EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100022/2020 (V)

Preliminary Hearing held remotely at Glasgow 1 to 5 March 2021
Deliberations 8-10 March 2021

Employment Judge Hoey
Tribunal Member McPherson
Tribunal Member Whistler

Mrs L M Sloan	**Claimant** **Represented by:** **Mr Collins** **(Lay representative)**
Dumfries and Galloway Health Board	**Respondent** **Represented by:** **Hazel Craik** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant was not constructively dismissed and so her claim for unfair constructive dismissal is dismissed.

2. The claims of indirect age and sex discrimination are ill-founded and are dismissed.

3. The claims are therefore dismissed.

REASONS

1. On 4 January 2020 the claimant lodged claims for constructive unfair dismissal together with age and sex discrimination. She sought reinstatement. ACAS had been contacted on 7 November 2019 with an Early conciliation certificate being issued on 7 December 2019. Case management had taken place at earlier preliminary hearings and the claimant had withdrawn her claims of direct sex and direct age discrimination and those claims had been dismissed. That left claims for constructive unfair dismissal and claims of indirect age and sex discrimination.

2. The hearing was conducted remotely via CVP with the claimant's agent, the claimant and the respondents' solicitor attending the entire hearing, with witnesses attending as necessary, all being able to be seen and heard, as well as being able themselves to see and hear. There were a number of breaks taken during the evidence. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

3. Written witness statements had been provided by each of the witnesses together with an agreed bundle running to 691 pages. Additional documents were added during the course of the hearing in relation to the impact of the menopause. We also allowed the claimant to lodge a supplementary written statement which we considered.

4. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. I had explained to the claimant's representative, who was not legally qualified, at previous case management preliminary hearings, that it was necessary to ensure evidence was led in respect of each matter upon which judgment was sought since the Tribunal is only able to make a decision based on the evidence that is before it.

5. I also explained the importance of the burden of proof and suggested reference was made to the Equality and Human Rights Commission's Code of Practice to assist with the discrimination issues, if needed. Both parties worked together to ensure relevant evidence was led. I assisted the claimant's representative, where I could, by asking a relevant question if that was necessary.

6. At the conclusion of the hearing, the claimant's agent confirmed that he had led all the evidence he had wished the Tribunal to consider and believed that he had been given a fair opportunity to do so.

Issues to be determined

7. The parties had also worked together to agree a list of issues setting out the issues to be determined which were as follows.

Unfair Dismissal

Was the claimant dismissed, and if so, when?

1.1 Did the respondent do the following:

1.1.1 Move claimant to a new building with ongoing environmental issues (low temperature and poor air quality which affected her health in 2017 to her resignation)

1.1.2 Carry out time and motion studies from January to March 2019 with no clear objectives; not carried out in an even-handed manner; felt to be degrading.

1.1.3 Attempted cancellation of flexible working/flexi time arrangements and then cancellation without notice or consultation in April 2019.

1.1.4 Fail to support the claimant when she complained of stalking. (November 2018 to April 2019)

1.1.5 At meetings in March/April 2019 middle or senior managers acted in a way which demonstrated a lack of trust and confidence in the claimant.

1.1.6 Did that breach the implied term of trust and confidence? The Tribunal to decide:

1.1.7 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.1.8 Whether it had reasonable and proper cause for doing so

1.1.9 Was the breach a fundamental one? Was it so serious that the claimant was entitled to treat the contract as being at an end?

1.1.10 Did the claimant resign in response to the breach?

1.1.11 Did the claimant affirm the contract before resigning?

Indirect Sex Discrimination

1.1.12 Did the respondent have the following provision criterion or practice (PCP): requiring the claimant and her colleagues to work in an environment where the air quality and temperature were below the required standard?

1.1.13 Did the respondent apply the PCP to the claimant?

1.1.14 Did the respondent apply the criteria to men and women?

1.1.15 Did the PCP put women at a particular disadvantage compared to men, in that women are more sensitive to temperature and air quality?

1.1.16 If the PCP is established the respondent does not seek to objectively justify it.

Indirect Age Discrimination

1.1.17 Did the respondent have the following PCP: requiring the claimant and her colleagues to work in an environment where the air quality and temperature were below the required standard?

1.1.18 Did the respondent apply the PCP to the claimant?

1.1.19 Did the respondent apply the PCP to persons outwith the age range of 50-65?

1.1.20 Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the clamant does not share the characteristic, in that older people are more sensitive to temperature and air quality?

1.1.21 Did the PCP put the claimant at that disadvantage?

1.1.22 If the PCP is established the respondent does not seek to objectively justify it.

Remedy

It was agreed that the Tribunal could consider remedy, if necessary. That would include reinstatement or re-engagement.

New PCP discussion

10 At the start of the hearing when I sought to clarify the issues that were to be determined the claimant's agent asked to introduce a new PCP which related to the policy of flexi time and working hours. At the case management preliminary hearing, at which considerable time was spent focussing the issues and setting out the specific claims being advanced, this PCP had not been raised. It had also not been raised following the issue of the Note following the hearing that sought to ensure everybody understood the precise basis of each claim.

11 The claimant's agent explained that he had in fact written to the Tribunal at the end of January 2021 seeking to add this PCP. The respondent had

objected to the request on the basis that it had not been raised before and would require significant new evidence. Regrettably the Tribunal had not considered the request and neither party had raised the matter again. In particular the parties had the opportunity at the preliminary hearing that had taken place the week before the hearing to raise any outstanding issues. This issue had not been progressed.

12 In considering this request we applied the overriding objective and sought to ensure that our decision was fair and just. We were particularly mindful of the fact that the claimant's representative was not legally qualified and wanted to ensure prejudice to the claimant was avoided if possible. We also wished to ensure any prejudice to the respondent was minimised and we acted fairly and justly. We considered whether any prejudice to the respondent in allowing the request could be resolved by a short delay to the commencement of proceedings to allow relevant evidence to be obtained. Regrettably to do so would take time and would have resulted in the hearing being adjourned and further delays being occasioned. To properly respond to the revised PCP the respondent would require fair notice of precisely what the PCP was and how it was said to result in particular disadvantage for women and for older people. Those issues had not been set out by the claimant and in any event it would be necessary to consider who precisely was affected by the revised PCP, what the statistical basis was and whether or not objective justification would be relied upon, and how this would be established in evidence. Such matters would clearly take time to consider and prepare. The PCP was clearly fundamentally different to that which was being progressed.

13 We took account of the fact that the parties had been working very closely together in preparation for the hearing and exchanged a significant amount of information, including agreeing a chronology and setting out their position in further and better particulars (which we considered). The respondent's agent had assisted the claimant in providing relevant documents and time and cost had been incurred in preparing for the hearing. Adjourning the hearing until a later date would not be consistent with the overriding objective

since it would delay matters further. We were also conscious of the fact that this hearing had been fixed at a time that all witnesses were available. Given the nature of the respondent's undertaking it was important not to cause any further delay (and have such individuals out of their day to day roles) if possible. We did not consider it in the claimant's interests to delay matters further.

14 The case was otherwise ready to proceed and case management had ensured the issues to be determined were clear and each of the parties had brought their evidence in support of these issues. The claimant's agent accepted that even if the adjustment to the PCP were permitted, there was in fact no evidence brought by the claimant with regard to how the additional PCP created group disadvantage. The specifics of the claim with the new PCP had not been fully considered nor set out.

15 We decided that it was not in the interests of the overriding objective to allow the claimant at this stage in the proceedings to introduce a new PCP and provided oral reasons at the hearing. The prejudice caused to the parties would be too great. The hearing would proceed on the basis of the issues as agreed by the parties and as set out above.

Evidence

16 The Tribunal heard evidence from 7 persons, comprising the claimant, Mr Collins (who had intervened with regard to the stalking issue) and from the respondent's side, Ms Dingwall (office manager), Ms Parker (administrative services manager), Ms Pattie (assistant general manager), Mr Hobbins (HR business partner) and Mr Bryden (head of estates and property). While an 8th witness, the occupational health adviser, was due to give evidence, due to personal reasons she was unable to attend but the relevant evidence required was agreed by the parties. We took that into account.

Facts

17 We are able to make the following findings of fact. The parties had worked together to agree facts within a chronology. The respondent's agent's submission set out a number of key facts following conclusion of the evidence upon which the claimant's agent commented and which we found of assistance. We only make findings of fact that are necessary to determine the issues that require to be determined (and not in relation to each of the matters raised in evidence nor where there were disputes). Where any disputes arise in respect of matters that required to be determined, we resolved these by considering the evidence in its totality in conjunction with the surrounding circumstances and any contemporaneous notes and decided what is more likely than not to be the case.

Background

18. The respondent is a health trust that is responsible for the health care of people within the relevant locality. The claimant was employed by the respondent from around 1998 and was latterly senior secretary within the ear nose and throat (ENT) department of the respondent, providing support services for consultants and other doctors within that team, assisting others as required. The claimant's employment ended on 23 August 2019. The claimant was latterly the only secretary within the ENT team.

19. The claimant was recognised by her consultants as friendly and knowledgeable and she had worked hard to keep the ENT service running smoothly. She was a band 4 secretary. The claimant's job description was an umbrella job description for a senior medical secretarial role.

20. The claimant reported to Ms Dingwall, who was office manager (and also a band 4 secretary). Ms Dingwall was responsible for around 25 secretarial staff including those within the ENT team and oral maxillofacial, cardiology, rheumatology and general surgery teams. Some of the people for whom Ms Dingwall is responsible work in different places. Ms Dingwall reported to Ms Parker, administrative services manager who held that post for around 20

years. She was responsible for line managing 7 office managers and had overarching responsibility for medical and surgical administrative staff and ward coordinators. Ms Parker was responsible for policy decisions within the department. Ms Parker reported to Ms Pattie who was clinical services manager.

Move to the new build hospital

21. The building that housed the hospital in which the claimant worked moved with effect from around 7 December 2017. It moved to a new building which was out of town. Previously those within the administration team had their own offices but that changed as the new building was open plan with secretaries split into pods of 4 people with more than one speciality working in the pod. The office in which the claimant worked had a number of pods. The respondent had outsourced a number of facilities and services as is common in many large scale new public projects.

Issues as to working environment – temperature and air quality

22. The move to the new hospital was a huge change for the secretaries since they were moving to an open plan environment. The noise levels were different and staff required to work in close proximity to each other, some of whom had not worked together before.

23. The area where the claimant worked differed from the old environment since there were no windows which opened in many areas. The office also housed around 25 people (if not considerably more) within the open plan environment. The majority of the staff within that area were female of varying ages.

24. The new building in which the claimant worked from December 2017 had a Building Environment Management System (BEMS) which was an automated system maintained by Serco, a third party. Serco's performance in dealing with problems which arise within the system is monitored by a project team, which met monthly.

