EMPLOYMENT TRIBUNALS

Claimant: **Ms K Doyle**

Respondent: **Castle Leisure Limited**

Heard at: **Cardiff** **On: 7 – 9 June 2021**

Before: **Employment Judge C Sharp**
Members: **Ms S Atkinson**
Mr M Lewis

Representation:
Claimant: In person
Respondent: Mr D Bheemah (Counsel)

RESERVED JUDGMENT

By unanimous decision

1. The Claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

2. The Claimant's claim of indirect sex discrimination is not well founded and is dismissed.

REASONS

1. Ms Kelly Doyle, the Claimant, was employed between 4 March 1997 and 14 February 2020 by Castle Leisure Limited, the Respondent, a chain of bingo clubs with 11 sites. By the time of her departure, the Claimant was a Senior Assistant Manager at the Nantgarw club. All of the evidence shows that she was a well-respected, professional and valued member of the Respondent's team. The Claimant issued on 10 April 2020 her complaint,

which comprised of two claims – constructive unfair dismissal and indirect sex discrimination. The Respondent denies all of these claims.

Background

2. The Claimant's case in essence turns on the events of 27 November 2019. On this day, the Claimant had an informal unscheduled conversation with Jodie Davis, Director of Operations for the Respondent, whose office was next door to the Manager's office at the Nantgarw club. The parties accept that there was a conversation between the Claimant and Ms Davis about a proposed new rota that was planned to come into effect at some point in January 2020 to address an issue with management cover in the Respondent's clubs on evenings and weekends. In essence, there was too much cover in a weekday (such as Monday), and too little management cover during the clubs' busiest periods.

3. The Claimant was a part-time employee and worked in the afternoon and evenings of Wednesdays and Fridays, following a series of successful flexible working applications during the course of her employment. The flexible working applications were due to childcare reasons. The parties agree on much that was said on 27 November 2019, though this will be detailed later in this Judgment. For the purposes of understanding the background of this claim, all that it is necessary to know is that Ms Davis suggested that the Claimant should consider working a weekend shift and that the Claimant would go and talk to her parents (who provided childcare while she was at work) and discuss the matter further with her General Manager, Marcus McLean. There is a dispute as to whether the Claimant was told to come and talk to Ms Davis again after discussing the matter with her parents.

4. The Claimant did speak to her General Manager later that day and expressed her concerns about the position as she would struggle to work weekends due to the lack of paid childcare and difficulties with her parents. Again, the parties agreed that it was left that the Claimant would talk to her parents and come back.

5. Ultimately, the Claimant was not able to secure childcare for weekends and it was clear from her own oral evidence that her parents were no longer willing to provide childcare. When asked why she did not accept the later offer made by the Respondent of keeping her original shifts, the Claimant's oral evidence was that *"my parents thought it was time to leave*".

6. The parties accept that on 4 December 2019 the Claimant told Mr McLean that her parents were not willing to discuss the situation and she believed that she had no alternative but to seek alternative employment. Mr

McLean's evidence is that the Claimant was told that she could continue her existing shifts, that they would not change for now and that he believed discussions were ongoing with the Claimant. In addition, the parties accept that the Claimant had at various points in 2019 been seeking alternative work to enable her to better manage her work/life balance. It now appears from later events that the Claimant before November 2019 was unhappy with the Respondent due to a series of events such as issues with her previous General Manager, the events following Boxing Day 2018, issues with stalking by an ex-boyfriend and the imposition of a final written warning in August 2019.

7. The parties agree that the Claimant did not discuss any concerns about her shifts with Mr McLean or Ms Davis any further. The Claimant's position is the reason for this was because she believed that Jodie Davis in the meeting of 27 November 2019 told her that the shifts were *"non-negotiable",* that she would not "*be beholden to any manager*" and managers were free to leave if they did not like the new working arrangements. Ms Davis adamantly denies saying this. The Respondent points to the surrounding contemporaneous emails from Ms Davis and the oral testimonies heard by the Tribunal from various managers at the same or similar level to the Claimant which demonstrate that this was not the approach taken. This is a finding of fact that the Tribunal must determine in order to resolve the claim.

8. However, the Claimant's position was believing that the position was non-negotiable, she panicked and secured an alternative job working as a school catering assistant for less hours and less money. She says that Mr McLean was aware that this was what happened because she asked him to be a referee on 12 December 2019. The texts do show that the Claimant asked Mr McLean to be a referee, but she did not specify why or say then that she was leaving due to issues with her future shifts. Mr McLean's evidence was that as the Claimant had asked him to be a referee on numerous occasions, he saw nothing unusual in this request.

