her maternity leave, we find that she would not have returned to work had she still been employed by the respondent.

138. There is also no additional award for the part-time workers complaint. The same financial losses arise irrespective of how many of the claimant's complaints have succeeded. The compensation for financial losses awarded in respect of the unfair dismissal complaint is the same as it would be under the part-time workers complaint and is not awarded twice. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 1998 expressly prohibit any compensation for injury to feelings, so we are not able to make an injury to feelings award in the claimant's case.

139. Finally, we have considered whether there should be any uplift because of breach of the Acas Code of Practice. We conclude that the Acas Code on Disciplinary and Grievance Procedures applies here, because we have found that the reason for dismissal was the claimant's conduct. However, as the claimant accepted in her evidence, a basic procedure which met the requirements of the Code was followed by the respondent. There was therefore no breach of the Code which would be grounds for considering an uplift of the award.

Employment Judge Hawksworth

Date: 25 September 2020

Sent to the parties on: .13/10/2020

Jon Marlowe
For the Tribunal Office