25. The acceptable temperature range for the working environment was set at between 18 to 28 degrees centigrade, with an optimum temperature of 21 degrees. The working environment took a period of time to settle down and a number of staff complained that it was too hot and a number of staff complained it was too cold. There was no consistency with regard to the issues identified shortly following the move.

26. Some administrative staff complained about being cold when staffing welcome desks. Fleeces were supplied to staff who required them. Some staff would wear these instead of a cardigan or jumper when working in the administrative area. They were worn generally and available even if the worker was not staffing the welcome desk.

27. Some complaints were escalated to Serco following the move to the new building. As part of the contractual process, Serco would attend site and assess the position. They would measure the temperature. On each occasion where complaints were made, the temperature was within the prescribed range. Serco would attend with a calibrated thermometer in order to make this assessment, and would not rely solely on the readings from the BEMS. There was no occasion when Serco found the temperature to be unacceptable.

28. The complaints that arose were made shortly after the move, and the number of complaints reduced very significantly during the early part of 2018 onwards. Staff accustomed to the new environment and had to accept some things, for example, the fact windows did not open and matters were controlled centrally.

29. There was a slight drop in temperature at the end of April 2019, when the building was being switched to summer temperature – but only by a degree or so - and it was 20 degrees centigrade after that.

30. The temperature of the building is recorded by the BEMS which was broadly accurate. The extract air temperature graph records the temperature of the air extracted from the building. For the duration of 2018 and January 2019 the temperature did not fall below 20 degrees centigrade within the hospital.

31. The air inside the hospital was fresh and not re-circulated air as in many office environments. The air filtration mechanism for the hospital was designed to filter out pollutants. There was an alarm system within the BEMS which alerted maintenance staff if an air filter is broken.

32. The claimant was the only person who complained to Ms Parker or Ms Dingwall about air quality. Had there been an issue with air quality in an area it would have affected more than one person, as the air is supplied to the area and not a particular pod of desks.

33. The claimant was off on one day from her work with a headache on 5 April 2019. She attributed this to the work environment. The claimant was referred to occupational health. The claimant asked for an air quality test on 16 April 2019. Her manager passed on that request to the Estates Department that day. As the relevant person was not aware of any issues with the air quality, and as the claimant was the only person affected, he suggested an occupational health referral in the first instance to check if there was a health issue contributing to the problem.

34. The claimant attended occupational health who suggested that the claimant try keeping a diary of her headaches and wear ear phones in relation to the noise distraction, in order to work out reasons for her headaches, and to come back in a month. The claimant did not take up these suggestions. The occupational health report referred to a number of stressors going on in the claimant's life. The claimant was herself uncertain that it was the working environment that was the issue.

35. There was no rise in sickness absence, nor change in the reasons for sickness absence, amongst the administrative staff in 2018-2019. The same people were off sick for the same reasons. There was no trend within the absences to suggest the move to the new building had affected staff health.

36. The air quality and temperature within the working environment where the claimant worked did not fall below the required standard at the material times.

Time and motion studies

37. As part of the information needed by management to assess work being done within teams, the respondent embarked upon time and motion studies. Work diaries were commonly used by the respondent to establish the tasks staff carry out in their day to day roles. They were used to help determine service need and avoid duplication.

38. The claimant was asked to complete a work diary by Ms Parker, and started to do so on 25 March 2019. All secretaries managed by Ms Parker were asked to do so (including Ms Dingwall and the claimant) because Ms Parker wished to use the diaries to give her an understanding of how the roles worked and how different specialities dealt with things differently, and to check that there was no unnecessary duplication of work.

39. The claimant felt completion of the diaries was degrading as she had to record time spent correcting the work of other typists.

40. Ms Parker determined that the claimant spent 99% of her time typing and told the claimant this at a meeting on 1 August 2019.

41. The use of and approach adopted in relation to the time and motion studies was appropriate, fair and reasonable.

Working time and flexi

42. In September 2015 Ms Parker was tasked by the General Manager to look at how working time (and flexi) was being utilised by staff. In December 2015 an operation group was set up comprising Assistant General Manager, 3 office managers, the trade union, HR and Ms Parker. The notes from that meeting were circulated to the wider administration staff. That included that flexi should not be accrued/built up and that extra work needed should be authorised. After various meetings it was agreed that the status quo would apply until the position was reviewed, which was in 2017.

43. In terms of the claimant's contract of employment, she was required to work 37.5 hours per week which was 7.5 hours per day. The core hours of work were determined by the respondent. The core hours for those for whom Ms Dingwall was responsible were 8.30am to 5pm with an hour for lunch (and a

discretionary 20 minute tea break). From time to time the respondent introduced workplace policies which impacted upon staff. These were agreed with the relevant trade unions and staff representatives.

44. The respondent's policy as to flexi time was found in a policy that was introduced in 2017 following a review of the position. While it had its origin within a national framework document (seen in a document entitled "Supporting the work-life balance pin policy" which was dated July 2015), Boards were to introduce local polices through their partnership forum. The respondent's forum met on 26 October 2017 and approved the Flexi Time policy that would apply to all staff. The employee representatives were present at the meeting at which the policy was approved.

45. The Flexi Time Policy was separate from the Flexible Working Requests Policy which allowed requests to be made for permanent alternation of hours. Requests for permanent changes to working pattern had been routinely granted.

46. Once approved by the Board, polices were circulated by email in an HR briefing by a line manager, and are put on the Board intranet. These policies were circulated by Ms Dingwall, and were placed on the intranet and applied to all staff. It was the responsibility of individual staff to check the intranet for policies in force from time to time, which failing raise the matter with HR or their manager. That included the Flexi Time Policy in 2017.

The applicable flexi policy

47. The 2017 policy stated that flexi time was not a contractual right and that the standard working day must be covered at all times. The standard working day in the administrative services was 8.30am-5pm with an hour for lunch. That ensured clinics were covered, and any urgent work after a clinic could be undertaken.

48. The policy stated that the "Basic Principles" of the scheme were to allow employees to work flexibly where possible, which included flexible start and finish times and the repayment of additional hours worked.

49. The policy that had been approved did not have published core working times since that was a matter for each department

50. Prior to the 2017 policy, the claimant had got into a pattern of starting at 8am, taking half an hour for lunch and finishing before 5pm. She had worked these hours for a number of years and had grown accustomed to flexi time on a day to day basis. The claimant was one of a handful of people who had chosen to change their working pattern which regularly departed from the core hours. Most people worked 8.30am to 5pm with an hour for lunch. As a result of the claimant having changed her working pattern, she routinely accrued time and took it in the next accounting period often by adding it to holidays.

51. In around December 2018 Ms Parker, who was responsible for policy (and working hours) within the team in which the claimant worked, identified that there was no need for staff to work over and above their contracted hours. There was capacity in the system. When staff built up flexitime and took a day off the following month, it was difficult to manage across the administrative services. There was sufficient slack within the system that staff did not need to work beyond their contracted hours and the system required staff to work within the broad times of 830am to 5pm. When a staff member was on leave, someone was needed to cover work that could arise during that time.

52. Ms Parker told the Employee Director in March 2019, that she was intending to tell staff that there was no requirement for staff to accrue time as the service did not need work outside core hours. He had no problem with that.

Communication to the claimant as to flexi

53. Ms Parker emailed the claimant on 22 March 2019 saying: “In Ms Dingwall’s absence I have had a few conversations with some of her team about altering their working pattern by using the flexi. This is not the purpose of the flexi system. I note that you have on only a handful of occasions been at work until 5pm since February. You seem to be building up quite a bit of flexi by coming in early and only having half an hour for lunch. If you are working above your 7.5 hours can you please take the time the next day or very latest the day

after so that your time is not building up. If you are needing to work any extra hours you need to have this authorised by Ms Dingwall or myself. Thanks in advance."

54. Ms Parker emailed all her staff on 4 April 2019 in an email entitled "Flexi" saying: "Just to remind all staff about the use of flexi – at the moment there is no need for anyone to work over the 7.5 hours a day (or your part time hours) as there is slack in the system. If for some reason you need to work any extra you must speak to myself Ms Dingwall or a manager to have this authorised. If you do work extra that has been authorised any extra should be taken back the next day or at the latest the next day after this. It may be in future that we will need some extra support but at the moment this is not needed. Thanks in advance."

55. On 20 May 2019 Ms Parker emailed all her staff an email headed "Flexi/Staggering Lunch/Tea Breaks" stating: "I would just like to remind you all about the email I sent out on 4 April 2019 about the use of flexi. This is still in place and I would also like to remind staff that altering their working times is not permitted as per the flexi policy, not flexible working as this is a different policy altogether. An example of this would be starting every day at 8am and finishing each night at 430pm. The core hours for a full time member of staff is 830am to 5pm with an hour for lunch. Can I also ask that lunches are staggered at all times and that someone is always available over the lunch hour and tea breaks to answer queries etc. Thanks all in advance." The flexible working request policy was a policy that allowed staff to alter their contractual working pattern.

56. Ms Parker chose to email staff since in this way she could tell all her staff at the one time (which was easier given the different locations of staff). It was Ms Parker's responsibility to set the policy for the department, which included the claimant.

57. No member of staff raised a grievance about Ms Parker's emails or the enforcement of the policy which in effect limited flexibility since it required all staff to commence work at 830am and finish at 5pm with an hour for lunch. If

staff wished to vary their hours from this core pattern, they required to seek the approval of their manager on each occasion (which was readily granted).

58. If staff required to work over 7.5 hours on a working day they could seek authorisation, and were to take the time back the next day where possible.

59. The claimant did not require to work over 7.5 hours a day. She chose to do so and prior to the introduction of the policy she had preferred to start early and take half an hour for lunch. She routinely accrued a day of leave which she would take the following month. She would often add this to a period of annual leave. The claimant had worked with a colleague to ensure that the service for which she worked (the ENT team) was not adversely affected.

60. Following the implementation of the policy in around April 2018, the claimant, and other staff, worked from 830am until 5pm with an hour for lunch but the claimant was unhappy since this did not suit her personal circumstances. She preferred starting work at 8am and having a half hour for lunch and finishing before 5pm. The respondent required all staff within the area to work until 5pm to deal with issues arising later in the day.

Stalking issues

61. An unidentified male had started following the claimant in the course of October 2018. He had been following the claimant from the end of her working day, from the hospital. The claimant reported this to Constable Jeffers who was the police officer employed by Police Scotland who was stationed within the hospital. Constable Jeffers did not deal with the complaint to the claimant's satisfaction. The claimant then reported the matter to her local police office on 8 November 2018.

62. The claimant emailed Ms Dingwall on 14 November 2018, and told her there had been a man in the car park watching her and that he had followed her on a number of occasions, and she had reported it to the police. She said she could "discuss further with you if need be". Ms Dingwall asked the claimant if she had reported it to Constable Jeffers which the claimant confirmed she had. Ms Dingwall asked if she knew the man and asked what Constable

Jeffers had said but the claimant did not respond. Ms Dingwall did not follow this up since the email had been written "in strict confidence". Ms Dingwall had an open door policy and would always make time to discuss any issue a worker raised and if the claimant wished to raise the issue with her, she believed the claimant would do so.