9. On 20 December 2019, the Claimant called Mr McLean to verbally notify him that she was leaving the Respondent's employment in February 2020. She asked if she could remain on Wednesday and Friday shifts until she left, to which Mr McLean agreed. His evidence was that he was confused as to why the Claimant had asked this as she had not been moved on to a different rota but as he was out of the office during the call and Christmas was an extremely busy time, he thought nothing of it.

10. On 8 January 2020, the Claimant was due to have her annual review meeting with Mr McLean and Jayne Beynon, Director of People for the Respondent. The parties agree there was a discussion about the purpose of the meeting given the Claimant's intention to leave (there is a dispute

about who raised the point first, but this is unimportant). It was agreed that rather than to go through the formal review process, it was better to simply have a discussion about the Claimant's new job and her situation generally. At this point, the Claimant raised a number of historic concerns and added that childcare was a difficult issue for her. There is a dispute about whether the Claimant said that the main issue about which she was concerned was the proposed shift changes.

11. It remained the case that the Claimant's shifts had not been changed and the new rota came into effect in the club on 13 January 2020. On 17 January 2020, the Claimant resigned with notice. In her resignation letter, she asserted for the first time that she was told by Ms Davis on 27 November 2019 that the new imposed rota was not negotiable, and this caused her great distress due to her childcare issues. She said that the Respondent had failed her on many occasions as discussed on 8 January 2020 and set out the reasons why in the remainder of her letter.

12. Following receipt of this letter by Mr McLean, there was then a discussion between the Claimant and Ms Davis on 5 February 2020. Ms Davis said that she had understood there was no difficulty for the Claimant in the suggestion of weekend working as the Claimant had not returned for a further discussion of any difficulties, but no changes had been made in respect of the Claimant's rota. Ms Davis explained the reasons for the new rota and asked if the Claimant could work a 9.30am to 3.30pm or 4.00pm to 10.00pm shift on a weekend. The Claimant agreed to consider the matter and discuss it with her parents. On 7 February 2020, the Claimant declined the offer.

13. The Claimant accepted that during the course of her evidence, she had tried not to disclose a conversation she had with a Mr Stephen Hamley-Lock, General Manager of another club. The Claimant's evidence was that he had advised her to file a grievance as the Respondent had a grievance procedure. This evidence did not come out until the panel questions during the Claimant's oral evidence. Equally, it did not come out until panel questions that not all of the notes made by Ms Davis were contemporaneous (see later).

14. The Claimant did file a grievance on 12 February 2020. Her grievance letter said that she wanted to raise a formal grievance about the new shift patterns; she said the changes made it impossible for her to work. Her letter focussed on the issue about weekend working. The Claimant attended a grievance meeting on 14 February 2020 with Ms Davis and Ms Beynon. Following discussion at that meeting, the Claimant was offered the ability to retain her original shifts which could be reviewed as and when her situation changed. The Claimant was also told that she could retract her resignation. The Claimant's response was that it was late in the

day, and she wanted to think about the matter. On 18 February 2020, the Claimant declined the offer. She then went through ACAS Early Conciliation.

The relevant law

15. The Claimant has brought two claims – constructive unfair dismissal and indirect sex discrimination. She was advised by a solicitor from the Newport CAB, though she represented herself at the Final Hearing in June 2021 (having been represented at the original listed hearing in January 2021, which was unable to proceed due to the outcome of a number of applications made by the Claimant's then representative). The legal principles were explained to the Claimant at the outset of the hearing. It was evident that there was no dispute about the relevant principles of law. The Respondent in its written submissions set out what it submitted were the relevant principles and the Tribunal accepted these as they matched fully its analysis as explained at the outset.

Constructive unfair dismissal

16. Under Section 95(1)(c) Employment Rights Act 1996 ("ERA"), an employee is regarded as dismissed where *"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."*. If an employee establishes that they are dismissed under this provision, Section 98 ERA must then be considered to decide whether or not the dismissal was unfair. Merely being dismissed is not enough to establish a claim of unfair dismissal.