63. The claimant was off work on 15 November 2018. The weekend was 17 and 18 November 2018, and the claimant was absent from work on account of sickness from 19 November until 10 December 2018. During her period of absence the claimant was referred to occupational health, and her managers kept in touch with her. The stalking issue was not discussed as the focus was on assisting the claimant to return to fitness. Ms Dingwall knew that the issue had been reported to the police. She believed that the matter was in hand.

64. By 10 December 2018 (when the claimant returned to work) Mr Collins had intervened and warned the stalker off. The claimant met with Ms Dingwall and Ms Pattie on 11 December 2018. Ms Pattie wanted permission to approach Constable Jeffers, with a view to supporting the claimant. Permission was refused by the claimant. Ms Pattie asked for the claimant to write a statement giving dates and times – as with more information the claimant might let her approach the police. If the claimant had provided more detail, Ms Pattie considered that time may be saved and Constable Jeffers would be able to focus the enquiry with regard to dates and times to view the CCTV footage. She was seeking to assist the claimant. The claimant had not advised the respondent that the stalking issue had been resolved by this date.

65. The claimant met with a specialist occupational health therapist on 12 December 2018 during which meeting the claimant stated that she felt a recurrence of stalking was unlikely. The claimant stated that she was in discussions with her managers. This was confirmed in an occupational health letter that was issued on 12 December 2018. The claimant had been told by the occupational therapist that she would see the letter before it was issued but this did not happen. The claimant was angry that the letter had been issued before she had the chance to comment upon it.

66. The claimant was absent by reason of sickness from 20 December 2018 until 10 January 2019 when the claimant retuned to work.

67. The claimant met with Ms Pattie and Mr Hobbins on 22 January 2019. She provided a report as to the stalking as had been requested. She did not provide permission for the police to be contacted to discuss the stalking situation. She advised that she had received closure and did not want to talk about it anymore. Mr Hobbins offered to see if a national policy group might take forward a stalking policy and the claimant provided information about the Lamplugh Trust which was read by Ms Pattie.

Band 4 secretaries

68. The claimant was a band 4 secretary, a senior secretary. There were other band 4 secretaries in place when the claimant was in the respondent's employment. Senior secretaries were not being replaced with band 2 secretaries. When vacancies arose each department considered a replacement based upon the prevailing requirements. In addition to typing, band 4 secretaries can do more coordination and administrative tasks. The role of a band 4 secretary changed over the years. In 2012 at the request of the Scottish Government waiting times and clinic booking were transferred from individual departments to a central department which meant that the work required of the band 4 secretary necessarily changed.

Moving on – claimant considers options

69. On 7 March 2019 the claimant sent an email to Mr Hobbins entitled "Initial enquiry". She stated: "I have just turned 55 and am looking ahead. I have 10 years left in my working life and I would like to find a way to retrain and reskill in line with the new skills that 2020 NHS will require. The role of Senior Medical Secretary is being phased out by a combination of technology and administration systems. I have considered a year out to explore other things but do not want to compromise my pension. I am keen to finish my career within NHS and would like to explore options to retrain. I see my options to cruise out 10 years on the same grade and see the role further deskilled with

Senior Secretaries replaced by Typists or I have to retrain and reskill. I can either retire and take time out to fund my own re-education or look to take a sabbatical for education. I would like to know what NHS Scotland would support either early retirement to let me go and fund my retraining or a sabbatical or unpaid time for training but continued service in terms of pension. I would appreciate your thoughts,"

70. The following day the claimant sent a further email to Mr Hobbins entitled "Follow up email" stating: "My apologies for the rather garbled email of yesterday. To recap and reiterate.. You may recall we met just after the horrible stalking incident which I suffered and I found your advice both helpful and insightful. I have just reached 55 which gives me another 10 years of work life. My role as senior medical secretary has been great and very challenging helping teams of consultants get the very best out of their scarce resources. I get on very well with all my consultants but I am realistic that the role of senior medical secretary has and is changing or reducing in skill due to both technology and the management of clinics and theatre lists by specialist teams. My role will over time be replaced by lower grade typing personnel. I feel that to progress my career within NHS I need to reskill to be able to offer a skill set that is attractive and required by NHS for 2020 and beyond. I believe that I have both the organisational and interpersonal skills to take on new challenges. I am looking at gaining study and qualification within the management science of effecting and implementing change within health care. I would like to end my career by making an important contribution to NHS and I am prepared to study and learn. My pension is final salary based so I would like to retire at terms on the very best grade that I can achieve. I would like to explore what my options are without seriously damaging my pension. If I were to retire early then re-join my break in continuity of service would seriously affect my pension. If it were possible to take some unpaid break in service but maintain my pensionable service then that may be possible. If retraining and reskilling requires that I have to take a break are there any options for enhanced early retirement given that my post would inevitably be filled by a lower cost lower grade personal? If you were to help

advise and help me explore what options might be open to me I would be most grateful."

71. In response to that email the claimant met with Mr Hobbins and Mr Howat on 11 April 2019 during which the claimant confirmed that she was exploring her options which included early retirement. The claimant found Mr Hobbins to be very helpful. She was considering retraining as an option. The claimant was considering a leaving date of 31 May and consideration would be given as to what the pension loss would be if that were to happen.

Claimant decides to retire early end of April 2019

72. By the end of April 2019 she decided that she would retire early and leave the employment of the respondent. In an email of 17 May 2019 to Ms Parker headed "My retirement on 2 June 2019" the claimant stated that:

"You are in the awkward position of "firing the bullets" to implement some very awkward changes within DGRI administration. You have my full respect in this matter but I have to protect my position and my health as best I can. Only gynaecology senior medical secretaries have any input over clinics and theatre lists. The rest of us are being side-lined into a rules based typing pool with less and less control over the functions we were recruited to support. You yourself have said that you are "top heavy" with band 4 medical secretaries. Instead of consulting with us you are forced into a process probably against your will to force through change without either notice or consultation with those affected This aggressive implementation of change process even questions us when we prioritise typing at the request of consultants to allow some letters to jump the queue. When excess load is being handled by non-ENT typists this process objects to my department deciding which letters are safety be left to typists with no knowledge of the consultants or terminology.

I met with Mr Hobbins recently to discuss my career options in light of the above changes and the deafness of management to the damage that these

changes have done to the functioning of the ENT department and staff morale as a whole.

Since the meeting further moves to force us to take one hour at lunch as opposed to the 30 minute required and further moves to force us to start at 830 rather than 8 have been imposed without further consultation or notice to further negatively impact the employment experience at DGRI. My consultants have at no point objected to me starting at 8am. All senior secretaries have been operating under flexi time working whereby excess hours worked were accumulated to allow up to 1.5 days leave per month. This has been abruptly terminated without either consultation or notice.

I have asked for air quality tests and have noticed that working temperatures have often fallen below the minimum required by law in UK offices. These issues appear not to have been addressed to date.

As Team Leader and Manager most organisations would allow you to support your teams through difficult change. Your role of "firing the bullets" amounts to you fronting a process of bullying in the workplace an these management practices and processes are no longer acceptable in any way. It is for this reason that I contacted HR on 2 May to indicate that I feel forced to take early retirement on 2 June 2019. This comes on top of the stalking incident where DGRI failed in its duties and it transpires DGRI has absolutely no security department nor any strategy or policy to cover stalking."

Respondent responds to the issues the claimant raised

73. In her reply on 23 May 2019 Ms Parker noted that the claimant was still absent on account of illness and sought an update. She tried to answer the points made.

74. She stated that she was not familiar with the process in gynaecology but there was a separate department that dealt with the booking of clinics and theatre lists thereby taking the pressure off administration staff. The change in

booking had been a change introduced via a Government policy in around 2012.

75. She stated that: "Any process change we have had in the past that was affecting staff has been outlined either by email or discussed at any team meetings. The flexi email was sent out on 4 April outlining the change so everyone got this at the same time and it did ask if you had any concerns to get in touch with me directly. We are in a position within the service that we are able to support each other as there is 'slack' within the main services which means that there is no need for anyone to work above their working hours, in your case 7.5 hours so this means you would start work at 0830 and finish at 1700 with an hour for lunch. We have asked everyone within our service to stick to this. If you are starting work at 8am (there is no need for anyone to be at their desk for 8am) every day this would mean you would have to leave at 430 every day but as outlined in the flexi policy you cannot use flexi to change your working day and this would fall within that category."

76. With regard to "operating under the policy" she said: "in the past people did accumulate flexi to allow them to take 1.5 days every 4 weeks – this was fine if this was needed within the service but as outlined above there is not the work to have anyone working extra. Anyone working should have this authorised and this is still the case if someone needs to work extra they need to have it authorised by myself, Ms Patty or one of the office managers and also how this time will be taken back or paid for. Any flexi that had been built up to 4 April 2019, individuals are still able to take this flexi time."

77. With regard to prioritising typing she said that she was happy for typing to be taken out of order where it is necessary to do so. She said that at a meeting with the lead consultant and the claimant it was agreed that specific individuals would help to provide them with consistency and knowledge.

78. Finally with reference to the air quality position, she said that from the occupational health report that was provided the occupational health physician consulted with the health and safety adviser who was familiar with

the air exchange and monitoring system and was satisfied that no specialist assessment was needed.

Claimant completes process to retire early

79. The claimant returned to work on 28 May 2019 and met with Mr Hobbins. She completed the early retirement forms. It was agreed that the claimant would continue in service up until 23 August 2019 but reduce the days when she worked and continue to be paid full pay in accordance with the retirement policy.

Resignation letter – 26 July 2019

80. On 26 July 2019 the claimant gave to Ms Parker her (undated) letter of resignation in which she stated that she had been "forced into early retirement directly by your actions and failures. The failures are not personal to you more organisational. You fundamentally changed both my working conditions and the terms under which I was employed to work without consultation or notice. I raised these concerns and you failed to address to deal with these. DGRI has failed to appreciate the organisational and knowledge role senior medical secretaries provide as opposed to typists and have in supporting and aiding the efficiency of consultants and their operations. Getting rid of and bullying secretaries out of their roles amounts to unfair practice and is detrimental to both the NHS and DGRI. You should have been in a position to offer either retraining or retirement with full pension rights if indeed senior secretaries no longer form part of your plans. Your failures and actions have resulted in my being bullied into early retirement. I tried to explain to Mr Hobbins about secretaries no longer being valued or having a place other than a typist and sought help to train into a more valued role. There was no provision or support for this. As to my environmental concerns, other than providing a fleece, these have been ignored whereas proper retesting should have taken place. I plan to take action to cover my losses. I had hoped to reach the age of 65 still making a valuable contribution to NHS but this has been made impossible."