17. The Claimant must, in order to succeed in this claim, establish that there has been an anticipatory breach of contract or that the Respondent breached the mutual duty of trust and confidence (or would have done so if the act that is alleged to be a breach of contract had occurred) by conducting itself in a manner calculated or likely to destroy/seriously damage the relationship of trust and confidence between the employer and employee without reasonable and proper cause. The Claimant has to show whether "*the anticipated change to the Claimant's shift pattern is a fundamental breach of contract, a change which the Claimant would have had to do had she not resigned?".*

18. The Employment Judge at the outset of the hearing explained to the Claimant that she needed to establish a breach of contract, which would be an anticipatory breach as the Claimant never worked the new shifts; and that it is not enough for there to be a breach of contract - it had to be absolutely fundamental to the contract itself such as to justify the resignation becoming a dismissal. It must be a breach that goes to the

heart of the contract. The Claimant has not argued the case as a "*final straw*" case and said that the conversation with Jodie Davis on 27 November 2019, where she was told about the proposed new rota, was the breach of contract. In the alternative, the Claimant argued that being told that the new proposed rota was *"non-negotiable"* was an act that seriously eroded or destroyed the "*cement*" of the mutual duty of trust and confidence and was done without reasonable and proper cause (though the Respondent denies saying the proposed rota was non-negotiable).

19. If the Claimant establishes that there is a breach of contract, she must have resigned in response to this breach - it must be a reason for the resignation. The Claimant must not have resigned for some other unconnected reason (such as to pursue a new business opportunity or to work more social hours). The Claimant must not have delayed too long in terminating the contract in response to any breach, or she will have been taken to have waived the breach of contract.

20. There is always a risk in such cases as this that the employee is deemed to have acted too quickly if they resign in response to a proposed breach of contract, rather than in response to an actual breach. An anticipatory breach happens when an employer indicates to the employee by words or by conduct that they do not intend to honour an essential term of the contract in the future. A classic example would be notification of a unilateral reduction in wages. A proposal that is vague or conditional is not an anticipatory breach.

21. The Tribunal was referred to a number of cases by Mr Bheemah on behalf of the Respondent in relation to constructive unfair dismissal. As indicated earlier in this Judgment, the legal principles set out in those written submissions are accepted by the Tribunal. However, these written reasons are intended to be readily understood by all the parties and offering a recitation of a list of cases within the legal principles can be less than helpful. The key ones are summarised where relevant in these reasons, but it is important to note that the Tribunal must consider matters objectively, including the question as to whether or not the mutual duty of trust and confidence has been breached.

Indirect sex discrimination

22. Indirect discrimination is dealt with by Section 19 Equality Act 2020 ("EqA"), which says:

*"**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.
(3) The relevant protected characteristics are—…sex;..."

23. As explained at the outset of the hearing, the purpose of Section 19 is to ensure that an ostensibly neutral provision, criterion, or practice (such as a rule or policy) applying to all but which in fact puts a particular protected group at a disadvantage is only imposed when it is a proportionate means of achieving a legitimate aim. In other words, it is part of a suite of legislation that puts everyone on a level playing field and ensures that people with a myriad of protected characteristics are able to play a full part in our society. The PCP ("*provision, criterion or practice*") was defined by the Claimant as *"requiring staff to work shift patterns as directed by the Respondent".*

24. The Tribunal is required to consider

    (i) whether the PCP exists?
    (ii) Was it applied to the Claimant at the relevant time?
    (iii) Did the Respondent apply the PCP to men?
    (iv) Did the PCP put women at one or more particular disadvantage compared to men? The Claimant's argument is that the particular disadvantage is weekend working (as that is part of the shift rota) which puts women at a particular disadvantage as there is no paid childcare available which requires them to source alternative childcare or find a new job if required to work weekends.
    (v) Did the PCP put the Claimant at that disadvantage?
    (vi) Did the Respondent show that the PCP was a proportionate means of achieving a legitimate aim? The Respondent says the aim was "*better workplace and organisational efficiency to meet the change in requirements of the business";* the business requires sufficient management to be on site in its busiest periods, which is the weekends and evenings.

25. The question about what is the relevant time is a live issue in this case. While the Claimant's claim is solely based on the events of 27 November 2019, the relevant time would be when she would be required to work the

shifts (or was due to be). The new rota was due to come into force on 13 January 2020, but the Claimant may not have been rota'd for weekend shifts on this date. There is an issue that needs to be determined regarding a rota that is at page 120 of the hearing bundle and whether or not it reflects shifts actually assigned to the Claimant.

26. There is a requirement for there to be a pool for comparison and that there must be no material difference between those in the pool and the Claimant, other than the protected characteristic relied upon, which is sex. Mr Leong on behalf of the Claimant at the hearing in January 2020 unequivocally said that the pool relied upon was set out in paragraph 4 of the witness statement of Ms Jodie Davis. This in full reads:

"We have 50 managers working across our clubs, 26 of which are female. 7 female managers worked part-time as a result of childcare commitments, all of whom work a weekend day and an evening with the exception of the Claimant."

27. Under Section 136 of EqA, the Claimant is required to show facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent committed an act of discrimination. The Claimant is required to show that the PCP exists, that it applied to her at the relevant time, that there was group disadvantage and that she suffered the individual disadvantage. If the Claimant establishes these points, the burden of proof for the discrimination claim then falls upon the Respondent to justify the PCP as a proportionate means of achieving a legitimate aim. This is further underpinned by judgments of the senior courts who confirm that it is necessary to show why the PCP puts people with the protected characteristic at a disadvantage and that there must be a causal link between the PCP and the particular disadvantage suffered by the group and the individual (see ***Essop and others -v- Home Office* (UK Border Agency and another case) [2017] ICR 640 SC**). This is particularly important given that Judicial Notice is something reserved only for the most obvious matters. Given the changes of society over the last 10 to 15 years, it cannot necessarily be assumed that women take on childcare responsibilities as a group, or that flexible working means that a particular sex prefers to work at particular times of day or the week. In short, some may prefer to work on the weekend as their partners or families are able to provide childcare.

Findings of Fact

28. The Tribunal made the necessary findings of fact to determine this claim. There were many points in contention between the parties, but many were irrelevant due to the way that the case had been put by the Claimant or her former representative. The Tribunal had the benefit of a hearing

bundle consisting of 172 pages and hearing oral evidence from 10 witnesses:

The Claimant;
Ms Marnie Kemp, Mr Rhydian Lee, Ms Brioni Davies, Ms Leanne Piecko (all managers at a level or similar level to the Claimant who gave evidence about the consultation and the effects of the new rota on them);
Mr Marcus McLean, General Manager of the Nantgarw club;
Mr Jeffrey Harris, Chief Executive Officer;
Ms Lisa Morgan, Managing Director;
Ms Jayne Beynon, Director of People;
Ms Jodie Davis, Director of Operations.

29. In addition, the Tribunal was provided with written submissions by both parties, though the Claimant herself accepted that the submissions she provided had been written by her former representative and were incorrect in parts as it described the PCP very differently as to that confirmed in January 2021 and attempted to widen the pool of comparison to all women in the UK (again, despite the submissions of that representative in January 21). Oral amplification of those submissions was received. The oral submissions were wholly about the evidence that the Tribunal had heard and had before it. The Tribunal therefore adopts the written submissions in full where they are relevant, but does not propose to summarise them, given there was no dispute regarding the law. Both agreed that the disputes between the parties centred on whether or not on 27 November 2019 the Claimant was told that the rota was non-negotiable, the status of the rota at page 120 and whether or not the 9 witnesses from the Respondent were lying as the Claimant had suggested in her oral evidence, or whether the Claimant had misunderstood the situation when explained to her by Ms Davis and panicked. The Claimant was also keen that the Tribunal looked at texts between her and Mr McLean regarding references.

27 November 2019

30. Turning to the events of 27 November 2019, the Tribunal found that it was unable to rely on or put much weight on either the diary entry of the Claimant regarding that meeting (pages 95 to 98 of the hearing bundle) or Ms Davis' typed record (page 46).

31. The Claimant's evidence was that her diary was written in the workplace and it was her practice to write such notes in work whenever an event happened that she wished to record, or to record passwords passcodes or ways of doing complicated things. The Claimant had not disclosed the full diary to the Respondent, despite requests. It was evident from the limited later disclosure that this one diary covered a very long period of time going

back as early as 2017, but the failure to disclose the full diary for inspection meant that it could not be verified as to whether the Claimant had written these entries contemporaneously, or in a consistent manner throughout to demonstrate that it was more likely than not her note was contemporaneous. The Tribunal considered it unusual, but not improbable, for an employee to have a diary with them at all times to write certain events down, but considered the failure to properly disclose the diary reduced the weight that could be put on the entry. The Claimant's diary entry claimed that Ms Davis had told her that the new proposed rota was non-negotiable, that she would not be beholden to any manager and managers who were unhappy could leave, but the Tribunal was unable to establish that the entry was contemporaneous.