Meeting to respond to issues claimant raised

80. On 1 August 2019 a meeting took place to discuss the claimant's letter which the claimant attended with her Union representative, Mr Hair, together with Ms Parker and Mr Hobbins. The claimant was asked if she wished to retract her resignation but she declined. In relation to change of working conditions, Ms Parker outlined that the claimant's working conditions had not changed: she was at the same band and worked the same hours. The claimant pointed out that flexi had been "withdrawn". Ms Parker explained that due to service need no one needed to work extra hours beyond the normal working day given the slack in the service and that the email she had contact should be made with her for authorisation to work beyond the contractual hours. At no point had the claimant been asked to work beyond her contractual hours. With regard to the claimant's working pattern, Ms Parker explained that she had a large service to manage and changing the working pattern had a detrimental impact since it resulted in potentially 18 extra days holidays each year.

81. With regard to training, Ms Parker explained that attempts had been made in discussions with Mr Hobbins and the claimant to identify specific training needs but the claimant was unsure as to what she wanted to do.

82. With regard to environmental concerns, Ms Parker explained that the estates team had checked the position and were happy with the results. There were no issues with regard to air quality. Mr Hare said climate control was being considered across the hospital.

Claimant's last days at work and communication to respondent

83. The claimant's last day was on 23 August 2019 which was the same day she sent a further email arguing that there had been environmental issues within the hospital for some time and that "issuing fleeces and denying the problems is nothing short of outrageous". The email stated that the respondent failed to follow up on stalking and the respondent was essentially making the role

of senior secretary redundant which was unfair and discriminating against senior female employees. She also referred to terminating of the flexi arrangement as being bullying and that the intention was to reduce band 4 workers and replace with band 2. She stated that she had been forced to take early retirement, it was not voluntary and she had lost 25% of her pension and lump sum. She concluded by saying: "I am happy to sign any non disclosure agreement as required as I do understand that Targets and other pressures may be causing your actions."

Respondent's formal response

84. Ms Pattie responded to the email by letter dated 19 September 2019. With regard to environmental concerns she stated that the matter had been escalated to the head of estates and property on 16 April 2019 for further discussion and the relevant individuals who were responsible had confirmed the air exchange and monitoring system were working appropriately. She also noted that at the return to work interview on 16 April 2019 the claimant was asked by Ms Dingwall to be referred to occupational health with regard to symptoms the claimant was experiencing at that time but she declined.

85. With regard to a failure to follow up on stalking, Ms Pattie said that when the incident was highlighted to the respondent the claimant was referred to occupational health for support and advice. The claimant was then absent by reason of sickness and upon return a meeting was convened the day after the claimant returned to support the claimant. At the meeting, which was on 11 December 2018, the claimant had said that she had an occupational health appointment arranged for 12 December 2018 and that the stalking incident was "not work related" and she had approached the on-site police constable. Ms Pattie noted the claimant refused permission for the respondent to approach the police. At a further meeting on 22 January 2019 the claimant had provided a report setting the matter out in writing but said that she did not want to take the matter forward. The claimant had said that there was nothing else the respondent could do for her She had said she

found occupational health very helpful and the advice and support from her GP was supportive. She said that she had achieved closure on the stalking incident and wanted to move forward. Mr Hobbins had said he would raise the stalking issue to the policy group for consideration.

86. With regard to the allegation that senior secretaries were being replaced with more junior staff, Ms Pattie explained that technology was evolving and Senor Secretaries remained at the same band. There had been no discrimination. It was denied that band 4s were being replaced by band 2s. Vacancies were considered on a case by case basis.

87. She noted that flexi time was in operation if authorised by a line manager and that had not changed.

88. The letter concluded by noting that at the claimant's meeting with Mr Hobbins on 11 May 2019 it was clear that she had already decided to retire and timescales had been agreed.

89. There had been no bullying or harassment claims or investigations within the group of staff for which Ms Parker is responsible. Staff work closely together and trained mediators can be used to resolve conflict if needed.

Steps to obtain alternative employment and earnings

90. Following the ending of her employment, she had focused on preparing for the Employment Tribunal rather than applying for vacancies that arose in other areas of the respondent. She had a number of potential job opportunities which might crystalise following the passing of the health pandemic. One had been in the hospitality sector. The claimant received her pension following her early retirement.

91. When she worked for the respondent she earned £2024.76 gross per month which is £1876.97 net. She was aged 55 at the end of her employment. She was also in receipt of a pension which the parties had not valued.

Menopause

92. The menopause involves a change in hormones as a result of which a woman stops having periods and is no longer able to get pregnant. Inadequate ventilation, high temperature, humidity and dryness can have a negative experience on hot flashes. Hot flashes are common but cold flashes can occur too. Cold flashes can be a sign of the menopause in some cases.

Observations on the evidence

93. Each of the witnesses provided evidence which was clear and candid. The respondent's agent noted that the claimant's evidence in chief in the form of her written statement, and her oral testimony in cross examination, were in far more measured terms than found in her contemporaneous emails. For example, in her email of 17 May 2019, she referred to an "aggressive implementation of change process", but when asked about any changes to her work, or banding, in the year before she resigned, she accepted that there had been none, and what she was referring to in this email was the fact that following a meeting with the lead consultant in mid-2018, the views expressed by the consultant in that meeting were not taken forward. There is merit in that observation. Clearly with the benefit of hindsight the claimant was able to be more objective with regard to the changes that had occurred, but there was no doubt that at the time she was unhappy with what she perceived was and had been happening to her role. She was concerned about change in the future and how her role could become different.

94. The other notable contrast raised by the respondent's agent was between the claimant's agent's views on the case, as put to witnesses on a number of occasions, and the claimant's own evidence. She gave the example where

the claimant's agent's view was that someone, on the 14th or 16th of November 2018, having been told by the claimant of the stalking for the first time, and that she had reported it to the police, should have "dragged PC Jeffers by the ear" to confront the stalker, or confronted him herself and have "bawled him out". The claimant, however, accepted in cross examination that the steps taken by her mangers between 14 November, and her return from sick leave, had been reasonable. That was an example, again with the benefit of hindsight, of the claimant assessing matters objectively.

95. There were few disputes on material facts which required to be resolved but the key issue was with regard to the issue of air quality and temperature. We considered this issue very carefully from the evidence presented to the Tribunal. The focus is on the evidence that is relevant to the issue in this case. The claimant did not have any specific evidence to challenge the data that had been provided by the respondent and sought to rely on extraneous matters, whether arising in the press or other hospitals. We had to focus on the evidence that related to the claimant's place of work. We found Mr Bryden to be clear and cogent and we accepted his evidence. The position the claimant's agent put to Mr Bryden was that the BEMS was inaccurately recording temperature, partly as a result of a failure to have independent testing at the commissioning stage, and then inadequate annual monitoring by an external company. This was rejected by Mr Bryden, whose experience in the area is significant. The claimant had no evidence to place before the Tribunal that there was any failure in the commissioning or maintenance of the building. At best the claimant's agent made assertions about his expectations or experience but there was no evidence, for example any specialist commissioned by the claimant. We took account of all the data provided to the Tribunal, and the absence of data, but were satisfied that Mr Bryden's evidence was credible and reliable. While he was only aware of a very limited amount of formal call outs in relation to Serco, Ms Dingwall believed a significant number of call outs had been made. She was clear that in every call out the temperature was found to be within the agreed limit. She did not consider there to be any issue with regard to temperature and the

formal testing confirmed this. Thus although there was an inconsistency with regard to the number of call outs to Serco, we found Mr Bryden's evidence to be credible. The tenor of his evidence with regard to the substantive points was consistent with the other witnesses, in that there were no issues regarding the temperature and air quality. That was evidence we accepted having carefully assessed all the evidence before the Tribunal.

96. We considered carefully the claimant's agent's position which was skilfully put to Mr Bryden. While his recollection was not perfect, and there was for example an absence of specific data in relation to certain aspects, ultimately the claimant had no direct evidence to show that the temperature or air quality was in fact beyond the required parameters. Even if the equipment had been faulty and even if Serco had not reported all incidents to the respondent, there was no evidential basis for finding that the temperature was too cold or the air quality unsuitable. The evidence the claimant had was all circumstantial. The weight of evidence before the Tribunal was such that the air quality and temperatures were both acceptable, particularly once everyone settled into the new environment.

97. With regard to temperature, the respondent's agent argued that the highpoint of the claimant's evidence in regard to independent testing is that her colleague, at one unspecified point in time, measured a temperature of 12 degrees on a phone app. Mr Bryden commented that such phone apps are normally inaccurate since they normally record temperatures at the nearest weather station. Mr Bryden would have been "gobsmacked" if the temperature had dropped below the usual range for any period of time, and his phone would have been "red hot". We were satisfied that the temperature and air quality was adequate. We did not accept the claimant's belief that the temperature was low and air quality poor. Other than a belief, and some evidence of what the claimant saw colleagues doing, there was no evidential basis to challenge the evidence of Mr Bryden which was key to this issue. We also took into account the surrounding factual matrix with regard to how other

staff reacted and their position, in contrast to that advanced by the claimant in reaching our view.

98. There was conflicting evidence from the respondent's witnesses about the number of complaints routed to Serco. Mr Bryden was only made aware of 2 by Serco, when he had asked them. This was in stark contrast to the number of complaints referred to by Ms Dingwall, to the extent that the complaints had to be routed via a manager. We considered this conflict in evidence. The claimant argued that it evidenced the fact there were serious and sustained problems with the environment. Having considered the evidence it is clear that the complaints had mostly arisen during the initial few months following the move when staff were unhappy with the new environment, and with complaints varying from too hot to too cold. By Spring 2018 there had been significantly fewer complaints and there were no material issues as to the working environment. We did not accept the claimant's evidence that there were serious issues with regard to temperature and air quality and accepted the evidence of Mr Bryden and the claimant's managers who had experience of the environment in which the claimant worked and found no issues. While there was a conflict in the evidence as to the number of issues arising, we accepted that at no stage was there any suggestion that the complaints that had been raised had merit or that the issue had continued beyond the transition stage following the move. The fact Mr Bryden only knew of 2 complaints (both of which were without merit) did not alter the fact that the outcome of each of the complaint (and the experience of the respondent's witnesses, some of whom sat near to the claimant) had been that the temperature was within the acceptable range.

99. There was also a dispute about why fleeces were provided. The claimant argued that fleeces were provided due to the low temperatures generally. The respondent's position was that fleeces had been provided due to certain areas being subject to colder air where windows in individual wards were open. Fleeces had been available generally to staff within the area and we preferred the respondent's evidence in that regard. We did not accept the

claimant's evidence that staff would routinely wear outside garments when at work. Staff could wear fleeces or jumpers and did so.

100. We accepted the evidence led by the respondent with regard to the issuing of the flexi policy. While the claimant argued that she had not seen the policy, we found Ms Dingwall and Ms Parker's evidence to be clear and candid. The policy had been issued and in any event was to be found on the intranet. It was open to the claimant to have raised any concern she had as to being unable to identify the policy with her managers or HR but she did not do so. We concluded that the flexi policy had been issued by email to the relevant staff, including the claimant, and had been placed on the intranet. We accepted the evidence from the respondent's witnesses. In any event, the claimant had been told by email, which she accepted she received, what the core hours and position was to be. She knew what the respondent required of her in terms of the reduced flexi position and core working hours. It was for each department to determine the degree of flexibility available.

101. With regard to the bands within the administration service, the respondent's agent in her submissions noted that Ms Parker was certain that there were no band 2 audio typists employed in the administration services managed by her in March 2019. The claimant's agent in cross examination asked her about 1 named person and Ms Parker was of the view that this individual was a Band 4. Mr Hobbins thought that there were band 2 secretaries employed at the time. We considered that the manager of the service was more likely than not to have a better knowledge of the bands of her staff. The evidence led before the Tribunal showed that the respondent was not seeking to dismiss staff at the claimant's band. While matters did evolve, the claimant accepted that her banding had not changed and she had not been told that her job was at risk. The claimant was unhappy with how matters had developed, but her role had not fundamentally changed, but had been subject to organic evolution.

102. Finally, with regard to the time and motion study, the claimant's agent's issue was that the approach taken was not formal in the sense of external agencies conducting the checks. It was argued that the diary exercise was not carried out appropriately as it was not possible for the claimant to spend as much as 99% of her time doing typing. We have no evidence as to how accurately the diary was filled in by the claimant nor specifically as to what she did each day in question but we accept the respondent's agent's submission that as the claimant only learned that this was Ms Parker's conclusion at a meeting on 1 August 2019, this cannot have factored in her decision to resign, which took place on 2 May 2019.

Law

103. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if: **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

104. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

105. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the (then) House of Lords considered the scope of that implied term and the Court approved a

formulation which imposed an obligation that the employer shall not: **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

106. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A: **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

107. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

108. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

109. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** the Employment Appeal Tribunal chaired by Langstaff P (as he then was) put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is**

a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:

> **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.

14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually

identified, is not only usually but perhaps almost always a repudiatory breach."

110. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

111. If the claimant proves that her resignation was in truth a dismissal, Section 98 governs the question of fairness.

Reinstatement and reengagement

112. Sections 112 onwards of the Employment Rights Act 1996 set out these remedies which gives the Tribunal the power to order an employer to reinstate or reengage an employee who has been unfairly dismissed in certain cases.

Compensation

113. Where an employee has been unfairly dismissed, compensation can be awarded which would comprise a basic award and a compensatory award.

Basic award

114. This is calculated in a similar way to a redundancy payment, namely half a week's gross pay for each year of employment when the claimant was under 22 (section 119 of the Employment Rights Act 1996).

Compensatory award

115. This must reflect the losses sustained by the claimant as a result of the dismissal. Section 123 of the Employment Rights Act 1996 states it shall be

such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The amount that can be awarded is subject to a statutory cap.

Indirect discrimination

116. The provisions on discrimination are within the Equality Act 2010, and are construed purposively against the background of the EU Framework Directive. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that sex and age are protected characteristics.

117. Section 19 of the Equality Act 2010 states:

> **"19 Indirect discrimination**
>
> 1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> 2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Section 39 of the Act provides:

"39 Employees and applicants

An employer (A) must not discriminate against a person (B) –

(2) …..(c) by dismissing B"

Section 136 provides:

"136 Burden of proof

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

Section 212 defines "substantial" as meaning "not minor or trivial".

Section 119 provides as follows:

"…..(3) the Sheriff has the power to make any order which could be made by the Court of Session –

(a) In proceedings for reparation

(b) On a petition for judicial review

(4) An award of damages may include compensation for injured feelings (whether or not it awards compensation on any other basis)"

Section 124 provides the following on remedy

"**124 Remedies: general**

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate ….

(4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but

(b is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

118. Lady Hale in the Supreme Court gave the following general guidance in **R (On the application of E) v Governing Body of JFS [2010] IRLR 136**

> "Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

119. The same principle applies for other protected characteristics, one of which is sex.

Provision, criterion or practice

120. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In **Hampson v Department of Education and Science** [**1989] ICR 179** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in **Essop v Home Office [2017] IRLR 558.**

121. In **Ishola v Transport for London [2020] IRLR 368** Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

122. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices,

> arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Disproportionate impact

123. There must be evidence that shows the PCP creates a disproportionate impact upon women (in respect of sex discrimination) and older people (in respect of age discrimination).. That is a matter also referred to in the Equality and Human Rights Commission Code of Practice: Employment ("the Code") at paragraph 4.15 onwards.

Particular disadvantage

124. The wording of section 19 does not require statistical proof. As Baroness Hale put it in **Homer v Chief Constable of West Yorkshire Police *[2012] IRLR 601*** the change in the Act over the predecessor provisions

> "was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question".

125. In **Essop v Home Office *[2017] IRLR 558*** the Supreme Court made the following comments:

> "A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men …"

126. In **Cumming v British Airways plc UKEAT/0337/19** that quotation was referred to in relation to sufficiency of evidence as follows:

> "there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

127. There may be some occasions and roles where one cannot proceed on the basis that childcare responsibilities fall more heavily on women than men in general, **Sinclair Roche & Temperley v Heard [2004] IRLR 763**, which involved city solicitors. The Employment Appeal Tribunal held that:

> "'the tribunal was not entitled to conclude that because women have greater responsibility for childcare, a considerably larger proportion of women than men are unable to commit themselves to full-time working, if this was intended to be a relevant finding with regard to men and women solicitors or men and women working in high-powered and highly-paid jobs in the City. Nor did the tribunal address whether a considerably larger proportion of female than male partners in the respondent firm was unable to commit themselves to full-time working'."'

Assumptions should be avoided and decisions made on the basis of evidence.

Objective justification

128. It is for the employer to establish the defence on the balance of probabilities. It has the elements of

(i) The means to achieve the aim must correspond to a real need for the organisation

(ii) They must be appropriate with a view to achieving the objective

(iii) They must be reasonably necessary to achieve that end.

129. In **Chief Constable v Homer 2012 ICR 704** Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

130. The Employment Appeal Tribunal held in **Land Registry v Houghton and others UKEAT/0149/14** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in **City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18** as follows "proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (**Hardys & Hansons place v Lax [2005] IRLR 726**). On the other hand, the test is something more than the range of reasonable responses (again see **Hardys**)."

131. Guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

Burden of proof

132. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities of **Igen v Wong [2005] IRLR 258**, and **Madarassy v Nomura International Plc [2007] IRLR 246,** both from the Court of Appeal. The claimant must first establish a first base or *prima facie* case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

133. In **Ayodele v Citylink Ltd [2018] ICR 748**, the Court of Appeal rejected an argument that the **Igen** and **Madarassy** authorities could no longer apply as

a matter of European law, and held that the onus did remain with the claimant at the first stage. As the Court of Appeal then confirmed in **Efobi v Royal Mail Group [2019] EWCA Civ 19** unless the Supreme Court reverses that decision the law remains as stated in **Ayodele**.

Remedy

134. Compensation is considered under section 124 of the Act, which refers in turn to section 119, of the 2010 Act. The first issue is injury to feelings. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be

In **Da'Bell v NSPCC [2010] IRLR 19,** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

135. In **De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844**, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2019, the Vento bands include a lower band of £900 to £8,800, a middle band of £8,800 to £26,300 and a higher band of £26,300 to £44,000.

136. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in **Abbey National plc and another v Chagger [2010] ICR 397**. The question is "what would have occurred if there had been no discriminatory dismissal."…….If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss." There is no cap on the amount of compensation that can be ordered.

137. It was stated in **Chief Constable of Northumbria Police v Erichsen 2015 WL 5202327** that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

138. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – **Ministry of Defence v Hunt and others [1996] ICR 554**.

139. Interest can be awarded in discrimination cases under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards made can

include for injury to feelings, and for past financial losses. No interest is due on future losses.

Submissions

140. The respondent's agent had submitted a detailed written submission to which she spoke during the submissions stage of the process. We refer below, where appropriate to the submissions, which we took into account. The claimant was given time to consider the submission and respond to each of the issues raised and make the claimant's submissions. Each of the points made by the parties, in writing and orally, were taken into account and we refer to the salient points below where appropriate.

The respondent's agent's submission: Constructive unfair dismissal

141. It was argued that the claimant was not constructively dismissed, because there was no breach of the implied term, and thus no fundamental breach of the contract of employment by the claimant's managers. The claimant's evidence was that the temperature where she worked was always too cold - but took a "turn for the worse" from April 2019. She sought to support her position that the temperature was too low from 2017 until her retirement with reference to a colleague who took a temperature measurement using an app on her phone at some point, and it showed 12 degrees, and to the fact that fleeces were provided to staff. She pointed to the number of complaints Ms Dingwall mentioned in her evidence. In relation to air quality her evidence was that the air did not feel "healthy, clean or nice". She gave evidence that at one point (unspecified) she saw a colleague with a bowl of water. The claimant had no evidence that any of her colleagues had been off sick due to cold or poor air quality.

142. The respondent's agent noted that Mr Bryden was able to provide reassurance that the new hospital was built in accordance with prescribed standards and in accordance with technical guidance. The temperature of the air delivered to the hospital is measured at the time of supply and extraction,

and the graphs for 2018-2019 show the air to be at an acceptable temperature. There was a slight drop at the end of April, when the building was being switched to summer temperature – but only by a degree or so, and it was 20 degrees centigrade after that. Mr Bryden did not accept that the temperature within the building was out of the set range and he would be "gobsmacked" if this was the case

143. The respondent's agent submitted that there was reference by Ms Dingwall and Ms Pattie, to some staff feeling that the area that they sat in tended to be cold, when they first moved to the new hospital, but that the temperature settled. Ms Dingwall, only recalled seeing someone on one occasion wearing fingerless gloves – and this was "towards the beginning when we first moved". She gave evidence that fleeces, provided just after the move to the new building due to complaints of it being cold when staff were working on the ward welcome desks, were worn by staff, "in place of a cardi or jumper". She used hers to walk to and from work. There was evidence from Ms Parker and Mr Hobbins and Mr Bryden that when they were in the building they would see fleeces on the backs of chairs – this suggests that they are not always worn. In short it was argued that there was no evidence that there were ongoing environmental issues (low temperature and poor air quality) from 2017 until the claimant's resignation.

144. It was also suggested that it was not clear that the claimant's health was affected by the air temperature or quality. She herself was not sure at the time that her headaches were due to the building. There were other stressors in her life at the time. She was asked by occupational health to keep a diary, try headphones and come back for a follow up appointment. None of those things happened. According to Ms Dingwall and Ms Parker, there was no increase of absences from work – that those who had tended to be absent in the former hospital, continued to be absent for similar reasons in the new build. There was no evidence that those absences were due to temperature or air quality. If there was a significant problem with the environment, for an

area where 40 people sat, it would not be unreasonable to expect more than one person to be affected.