32. The note made by Ms Davis was not a document on which the Tribunal could place much weight upon because, in response to questions from the Judge, it was revealed that the note of this conversation had not been made contemporaneously. Ms Davis's evidence was that she had been asked to write the note at the request of Ms Beynon sometime after the conversation. She was not clear when the note had been requested but she thought it was possible it was on 9 January 2020 as the preceding day Ms Beynon had the conversation with the Claimant where the Claimant had raised a number of issues involving the business and Ms Davis, including the conversation with Ms Davis on 27 November 2019. The Tribunal considered that the note had therefore not been prepared at the time of events and potentially was drafted in expectation of having to be relied upon in proceedings due to the concerns raised by the Claimant in January 2020.

33. However, the Tribunal had the benefit of having witness statements from Ms Davis and the Claimant, having heard oral evidence and access to confirmed contemporaneous documents demonstrating the mindset of Ms Davis at the time and the approach of the business. It also heard oral evidence from other witnesses about the consultation process and how other managers at the same level as the Claimant were treated. It considered that this wider evidence would be critical in resolving the dispute about what was said on 27 November 2019.

34. The Tribunal considered it a worthwhile process to note what was agreed between the parties as having happened. The parties agreed that the Claimant and Ms Davis met in Ms Davis's office and the Claimant had walked in to discuss the staffing situation at Nantgarw generally. It was an informal meeting between two people who had worked together over 20 years, who attended a number of the same social functions over the years, and could reasonably be described as friends, given that Ms Davis had stayed at the Claimant's home in the past. It is agreed that Ms Davis took the opportunity to show the Claimant the new rota proposals

expected to come into force in January 2020 and to explain to her the Respondent's reasons for wanting to change the rota to ensure that there was more management cover in place for evenings and weekends.

35. It is agreed that, as shown by page 172 of the bundle, 2 days earlier Ms Davis had emailed the general managers and Ms Beynon (the Claimant did not receive this email as she was not a general manager) an example of the management rota due to come into effect. The contents of this email are not disputed and within that email Ms Davis said *"if you have part-time managers/flexible working, it will be useful for you to fully understand what the individual set up is with Jayne prior to us discussing and setting numbers for each session/day. Please note the finishing times will not be amended for part-time managers, the start time is the area that will be amended to suit contracted hours.".* The expectation from this email was that general managers would have conversations with their management teams and part-time managers would have to be consulted and specifically considered in light of their personal arrangements.

36. The first time that the Claimant was in the club after the sending of this email by Ms Davis was 27 November; she arrived in work and spoke to Ms Davis before her General Manager, Mr McLean, had arrived in the club to have his conversation with her. The parties agree that the Claimant was told that she could be affected as her hours were Wednesday and Friday evenings and that Ms Davis wanted her to agree to work a weekend shift. It is agreed that there was a discussion and that the Claimant said that she would have to go and talk to her parents and come back to discuss the matter further once she knew their position. It is agreed that later that day the Claimant spoke to Mr McLean that she discussed her difficulties with the proposal and that she told him she was going to talk to her parents and then discuss the matter again.

37. What is not agreed is whether at the end of the meeting with Ms Davis, it was decided whether the Claimant would return to Ms Davis or her General Manager with her parents' response; whether Ms Davis used the phrase "*non-negotiable*" in relation to the rota, or added that she would not be beholden to any manager and managers could leave if they did not like the new rota.

38. The Tribunal considered having heard all the evidence that the informal conversation between the Claimant and Ms Jodie Davis was a classic example of miscommunication and the communication cycle breaking down. It accepted that Ms Jodie Davis's expectation was that the Claimant would return to her to discuss the matter as they had had the initial discussion, they were long standing colleagues and friends, and that this is what had happened with other managers who had raised concerns with Ms Davis according to her unchallenged evidence given under cross-

examination and the evidence of Ms Brioni Davies and Ms Leanne Piecko (who were able to amend the rota shortly after it had come into effect to better meet their personal individual circumstances), and the evidence of Ms Kemp and Mr Lee regarding the general flexibility and support offered to them by the Respondent. This evidence was credible and matched the process laid out in Ms Davis' email to the general managers.