145. The respondent's agent argued that although the claimant may not have liked the open plan air-conditioned environment in the new build, that there were no, "ongoing environmental issues - low temperature and poor air quality" in at least the year prior to her resignation, and as a result her health was not affected. That could not be a breach of contract.

146. With regard to time and motion studies, the claimant completed a 2 week work diary in March 2019. She was asked to do so, along with all colleagues managed by Ms Parker, and her own manager, Ms Dingwall. This was "even handed". The reason she was asked to do so was explained by Ms Parker. The claimant's agent had not challenged the rationale or objective of the request for diaries to be kept. In cross examination the claimant said that the reason she found completion of them to be degrading was that she had to record time when she had been correcting the work of band 2 audio typists. The reason why that might be degrading was not made clear. The claimant's agent had made much of the fact that in a meeting on 1 August 2019 Ms Parker described her analysis of the claimant's diary as showing that she spent 99% of her time typing. Ms Parker stood by that. Even if the Tribunal was minded to conclude that that was an overstatement, the fact is that the claimant learnt of this after she resigned, and so it cannot form part of her case of constructive dismissal. It might be pertinent if Ms Parker had started to make any changes to the claimant's job or the way in which she was asked to do it, on account of her findings, but the claimant was clear that no recent change had been made to her job or banding in the year before her resignation. It was submitted that the request made by Ms Parker for work diaries to be completed, had clear objectives, was carried out in an even-handed manner, and there is no objective reason for the task to be considered degrading. That was not therefore a breach of contract.

147. With regard to flexi, it was noted that the Flexi Policy is not contractual. The evidence showed how the 2017 policy came to be part of the suite of policies that are applied, via the partnership forum and disseminated to staff. The policy expressly stated it is non contractual. It was approved by the Area Partnership Forum in October 2017, which included the relevant trade unions. Whatever the claimant understood she had been told by the union in the past, by 2017 the Flexi Policy is not contractual. The claimant was used to accruing time and taking it back the following month. Although she saw no operational difficulty in that, others who had a management role, for services beyond ENT, did. Work had to be covered at times she was not there. There was no operational requirement for her to build up time. It was not unreasonable to say to staff that in that regard the policy should be applied – extra hours should only be worked if there is a service need. Ms Parker emailed the claimant personally on 22 March to point out that extra hours – if needed, should be authorised, and time taken back the next day, or day after. This was followed up by a more widely circulated email on 4 April. It was not unreasonable to email when there were staff in different locations. It was not unreasonable to expect staff to be in work at the time that the work needs to be done – 8.30-5pm with an hour for lunch. Ms Parker's evidence in cross examination was that it was important that there was secretarial cover from 8.30am, as clinics started at 9.00am and up to 5.00pm as clinics ended at 4.30pm, and there might be urgent work. Although the claimant said she spoke to Ms Parker about the flexi, she did so in the hope that she might change her mind and it would go back to how it was, but she did not give any compelling evidence about why she required to work her previous pattern, from the point of view of caring commitments. No other member of staff raised a complaint or grievance. As Ms Dingwall said: "though everyone loves taking flexi it was not an efficient way of managing staff." Asking staff to work their hours, at the time the service needs staff to be present is not unreasonable and not a breach of contract.

148. With regard to stalking, the claimant raised the fact that she had been followed by a man on a "number of occasions", and had reported it to the

police, with her manager Ms Dingwall by email on 14 November 2018. The claimant accepted that the tone of her email did not suggest that she was very upset or that she wanted anything particular done by Ms Dingwall. Ms Dingwall ascertained that it had been reported by the claimant to the police. She asked for more information – did she know the man, and what had PC Jeffers said - but got no reply. The claimant was at work for one further day (16th November) before going off sick. When she was on sick leave Ms Dingwall and Ms Pattie were both in touch with her and a referral was made to occupational health. The claimant accepted that this had been a supportive approach in cross examination. Because the claimant did not tell her managers that in her absence Mr Collins had warned the stalker off, they did not know that the issue was resolved when the claimant returned to work on 10 December. They met with her the day after to try and support her, and Ms Pattie had asked for permission to contact PC Jeffers. This was refused – without a reason being given. Ms Pattie asked the claimant for a statement, including times, as she hoped to be given permission to discuss this with PC Jeffers. A further meeting was arranged with HR support, again to try and help. The claimant provided a report but still did not give permission for PC Jeffers to be contacted. The claimant did not say in her evidence that she had wished, or expected, her managers to do so in the absence of her permission.

149. The Suzy Lamplugh guidance was received gratefully by Ms Pattie and Ms Dingwall, and efforts were made to ascertain if a national policy might be developed. It was argued that that the respondent did what was reasonable to help the claimant. It is not reasonable to expect managers to “bawl out” a member of the public in the hospital car park, or to take the police woman assigned to the hospital “by the ear” and drag her out to deal with it. It is not correct to equate a police presence at the hospital with a security service contracted for by the respondent. It is not reasonable to suggest that PC Jeffers should have been contacted without the consent of the claimant. It was argued that there was no breach of the implied term of trust and confidence in this regard.

150. With regard to lack of trust at meetings, it was argued that the evidence of Mr Hobbins was clear. There was no reasonable basis to find that Ms Dingwall or Ms Pattie had acted in a way that showed trust had been destroyed.

151. In short, the respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. In the event that the Tribunal consider that it did in relation to one or more of the alleged breaches, there was reasonable and proper cause for doing so, and any breach which has been established was not so serious that the claimant was entitled to treat the contract as being at an end.

152. In answer to the question as to whether the claimant resigned in response to the breach, the claimant started to explore options for progressing her career, and retraining or upskilling, including early retirement on 7 March 2019. She said this was as she saw her job being phased out, or changing "over time" in a way that she did not wish. At this point the alleged drop in temperature in April had not occurred, and there had been no emails about flexi. The claimant met Mr Hobbins and his colleague on 11 April, at which point there had been the email to her re flexi on 22 March and to colleagues on 4th April. This is not discussed at the meeting. Mr Hobbins recalled that although at that meeting options were being explored, the main option was retirement. This would explain why the claimant made no effort to follow up any of the other suggestions about retraining. In the claimant's email of 17 May, she said she had "contacted HR on 2 May to indicate that I feel forced to take early retirement on 2 June 2019" She had obtained the pension forms by 9 May.

153. In the email of 17 May the reasons given for deciding to take early retirement are listed – Lack of input into clinics and theatre lists – less autonomy, lack of consultation in relation to change to role of medical secretary, flexi – move to require an hour for lunch, and start at 8.30 – rather than accrual of time,

temperature often fallen below minimum legal level in the office and had asked for air quality test and DGRI failed in its duties re stalking.

154. The first 2 points were not breaches which were alleged. However, in any event it has been established that the change in relation to clinic and theatre list booking happened in 2012, and there was no plan to change her role. The claimant conceded that there had been no suggestion made to her that her role would be changing – in the year prior to her leaving. Notably, there is no mention of the way in which the time and motion studies were conducted. It is entirely unclear what the final straw is that the claimant is relying upon. If the Tribunal accepted that there was a breach in relation to flexi/temperature/stalking, then the respondent would accept she did in part resign in response to it/them.

155. As to whether the claimant affirmed the contract before resigning, the claimant said in her email of 17 May that she had contacted HR on 2nd May to say she felt forced to take early retirement. The last alleged breach must therefore have occurred before that. The claimant met to fill in the retirement forms with Mr Hobbins on 28 May. It was explained to her that as the pensions agency takes 3 months or so to process a pension application, if she persists with retiring on 2 June, she might be without income for a period. She formalised her position and sent Ms Parker an undated letter of resignation on 26 July. There is a period between a date before 2 May until 26 July. The claimant's last day of employment was 23 August 2019. The claimant agreed to stay in employment from 28 May, until confirming her position on 26 July, in order to avoid a gap in her income, and to take advantage of the Board's phased retirement policy, which provides for full pay, whilst gradually working less. The claimant affirmed her contract before resigning.

Indirect discrimination

156. It was submitted that the claimant set out to prove that there was a provision, criterion or practice (PCP) applied by the respondent whereby she and colleagues were required to work in an environment where the air quality and temperature were below the required standard. The claimant asserted that the PCP placed females, and those in the age range of 50-65, at a significant disadvantage compared with male colleagues, and female colleagues outwith that age range. The age range has been selected by her as the age range for women undergoing the menopause. It was argued that the claimant has not proved any facts which would give the Tribunal the evidential basis on which to conclude that the PCP which is put forward by the claimant exists, and even were it to exist, that there is no evidential basis upon which to conclude that there has been group disadvantage, and insufficient evidence to conclude disadvantage to the claimant. The claimant had entirely failed to make out her claim of indirect age or sex discrimination.

157. It was argued that there was no evidence of the claimant having suffered any disadvantage as a result of the PCP relied upon. She herself was not sure the headaches were connected to the working environment or for personal reasons for example. There was no evidence the PCP had any difference in terms of impact between men and women and the evidence presented on the menopause focused on becoming too hot, not too cold. The claimant had accepted she did not suffer from cold flashes.

158. Similarly there was no evidence the PCP had any difference in terms of impact depending on age. The environment was the same for colleagues of all ages. The absence rates were the same and there was no gender or age bias.

159. With regard to remedy, it is unusual that in a constructive unfair dismissal claim the claimant seeks reinstatement to her former job albeit subject to caveats as to the environmental issues being resolved and being allowed to return to her former working pattern. The department had amalgamated with

another team and as a result of the claimant's departure things changed. It was not reasonable to reinstate.

160. With regard to the schedule of loss, the basic award was agreed as set out in the schedule. If the claimant has mitigated her loss then the net loss of earnings figure was agreed taking losses to £20,680.83. Loss of statutory rights was agreed at £500. Pension loss would require to be considered separately. Injury to feelings should be in the lower band.

Claimant's agent's submissions

161. The claimant's agent had considered the respondent's written submissions and responded in detail. Where necessary I put relevant issues raised within the respondent's submission to the claimant's agent to ensure each of the relevant issues were considered and the claimant had a fair opportunity to respond. It was argued that the respondent had breached the claimant's contract and thereby entitled her to resign.

162. It was submitted that there was a contractual right to flexi time which had been in place until 4 April 2019 for around 10 years. The new policy had not been implemented properly as it had not been communicated. The appendix had not been properly completed. No evidence of communication of the policy had been provided and so it was not valid, it was argued.

163. The breach as to the flexi position was sufficient in itself, it was submitted, to entitle the claimant to resign. If not, there were other breaches of the implied term of trust and confidence that resulted in the claimant being constructively unfairly dismissed.

164. One breach was related to how stalking had been managed. This had begun in October. There was no other security service to go to, other than the police and as a result the issue had not been handled properly. The claimant was

too frightened to approach Ms Dingwall and she did not want the police coming to her desk.

165. The last straw was the combination of the flexi time issues and the denial of environment air tests denied. The flexi time issue happened from April onwards when it was clear in May that core hours were being insisted upon.

166. The lack of care for the workplace environment and air tests was a "creeping thing" since the claimant would suffer cold some time and had to "layer up" to keep warm. She complained of headaches in April. By the end of April she had lost confidence in the respondent given the absence of tests.

167. The claimant designed to resign in or around 2 May when she gave 30 day's notice. She wanted to finish her career in the NHS and explore options but eventually could not work in an environment without flexible working and the environment she faced.

168. The time and motion studies were not appropriate and keeping a diary is not an accepted time and motion method of measure work and the conclusion was unfair.

169. A further potential "straw" was the decision to remove a colleague and use lower bands. Lower grade administrative staff did typing with errors the claimant had to fix. That showed that managers were not sympathetic to the needs of the service.

170. The claimant's agent explained that there had been no independent testing of the site and the absence of data showed this. Mr Bryden should not be believed given the absence of data. The claimant's agent argued that there was indirect evidence to support the claimant's position, namely having to wear fleeces and a phone app data. The claimant's agent explained he had experience in air systems and the evidence of Mr Bryden was not credible.

171. The claimant's agent pointed to the fact that Mr Bryden had said his phone would be "red hot" if issues had arisen and yet Ms Dingwall said there were at least 5 or 6 complaints a day which ought to have gone to Serco. These issues had not properly been logged and there ought to be evidence of the issues about which the claimant complains.

172. With regard to air quality it was submitted that there was insufficient evidence to show the system was working properly. In the claimant's agent's experience there should be evidence that showed the matters in dispute and this had not been provided. The position "beggared belief" and should not be accepted. This matter had led to external involvement and an article in a newspaper which showed that the ventilation was suspect. Even if the complaints did eventually settle down, that may be due to people realising there was no point continually raising matters since the issue had not been fixed. Ms Dingwall's evidence undermined Mr Bryden's position.

173. The claimant had been told over time on a number occasions that her job was changing. The time and motion studies were poor showing she did typing 99% of her time. She was never told her band would be reduced but she feared change.

174. The claimant's agent argued that the flexi issue goes to the core of trust and confidence. The claimant knew what worked for her department and arranged cover when she was away. While it was argued that the needs of the service required a change, the policy had not been communicated and the claimant's rights had not changed. The working pattern had been what the claimant had been doing. It was clear that flexi was being cancelled and it had not been communicated.

175. With regard to sex discrimination there was evidence as to the effect of the menopause which showed that temperature had an effect on women, whether cold or hot. The claimant's agent noted that each woman is different but he believed younger women had less of a problem since the menopause

was a chemical issue. He accepted that there was no evidence before the Tribunal that younger woman would feel the cold more than younger men. He also accepted that there was no evidence before the Tribunal that the temperature issue had a greater impact on women generally than men generally, other than in relation to the menopause.

176. With regard to age discrimination, the claimant's agent confirmed that there was no evidence before the Tribunal that showed the PCP had a greater impact on older people as such compared to younger people as such.

177. With regard to remedy the claimant wanted to return to employment. The environment issue should be sorted and a test undertaken.

178. In short, the claims should be upheld.

Decision and discussion

179. The Tribunal considered the evidence led before it, comprising the oral evidence and the paperwork to which the Tribunal's attention was directed and was able to reach a unanimous view. We approach this matter by reference to the agreed issues we had to determine. We consider them in turn.

Unfair dismissal

180. The first issue is whether or not the claimant was dismissed, in other words did the respondent act in such a way so as to entitle the claimant to resign and argue that her contract had been fundamentally breached. We considered each of the alleged breaches relied upon by the claimant in turn.

Workplace issues

181. Firstly, it was argued that the move to a new building with ongoing environmental issues (low temperature and poor air quality which affected her health 2017-resignation) resulted in the respondent breaching her contract of employment. We found that the claimant was not required to work in a building which had low temperature or poor air quality. The claimant perceived there to be issues, and there were transitional issues given the move resulted in a different type of working environment in a new building but we found no evidence to support the contention that the temperature was too low nor that the air quality was poor to any material extent. The claimant stated in her claim form that "recorded temperatures as low as 12 degrees" but other than an app on a colleague's phone showing that temperature there was no evidence to sustain that belief of the claimant. We found that the temperature and air quality was properly monitored and that there were no relevant issues arising. We accepted the evidence led by the respondent in this regard and upheld the respondent's agent's submissions.

182. We noted for example that Mr Hobbins had worked in the same environment where the claimant had worked and found no issues. We took into account that initially a large number of staff had raised concerns with Ms Dingwall. That for the most part was due to the change in environment and the fact that everyone had a different view in terms of optimum working environment. The complaints that had been made did significantly subside and other than the claimant's belief, there was no evidence to support the assertion the temperature was unreasonably low or that the air quality was below standard. We carefully assessed the evidence presented to the Tribunal, both in terms of the data, written information and oral evidence. The claimant's position was that it was always too cold. That was her perception but from the evidence we do not find that the environment in which she required to work was in any way deficient. Even if there were issues with regard to "climate control" the temperature and air quality, from the evidence led before the Tribunal were both satisfactory. In all the circumstances the claimant was not required to work in an environment that had any adverse issue to any material extent,

whether in terms of temperature or air quality. There was no breach of contract (express or implied) in that regard.

Time and motion studies

183. Secondly, the claimant argued that the carrying out of time and motion studies from January to March 2019 with no clear objectives was not carried out in an even-handed manner and was felt to be degrading. We accept the respondent's agent's submissions that the claimant was not clear as to why, precisely, the asking of staff to keep diaries in the way that occurred was degrading. The claimant and her agent accepted that it was a legitimate management practice and all relevant staff were treated in the same way. In her claim form the claimant alleges that the studies were used "in an attempt to prove [her] work was only worthy of band 2 status [which made her feel] undervalued and unappreciated". We do not agree as the study was undertaken for proper management purposes and were conducted fairly and reasonably. The claimant did not like having to record what she did, especially given she was correcting other staff's work. Similarly she did not like the conclusion that had been reached. In cross examination the claimant accepted that the time and motion diary approach was not an unreasonable, demeaning or humiliating thing to do. Ultimately the way in which the time and motion study was carried out (both in terms of process and conclusions reached) was entirely reasonable and in no way amounted to a breach of contract, whether express or implied.

Flex issues and working time

184. Thirdly, the claimant argued that the attempted cancellation of flexible working/flexi time arrangements and then cancellation without notice or consultation in April 2019 amounted to a breach of her contract. We had sympathy with the claimant given the change to the flexibility she had enjoyed for some time that was being introduced. However, flexi time was not a contractual right. The decision as to the core hours worked by administrative

staff was a matter for the respondent to determine. She was contracted to work 37.5 per week and the core hours could be determined by the respondent. While the claimant may have been told at some point (by a union representative) that flexi time became contractual if she worked it enough, that was not correct. The respondent required to ensure that the hours all staff worked best met the needs of the service as a whole. The team of which the claimant was part required to work the hours determined by the respondent. While she had previously departed from the core hours, due to the flexi arrangement in place at that time, the flexi system changed and the respondent required all staff within the team, which included the claimant, to work their core hours, with flexibility on an ongoing basis as required, subject to management approval. The policy that had been approved in 2017 was clear that flexi was a matter for management to determine and it was not a right. The hours staff worked and the flexibility were both matters for the relevant departments to manage from time to time.

185. There were 2 separate issues under this head. Firstly, the requirement to work 7.5 hours a day, and only work beyond that if needed and authorised (taking the time back the following day or the day after that). That was something for which the respondent was responsible and the claimant could not insist on working fewer or greater hours per day. There were clear business reasons to insist upon this and the approach taken and request was not unreasonable nor a breach of any contractual right. Secondly, the requirement to work core hours. This was the key issue affecting the claimant since she preferred the flexibility she believed she had since she had been working it for years. This was something her department manager wished to change. Again there were compelling reasons for doing so. Insisting upon core hours, with a degree of flexibility, was a matter for the respondent and the claimant did not have the contractual right to insist that she retain her flexi pattern. The respondent did not act unreasonably or in breach of the claimant's contract in this regard.

186. In her claim form the claimant alleges that the respondent "implemented changes to [her] working arrangement without consultation or notice" in breach of her contractual and human rights. We do not uphold that claim. There was no breach of contract nor any infringement with the claimant's human rights. Any interference with her human rights was proportionate and legitimate given the needs of the service in which the claimant worked.

187. If the claimant wished to change her core working pattern, the flexible working requests policy existed to allow her to do so. It was open to her to seek to fix her working pattern to give her the certainty she said she needed and to retain what she believed she had (albeit erroneously believing it was a contractual entitlement). She did not seek to do so and instead relied upon the fact that she had been working a pattern that suited her and, she believed, her consultants, for a number of years and the decision to change the approach was, she says, unfair.

188. The respondent acted fairly and reasonably in introducing and implementing the flexi policy in 2017 and beyond. While the claimant was unhappy with the change, she knew of it. It had been communicated to her via the emails she had received. While the policy itself might not have been clear to the claimant she clearly and fully understood that she was required to work the core hours. She knew the respondent was insisting staff work to the core hours unless otherwise authorised. She knew she had to start at 830am (instead of 8am), that she needed to take an hour for lunch and leave at the appointed time (and the period over which extra time work had to be taken back). It was suggested that the policy could not be located on the intranet but it was open to the claimant to speak with her managers or HR if she required to see the policy or if she needed further information. While she argued that she had been told by the union that flexi was a contractual right, the policy that was introduced, and implemented, was clear that flexi was not contractual.

189. While the claimant had developed a working pattern that suited her, her contractual position was to work the core hours. If she wished to depart from

the core hours she could make a request via the flexible working requests policy. Working a pattern that suited her for a number of years did not create a contractual right to that pattern. We do not accept the assertion (as set out in the claimant's further and better particulars) that the flexible working arrangement had become part of her "accrued rights" or "contractual rights built up through agreement". The position with regard to flexi time was clear. The respondent was in control of the system and required all staff to work core hours. That was consistent with the contractual position pertaining to the claimant (and all other staff). The respondent was entitled to insist upon workers, including the claimant, working core hours.

190. Moreover, flexi had not been "cancelled", but instead the working pattern previously enjoyed by the claimant required to change because of the needs of the service in which the claimant worked. In other words the amount of flexi the claimant enjoyed would be reduced. She required to follow the policy set out by Ms Parker, whose job it was to set out the position in respect of the administrative staff for whom she was responsible. The emails by themselves make clear what the position required to be and was known by the claimant. She was required to comply with that instruction and work core hours, unless otherwise agreed on a day to day basis.