39. The Tribunal also accepted that the Claimant believed that her discussion in December 2019 with her General Manager was sufficient; she expected that he was going to talk further with Jodie Davies. Indeed, this is the approach consistent with Ms Davis's own email of 25 November 2019 to the General Managers - the expectation was that they would talk to their teams and agree the way forward. Because the discussion on 27 November 2019 was informal and unplanned, the Tribunal concluded that it was more likely than not that each participant came away with their own understanding of who the Claimant was going to talk to next after she discussed the matter with her parents. It is also relevant that the Claimant by her own admission says that she was panicking during this conversation; it is human nature not to take in all of what is being said when one is in a state of emotional distress or panic. However, it remains unclear to the Tribunal why if the Claimant's account is correct and she truly believed that she had no choice but to leave her job, why she did not go back and discuss the matter with Ms Davis. Mr McLean at paragraph 10 of his witness statement gave evidence that the Claimant had been told that her shifts would not change due to the difficulties she was facing.

40. Turning to the question of whether or not Ms Davis used the phrase *"non-negotiable*" in relation to the proposed new rota, or said that she was not beholden to any manager and that they could leave, the Tribunal found that on the balance of probability Ms Davis did not say these words. It considered it pertinent that the whole approach set out in Ms Davis's email of 25 November 2019 was all about consultation with part-time and flexible working managers. This spirit of consultation was confirmed at the hearing by Ms Piecko, Ms Kemp, Mr Lee, and Ms Brioni Davies. The unchallenged evidence of the Managing Director Ms Morgan and the Chief Executive Officer Mr Harris was that the Board mandated consultation to occur regarding the new rota as it was a big change for the Respondent. It was unchallenged that they valued greatly the Claimant, who was someone that they had supported throughout her career with access to training and qualifications, and approved numerous flexible working applications to retain her.

41. The Tribunal considered that the evidence supported a finding that Ms Davis's approach was consensual, open to discussion and consultation. It was not probable that she would use the phrase *"non-negotiable"* in relation to a proposed rota that she then negotiated with several

managers, both before and after the imposition of the rota (which is striking as often employers are unwilling to change rotas once they have been established). The Claimant by her own acceptance never mentioned in any of the meetings that she had with either Ms Beynon or Jodie Davis herself in January 2020 that Jodie had said that the rota was not negotiable, a rather obvious point when complaining about the hours. The first time the Claimant makes this allegation is in her resignation letter of 17 January 2020.

42. In addition, the fact that as soon as the Respondent was made aware that the Claimant was seriously upset about the proposed rota and was now indicating it was one of the reasons for her resignation, as opposed to the reasons that the Respondent believed and discussed in the meeting of 8 January 2020, immediately Ms Davis offered initially a day time shift in the weekend and then offered that the Claimant could permanently have her original shifts until her personal circumstances changed and she was able to work different hours. This approach is not indicative of someone who would not negotiate in any way. The Tribunal does not consider that the Claimant was being untruthful, and it accepted her account that she was panicked by a mere discussion of the potential of weekend working, possibly motivated by the difficulties she outlined she would face with her parents and their reaction.

Page 120 of the bundle

43. The Claimant's position was that part of her reason for being concerned was because she found a rota on a manager's computer at the Nantgarw club (page 120 of the hearing bundle). What is actually at page 120 is a screen shot of a printed rota against a table, rather than the document itself. All the parties agree that this document is a very odd document, and no-one can explain how it has been created. The Respondent suggested that the Claimant had created it in essence to bolster her claim; the Claimant denies this.

44. What all the parties agree is that this rota cannot in fact be a real actual rota. It is a mixture of shift patterns from the old shift system and the new shift system. It is operationally flawed in that there is not sufficient cover in respect of managers, which the Claimant herself accepted. The Claimant says that this rota shows that the Respondent was going to make her work weekends, but she cannot explain the fact that this rota was due to come into effect on 30 December 2019 (which had never been the Respondent intention and the Claimant was aware of this from her conversations with Mr McLean, as well as the conversation with Ms Davis). The rota is wrong in respect of the number of hours that the Claimant worked. It is possible that this rota was someone trying to create a rota, knowing of the proposed new system due to start in January 2020, but this does not

explain why old shift patterns were being used as well. Critically, the Claimant was never provided with this rota by the Respondent and told that she had to work it; it is a document that she found on the computer according to her evidence.

45. The Tribunal did not find that there was sufficient evidence to find on the balance of probabilities that the Claimant had fabricated this rota, but it was not a real rota in the sense that it was a rota that people were expected to work as it could not work from an operational or contractual perspective. By the time the Claimant says she found this rota, she had already found a new job.

46. The Claimant's evidence was that the finding of this rota triggered her to text Mr McLean to ask if she could continue to work her Wednesday and Friday shifts until she left. Mr McLean's evidence is he did not really understand why the Claimant was asking this as she was not being asked to change her shifts at this time but as he was not at the club, he saw no reason to challenge her and simply agreed to her request. In the Tribunal's judgment, in light of the evidence it did not find that the Claimant genuinely believed this rota with all its flaws and unusual contents was a real rota she was expected to work, and her texts to Mr McLean were not sent due to its discovery.

Texts of 12 December 2019

47. The Claimant says that her texts with Mr McLean on 12 December 2019 are important and crucial. She says that they show that Mr McLean knew that she was leaving and why. The texts are at page 93 of the hearing bundle. They confirm that the Claimant asked Mr McLean to be a referee, and she said that she could not work the new shifts. However, the Tribunal accepted the evidence of both the Claimant and Mr McLean that the Claimant in 2019 had applied for a number of jobs. It considered that it would have been helpful had Mr McLean texted the Claimant back in response to the text about her inability to work new shifts. The Tribunal bore in mind the evidence that Mr McLean saw the Claimant on a regular basis, but was unable to speak to her further after receipt of this text for some time due to a combination of Christmas parties and ill health on the Claimant's part. He was then told that she had obtained a new job. In the Judgment of the Tribunal, it considers that these texts demonstrate the Claimant was still under the belief that at some point she was going to have to work weekend shifts. This was an opportunity for Mr McLean to clarify matters with her, but unfortunately, he did not get an opportunity to do so in person due to the Claimant not being in work at an appropriate time to discuss the matter before she was offered her new job (a party not being an appropriate time).

Conclusions

48. In relation to the constructive unfair dismissal claim, the Tribunal could not identify any breach of contract by the Respondent. The Claimant's contract of employment said that she would work the hours required to discharge her duties, and she had the benefit an amendment to this through the flexible working arrangement to work 16 hours a week over two days involving two weekday evenings. The Claimant has not been able to point to any contractual provision that she says is breached by her employer wishing to institute a new rota.

49. The Tribunal finds that in any event the Claimant was not presented with a rota and told that she must work weekends but merely was told that there was going to be a new rota system and ideally, she would work a weekend, but the Respondent appreciated that she needed to talk to her parents and discuss the matter further. The proposed rota and the discussions of 27 November 2019 do not constitute a breach of contract, let alone a fundamental breach of contract. It was not set in its terms, hence the discussion with the Claimant. Employers can propose changes and consult about those changes. In essence, the Claimant resigned far too soon as no change was imposed or proposed to be imposed on her following her discussions with Ms Davis and Mr McLean.

50. In addition, there is nothing in the Respondent's conduct towards the Claimant that constituted a breach of the mutual duty of trust and confidence without reasonable and proper cause. The Respondent through Ms Davis told the Claimant of the proposal, and agreed that there would be further discussion and consultation. The reason for the rota was based on sound business reasons due to the need for proper management cover at the busiest times for the business. This means as there has been no breach of contract, the claim for constructive unfair dismissal inevitably fails.

51. In relation to the claim of indirect sex discrimination, the Tribunal did not understand the submissions of Mr Bheemah on behalf of the Respondent on one point. He submitted that the PCP did not exist because the Respondent's staff members worked on different days with different shift patterns. In addition, he argued that as the Claimant's shift patterns did not change, there was no valid PCP. In the Tribunal's judgment, this conflated several different issues and was not the way forward it adopted.

52. The PCP asserted is *"requiring staff to work shift patterns as directed by the Respondent".* In the Judgment of the Tribunal, the PCP existed. Rotas were created, and those were the hours that the employees were directed to work by the Respondent. It is difficult to see how the Respondent's business could operate without such a system. The fact that the directions

of the Respondent confirmed in the rota may follow contractual agreements and arrangements agreed through the flexible working provisions or informal discussions did not change the fact that the PCP as put forward by the Claimant existed – staff were required to work the shift patterns as directed by the Respondent.

53. It was evident on the basis of the evidence before the Tribunal that this PCP applied to all staff members throughout the course of the Claimant's employment and therefore whether it was a provision, criterion or practice, there was sufficient repetition to justify such a finding.