191. We considered whether or not there was a breach of contract in the approach taken by the respondent in changing the claimant's hours. We find no breach of any express or implied term. The respondent introduced a policy whereby flexibility was limited to day to day flexibility. In other words if on a particular day an employee required to start later or have some other flexibility, that would be considered. It was no longer possible to allow people to have total flexibility in their working time, even if that was the position that had applied before.

192. While that approach significantly reduced the amount of flexibility previously enjoyed by staff and might be considered inconsistent with the flexi policy, ultimately the flexibility as to working hours enjoyed by staff was a matter for

Ms Parker in deciding how to implement that for her team. Staff could not insist upon their start and end times being different to the hours deemed to be core hours by the respondent. The way to achieve such an outcome would be to apply via the flexible working requests policy, which was a policy to which the respondent had referred in raising this matter in an email to all relevant staff.

193. Had the claimant wished to maintain her position, which appeared to work for the team, she could have made a formal request to change her hours (which she could have done formally with her line manager's consent). She did not do so. The HR team and trade union could have assisted her if required in making such a request, as could her consultants if the suggested pattern was in their interests. That approach was not taken.

194. We do not consider that the respondent acted unreasonably or in breach of contract by introducing the flexi policy in the way it did nor were the terms introduced unreasonable.

195. The respondent had a clear business need to ensure cover was available each day between 830am and 430pm. There was sufficient slack in the system such that staff were not required to work beyond their working hours. Working extra during one day would result in the worker requiring to work less the next day, despite work being available. That approach did not work for the respondent. We accept that the flexibility previously enjoyed by the claimant changed but doing so did not amount to a breach of contract, expressly or impliedly.

Stalking issues

196. Fourthly, we considered whether the respondent failed to support the claimant when she complained of stalking. We uphold the respondent's submissions in this regard. The claimant first raised the issue with her manager Ms Dingwall by email on 14 November 2018. In cross examination

the claimant accepted that the tone of her email did not suggest that she was very upset or that she wanted anything particular done by Ms Dingwall. Ms Dingwall ascertained that it had been reported by her to the police. She asked for more information – did she know the man, and what had Constable Jeffers said - but got no reply. The claimant was at work for one further day (16th November) before going off sick. When she was on sick leave Ms Dingwall and Ms Pattie were both in touch with her and a referral was made to occupational health. The claimant accepted that this had been a supportive approach in her answers in cross examination.

197. In her further and better particulars the claimant asserts that the respondent did not support her by "helping bring the stalking to an end" and by not "taking ownership" of the matter. We consider that to be an unfair criticism of the respondent whose staff sought to support the claimant, knowing that the matter had (rightly) been placed in the hands of the police. It is not accurate to suggest that there was "no help forthcoming" given the discussions and support that took place.

198. Because the claimant did not tell her managers that in her absence that Mr Collins had warned the stalker off, they did not know that the issue was resolved when the claimant returned to work on 10 December. They met with her the day after to try and support her, and Ms Pattie had asked for permission to contact Constable Jeffers. This was refused. No reason being given by the claimant but it was her right to do so. Having refused permission for the respondent to make inquiries with the police, it was difficult to see what further steps the respondent could take, and none was suggested. Ms Pattie asked the claimant for a statement, including times, as she hoped to be given permission to discuss this with Constable Jeffers. A further meeting was arranged with HR support, again to try and help the claimant. The claimant provided a report but still did not give permission for Constable Jeffers to be contacted. The claimant did not say in her evidence that she had wished, or expected, her managers to do so in the absence of her permission.

199. The Suzy Lamplugh guidance was received by Ms Pattie and Ms Dingwall, and efforts were made to ascertain if a national policy might be developed. We accept that that the respondent did what was reasonable to help the claimant. It is not reasonable to expect managers to "bawl out" a member of the public in the hospital car park, or to take the police woman assigned to the hospital "by the ear" and drag her out to deal with it as had been suggested on the claimant's behalf.

200. We also do not accept that it is correct to equate a police presence at the hospital with a security service contracted for by the respondent. It was not reasonable to suggest that Constable Jeffers should have been contacted without the consent of the claimant. The respondent offered the claimant support which was reasonable. We do not consider the fact that there is no separate security service available (in addition to the police officer within the hospital) to result in any failing. The way in which the respondent dealt with the stalking incident did not amount to a breach of any express or implied term of her contract.

Trust and confidence

201. The final matter on which the claimant relied as evidencing a breach of contract was at a number of meetings in March/April 2019 where it was alleged that trust and confidence had been destroyed. We found no evidence to support the assertion that trust and confidence had been destroyed during any meeting with the claimant. We considered the further and better particulars the claimant provided and examined the meetings referred to and the discussions relied upon in support of this aspect of her claim.

202. At the meetings the claimant had with Ms Dingwall and Ms Pattie, support was offered to the claimant and occupational health referrals were initiated. The respondent acted reasonably in working with the claimant and supporting her. The respondent did support the claimant and it was open to the claimant to allow the respondents to progress matters with the police, but she did not

wish them to do so, which was her right. We do not consider there to be any breach of the implied term during any discussion the claimant had with the respondent's staff in connection with stalking. The discussion was professional and supportive of the claimant. While other employers might have acted differently, the respondent did not act in any way to breach the trust and confidence within the employment relationship.

203. While we accept that the occupational health adviser issued a letter without the claimant's express consent (since she wished to see this first) we did not consider this to amount to a breach of contract. It was an error. Even if it were to amount to a breach of contract, it was not a breach that was fundamental that entitled the claimant to resign and claim constructive dismissal.

204. We considered whether any discussion with Mr Hobbins had resulted in the claimant's contract of employment being breached but were satisfied Mr Hobbins acted professionally. We did not find that he said "flexi cancelled Board wide by order of the Board" but rather that it was up to each individual business unit to consider how best to deploy resources to meet their needs. The flexibility given to the claimant was curtailed but it was open to her to seek to amend her contractual hours or seek a degree of flexibility on a day to day basis. The actions of Mr Hobbins did not in any way breach the implied term of trust and confidence and his relationship with the claimant and conduct was professional and supportive.

205. We found no evidence at any meeting with Ms Parker (or indeed any other manager or colleague) that supported the assertion trust and confidence had been destroyed.

206. In the further and better particulars the claimant argued that meetings with "senior/middle managers demonstrated lack of trust and confidence" and that the cancellation of flexi, time and motion, stalking failures and environment failures and misleading statements all together broke the trust and

confidence. We do not uphold that submission having considered the meetings and discussions that took place.

207. We note that the claimant refers to the meeting on 1 August when it was alleged that "environmental problems were admitted". That was not an accurate summary of the discussion since there was a statement that climate control was being considered across the site but this meeting post dated the claimant's decision to resign and could not therefore be part of her reason for resigning.

208. We also considered whether there was any evidence that the claimant's role had been reduced such as to result in a breach of contract in some way. The claimant believed that the role of senior secretary was being destroyed in favour of lower rated roles. While that was her assertion there was no evidence to support it. The claimant accepted that her band had not changed (and that she not had not been told that it would change). While some of her duties had changed, some of that had been historical (such as changes in 2012 to waiting lists and theatres in part due to Government requirements) and others had been evolutionary (as the respondent wanted to avoid duplication and free up time to allow departmental secretaries to carry out valuable work in the department). The changes required of the claimant in terms of her role were evolutionary and organic and did not amount to a breach of any express or implied term of her contract of employment.

209. We note the terms of the claimant's email to Mr Hobbins of 8 March in which the claimant sets out that it is her understanding that her role is changing over time. She stated that she is "realistic that the role has and is changing ... due to technology" and the fact that (in 2012) clinics and theatre lists were developed to separate teams. She recognised that there was evolution but her band had not changed and her role remained. She was clearly concerned that changes were happening, as it does with most roles, and she was concerned for the future. She was exploring her options and was keen to look at alternatives. There was no change to her role that was in any way adverse

to the claimant. There was no breach of the implied term in terms of the conduct of any of the respondent's staff during their meetings with the claimant. We were satisfied that the conduct was reasonable and consistent with ordinary workplace relations.

210. Having carefully analysed the evidence led before the Tribunal and having taken a step back to consider matters, we found no breach of the claimant's contract of employment, whether express or implied, by any act individually or cumulatively. The claimant was not dismissed and her claim for constructive unfair dismissal is ill-founded and is dismissed. It is not necessary therefore to consider the other issues pertaining to that claim.

Indirect sex and age discrimination

211. The first issue in respect of both discrimination claims is whether the respondent had the PCP of requiring the claimant and her colleagues to work in an environment where the air quality and temperature were below the required standard. The onus is on the claimant to establish, by the leading of evidence, that the PCP existed. We considered this very carefully from all the evidence presented to the Tribunal. If the claimant failed to discharge that onus, both discrimination claims would fail. We took a great deal of time to assess the evidence and carefully consider the position in this regard.

212. The respondent's agent argued that the claimant has not proved any facts which would give the Tribunal the evidential basis on which to conclude that the PCP which is put forward by the claimant existed. Having analysed the evidence, we agree with that submission. From the evidence presented to the Tribunal the claimant was not required to work in an environment where the air quality or temperatures were below the required standard. While the claimant believed that the air quality and temperature was below the required standard, the evidence did not support that belief. On that basis, each of the discrimination claims fail.

213. Even if the PCP had been established, it had been accepted by the claimant's agent that there was no evidence before the Tribunal that would entitle the Tribunal to find that the application of the PCP put women at a particular disadvantage compared to men or that it had put older people at a particular disadvantage compared to younger people. Those were matters in respect of which specific evidence would have been needed to show that women in particular were at a disadvantage and that younger people were at a disadvantage.

214. Had we been required to consider it, we would have been concerned that the evidence before the Tribunal did not show the specific disadvantage within the relevant groups. We would have considered that the respondent's agent's submissions with regard to the discrimination claims had merit.

215. While there was evidence showing women going through the menopause could be susceptible to changes in temperature, there was no evidence showing men had no issues as they got older or that the women in general were more likely to be placed at a disadvantage. In other words no evidence had been led by the claimant to suggest that women are more sensitive to cold or to substandard air quality than men. While the evidence presented by the claimant focused on the menopause, the claimant's case was that the building was too cold. She did not have cold flashes.

216. There was no evidence showing the impact of the PCP had a greater effect on women generally or on older people generally which would have created serious issues for the discrimination claims had we required to consider those matters but we did not require to consider the remaining issues.

217. Given the PCP had not been established in respect of the discrimination claims, the indirect discrimination claims are ill-founded and are dismissed.

Observation

218. We wish to thank both parties for their skilful presentation of their cases, their professionalism during the course of the hearing and for the way in which both parties worked together with the Tribunal to comply with the overriding objective.

Employment Judge: David Hoey
Date of Judgment: 17 March 2021
Entered in register: 20 March 2021
and copied to parties