54. Did the PCP apply at the relevant time? Whether or not the relevant time was 27 November 2019 or when the new rota came into effect on 13 January 2020 is to a large extent an irrelevant question. The rota that was in force on 27 November 2019 applied and the Claimant attended work as directed. Under the new rota of 13 January 2020 onwards, the Claimant's shifts had not changed due to her discussions with Mr McLean and she attended work as directed by the rota. It is more likely than not that other employees attended work as directed by the rota. The PCP as relied upon by the Claimant applied throughout her employment. The PCP applied to all members of staff; it was applied to men as well as women.

55. The next question is whether the PCP put women at one or more particular disadvantage compared to men. The particular disadvantage was repeatedly identified by the Claimant as weekend working which requires parents to find childcare when paid childcare is not available or to get a new job. The Claimant accepted that she provided no evidence of group disadvantage, while the evidence of Ms Piecko, Ms Kemp, Ms Brioni Davies and Mr Lee was that as far as they were aware there was no particular disadvantage. The three witnesses from this group who were female gave evidence that they had no difficulty in weekend working as their partners and families were able to give them support. The impression was given by these witnesses was that weekend working was not viewed as a disadvantage by part-time working parents. Given the absence of group disadvantage, the Claimant's claim for indirect sex discrimination must fail.

56. However, in the circumstance that the Tribunal is wrong in this finding, it went on to consider whether the Claimant suffered the particular disadvantage as an individual. The conclusion was no. The Claimant was never directed to work on weekends. At the very highest, the Claimant was asked to consider working on weekends but she did not agree and the rota was never changed to direct her to work on weekends. For this reason, the Claimant's claim for indirect sex discrimination must fail.

57. It would appear that this is an unfortunate situation where the Claimant resigned when there was no need to do so. This is particularly unfortunate, given the clear pride and enjoyment that the Claimant had from her role with the Respondent and the many positive things that the Respondent's witnesses said about the Claimant and her approach in the workplace.

Costs Application

58. The Respondent in its submissions indicated that it intended to seek costs from the Claimant relating to the aborted costs of the 2-day hearing in January 2021 due to the applications made by her former representative. Formal written reasons were provided in relation to the decisions made by the Tribunal in January 2021, which confirm that it was the actions of this former representative that caused the postponement. A number of relevant findings were made by the Tribunal regarding this matter.

59. For the assistance of the Claimant, the relevant rules are Rules 74 – 84 Employment Rules of Procedure 2013 (as amended). A cost order is an order that a party (such as the Claimant) is ordered to pay money to the other side by the Tribunal due to a number of reasons, which can include the conduct of a representative. A wasted costs order is an order that the representative pays the costs; however, such an order cannot be made against a representative not acting in pursuit of profit (in other words, an unpaid representative). It is likely that Mr Leong and the Newport CAB falls into the category of representative who cannot be made subject to a wasted costs order, unless the Claimant paid for its services.

60. The Respondent is directed to confirm to the Claimant and the Tribunal within 14 days of the date of the receipt of the written reasons the following points:

    (1) Whether it wishes to pursue an application for costs;
    (2) If so, it should set out in detail the basis of the application and evidence of the cost caused by the postponement of the hearing in January 2021.

61. If the Respondent does wish to pursue the application and complies with the provisions of the paragraph above, the Claimant may wish to invite the supervising lawyer from Newport CAB to write to the Tribunal (within 21 days of receipt of the Respondent's application) to explain the conduct of Mr Leong. If the CAB is unwilling to assist, the Tribunal is able to issue a witness order if requested and if it is informed of the name of the supervising lawyer for the CAB for them to attend any costs hearing and give evidence (this is mentioned to assist the Claimant as a litigant in person).

62. In any event, if the Respondent does pursue the costs application the Claimant must set out her response 21 days after receipt of the Respondent's detailed application to both the Respondent and the Employment Tribunal.

63. The file will then be referred to Employment Judge Sharp. If the matter is disputed, a hearing will be arranged before the full panel to determine whether or not a Costs Order should be made against the Claimant in respect of the wasted costs incurred in January 2021 by the Respondent. The Tribunal observes that if the Respondent demonstrates that the threshold for making a Costs Order is met, it remains wholly within the discretion of the Tribunal whether or not to make such an Order and it will have to consider the financial resources of the Claimant.

Employment Judge C Sharp
Dated: 24 June 2021

JUDGMENT SENT TO THE PARTIES ON 28 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche