EMPLOYMENT TRIBUNALS

Claimant: **Miss. K Green**

Respondent: **Nuffield Health**

Heard at: **Via Cloud Video Platform (Midlands East Region)**

On: **17th, 18th, 19th, 20th May 2021**
21st May 2021 (in Chambers)

Before: **Employment Judge Heap**
Members: **Mr. C Tansley**
Ms. D Newton

Representation
Claimant: **Mr. R Castillo – Lay Representative**
Respondent: **Mr. P Bownes - Solicitor**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote via CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaint of indirect discrimination set out at allegation 3 of the scott schedule is dismissed on withdrawal by the Claimant.

2. The complaints of harassment set out at allegations 2, 3, 4 and 5 of the scott schedule are dismissed on withdrawal by the Claimant. All other complaints of harassment and not well founded and they are dismissed.

3. The complaints of victimisation set out at allegations 2, 3, 4 and 5 of the scott schedule are dismissed on withdrawal by the Claimant. All other complaints of victimisation are not well founded and they are dismissed.

4. The complaints of direct discrimination relying on the protected characteristic of sex all fail and are dismissed.

5. The complaints of indirect sex discrimination fail and are dismissed.

6. The complaint of constructive unfair dismissal contrary to Section 95 Employment Rights Act 1996 fails and is dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Miss. Kayleigh Green (hereinafter referred to as "The Claimant") against her now former employer, Nuffield Health (hereinafter referred to as "The Respondent") presented by way of a Claim Form received by the Employment Tribunal on 11th December 2018. The claim is one of constructive dismissal and of discrimination relying on the protected characteristic of sex. The latter complaints include allegations of direct discrimination, indirect discrimination, harassment and victimisation. Following discussion at the outset of the hearing, Mr. Castillo abandoned some of the discrimination allegations set out within a scott schedule prepared earlier in the proceedings, although the factual basis continued to be relied upon in the context of the constructive dismissal claim. All remaining complaints are resisted by the Respondent.

2. The claim has been the subject of a number of Preliminary hearings, the most important being one which took place before Employment Judge Britton on 22nd October 2020. At that hearing Orders were made for further information about the complaints made to be provided by way of the preparation of scott schedules. Those were completed by and appear in the hearing bundle at pages 38 to 49.

3. However, some aspects of the claim still remained unclear including the provision, criterion or practice ("PCP") relied on by the Claimant for the purposes of the indirect discrimination claim; the comparators in respect of the claim of direct discrimination and the protected act with regard to the victimisation complaints.

4. As we have already referred to above, following that discussion some elements of the claim were withdrawn by Mr. Castillo on the Claimant's behalf. We should observe that we adjourned the hearing to allow Mr. Castillo and the Claimant to review overnight a note of the different types of discrimination that were being advanced that we provided to them via email and so as to deal with the additional information that was required.

5. After that point, Mr. Castillo set out that in relation to all allegations of indirect discrimination the PCP relied upon was the requirement to work full time; in respect of comparators other than for a complaint about pay the Claimant relies on hypothetical comparators and she relied on one protected act, that being what she told an Occupational Health adviser that was then recorded in a report sent to the Respondent.

6. It was clarified with Mr. Bownes on behalf of the Respondent that it was accepted that the Claimant did a protected act by virtue of what she told the Occupational Health adviser. It was also confirmed that the Respondent did not intend to raise any issue that the complaint about pay should have been advanced as an equal pay claim and not as a direct discrimination claim.

THE CLAIMANT'S POSITION

7. The Claimant contends that during the course of her employment she was subjected to indirect discrimination, harassment and victimisation with the latter arising from her having done a protected act by raising issues of inequality of pay with an Occupational health adviser.

8. She further contends that as a result of the conduct of the Respondent, which she says was a fundamental breach of contract, that she had no alternative but to resign from their employment and that accordingly she was constructively dismissed. The Claimant relies upon a breach of the implied term of mutual trust and confidence, with the last straw being the outcome of her appeal against a grievance that she had raised which suggested that she engage in mediation with the managers against whom she had brought that grievance.

THE RESPONDENT'S POSITION

9. The Respondent contends entirely to the contrary.

10. It is not accepted by the Respondent that the Claimant was subjected to any discriminatory treatment and that her sex and what she had told Occupational Health played no part in the treatment of which she complains. It is further said in respect of a number of the complaints that they did not occur or otherwise did not occur as the Claimant alleges.

11. The Respondent also contends that the Employment Tribunal had no jurisdiction to entertain a number of the discrimination complaints as the Claimant had presented them outside the appropriate statutory time limit provided for by Section 123 Equality Act 2010 and they could not properly be considered to be a continuing course of conduct.

12. Insofar as the matter of constructive dismissal is concerned, the Respondent's position was that there was no fundamental breach of contract and that the Claimant had, by her actions in continuing to accept sick pay, in all events affirmed any breaches that were alleged.

THE HEARING

13. The claim was originally scheduled to be heard in person but there were still ongoing issues regarding Covid-19 at the time and so it was conducted as a fully remote hearing which enabled it to proceed. We are satisfied that despite some technical issues arising during the course of the hearing, those were overcome and did not affect either the evidence or the fairness of the hearing.

14. However, we did determine that those technical issues would not lend themselves to us being able to deliver an effective oral judgment and so we reserved our decision which now appears below.

WITNESSES

15. During the course of the hearing, we heard evidence from the Claimant on her own behalf. In addition to her evidence, we also heard from the Claimant's partner, Mr. Ryan Castillo.

16. We also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

- David Edgeley – Deputy General Manager of the Health Club where the Claimant was employed and her direct line manager at the material time;
- Jonathan McGuinness – the General Manager of the Health Club and line manager of Mr. Edgeley;
- Damion Groom – a Senior General Manager who dealt with the Claimant's grievance regarding Mr. Edgeley and Mr. McGuinness; and
- David Richardson – a Hospital Director who dealt with the Claimant's appeal against the outcome of her grievance.

17. We make our observations in relation to matters of credibility in respect of each of the witnesses from whom we have heard below.

18. In addition to the witness evidence that we have heard, we have also paid careful reference to the documentation to which we have been taken during the course of the proceedings and also to the oral submissions made by Mr. Castillo on behalf of the Claimant and Mr. Bownes on behalf of the Respondent.

CREDIBILITY

19. One issue that has invariably informed our findings of fact in respect of the complaints before us is the matter of credibility. Therefore, we say a word about that matter now.

20. We begin with our assessment of the Claimant. Ultimately, we found her to be an unsatisfactory witness. In many areas of his evidence we found her to be evasive and found that she frequently failed to answer the questions asked of her, choosing instead to answer something completely different despite having been told at the outset of her evidence that she needed to focus on the questions asked.

21. Moreover, we found the Claimant's evidence to have been exaggerated. That was particularly the case in respect of the events of a meeting with Mr. Edgeley and Mr. McGuinness. In this regard her witness statement featured detail that she was met with "explosive anger", was scared for her safety and thought that she was going to be physically attacked and had to run to her car to escape where she could not initially drive because she was so distressed.

22. The Claimant could give no convincing explanation for the fact that none of that appeared in an otherwise detailed grievance that she had raised, was not mentioned at a grievance meeting, was not referenced in her appeal against the outcome or the appeal meeting, in her resignation letter nor even in her ET1 Claim Form. We did not accept that the Claimant was in some way prevented from raising the matters whilst still in employment because she was scared to do

so as in all events we are satisfied that after the meeting itself she had no intention of returning to work for the Respondent.

23. However, that in any event would not explain the absence of a reference about those matters from the resignation letter or Claim Form. We did not accept the explanation from Mr. Castillo that they had omitted to make reference to those matters because they were "amateurs" in terms of preparing legal documentation. Mr. Castillo is a former police officer and would recognise as such the importance of such a key event. Moreover, if the meeting had proceeded as the Claimant claims and she was in fear for her safety and had what she described in her evidence as a "massive panic attack" that is by far the most serious issue that occurred during her time with the Respondent and many of the other events that were detailed in the Claim Form and grievance pale in comparison. It is beyond comprehension that that would not have been at the forefront of her mind when preparing those documents. Instead, we are satisfied that the Claimant had exaggerated those events in order to seek to bolster her claim.

24. We did not consider the evidence of Mr. Castillo to be of assistance in determining the issues. He is the Claimant's partner and had no first hand evidence that could be given in respect of most of the events with which the claim is concerned. He could only give direct evidence about a meeting that he had with Mr. McGuinness but his witness statement lacked any detail about the confidential information that he says was disclosed to him during the same. That is a surprising omission and no detail about that at all was given during his oral evidence. As such, we did not consider his evidence to be satisfactory.

25. We turn then to the evidence given on behalf of the Respondents. We considered them to be forthcoming in their answers during cross examination and, in contrast to the Claimant, they were largely prepared to make concessions where appropriate. That was particularly the case with Mr. Edgeley who candidly accepted that he had made mistakes and that matters could have been handled better. The evidence of all of the Respondent's witnesses was also consistent with the contemporaneous documentation that we had before us.

26. Against that background, unless we have said otherwise we preferred the evidence of the Respondents witnesses to the Claimant and Mr. Castillo.

THE LAW

27. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Constructive Unfair Dismissal

28. A dismissal for the purposes of Section 95 Employment Rights Act 1996 includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

29. Tribunals take guidance in relation to claims of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

"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; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

30. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always be found to be repudiatory by its very nature.

31. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

32. Where an employee relies on an act of the employer as being the "last straw" that act might amount to a relatively minor incident and need not of itself amount to a breach of contract. However, whilst the final straw may be relatively insignificant in respect of the overall conduct of the employer it must not be utterly trivial or innocuous, even if the employee does not view it as such (see **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA** and **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**.)

33. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

34. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

Discrimination relying on the protected characteristic of sex

35. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 19, 26, 27 and 39.

36. Section 39 EqA 2010 provides for protection from discrimination in the work arena and the relevant parts provide as follows:

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

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

37. Section 13 EqA 2010 provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

38. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate

non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).

39. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

40. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

41. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomura International Plc [2007] IRLR 246**:

> *"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.*
>
> *The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

42. However, there must be something from which an inference could be drawn that the treatment complained of relates to the protected characteristic relied on. The fact that a person has that protected characteristic is not enough nor is a mere difference in treatment. Similarly, unreasonable treatment is not enough to establish that there has been discrimination (see **Bahl v The Law Society [2004] IRLR 799**).

43. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory

motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450.**)

44. Section 19 Equality Act 2010 deals with indirect discrimination and provides as follows:

"*(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."

45. Harassment is prohibited by virtue of Section 26 EqA 2010 which provides as follows:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
i. Violating B's dignity, or
ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

46. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant.

47. As set out by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:

a) What was the conduct in question?

b) Was it unwanted?

c) Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?

d) Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?

e) Was the conduct related to the protected characteristic relied upon?

48. Section 27 EqA 2010 provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

49. In dealing with a complaint of victimisation under Section 27 EqA 2010, Tribunal will need to consider whether:

(a) The alleged victimisation arose in any of the prohibited circumstances covered by Section 39(3) and/or Section 39(4) EqA 2010 (which are set out above);

(b) If so, was the Claimant subjected to a detriment; and

(c) If so, was the Claimant subjected to that detriment because he or she had done a protected act.

50. In respect of the question of whether an individual has been subjected to a detriment, the Tribunal will need to consider the guidance provided by the EHRC Code (as referred to further below) and the question of whether the treatment complained of might be reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment (see paragraphs 9.8 and 9.9 of the EHRC Code).

51. If detriment is established, then in order for a complaint to succeed, that detriment must also have been "because of" the protected act relied upon. The question for the Tribunal will be what motivated the employer to subject the employee to any detriment found. That motivation need not be explicit, nor even conscious, and subconscious motivation will be sufficient to satisfy the "because of" test.

52. A complainant need not show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a "significant influence" on the employer's decision making (**Nagarajan v London Regional Transport 1999 ICR 877**). If in relation to any particular decision, the protected act is not a material influence of factor – and thus is only a trivial influence - it will not satisfy the "significant influence" test (**Villalba v Merrill Lynch & Co Inc & Ors 2007 ICR 469**).

The EHRC Code

53. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Jurisdiction

54. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

> *"Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a)the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b)such other period as the employment tribunal thinks just and equitable.*
>
> *(2)Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a)the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b)such other period as the employment tribunal thinks just and equitable.*
>
> *(3)For the purposes of this section—*
>
> *(a)conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b)failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a)when P does an act inconsistent with doing it, or*
>
> *(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

55. Therefore, Section 123 provides that proceedings must be brought *"within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".* That three month time limit is subject to an extension for the period of ACAS Early Conciliation which "stops the clock" for period that the parties are engaged in that process.

56. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is "just and equitable" to allow time to be extended and allow the complaint(s) to proceed out of time.

57. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and will usually have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).

58. In considering whether to exercise their discretion, a Tribunal will often consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

59. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. The guidance above should not be used as a steadfast or rigid checklist. Instead, the best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular, the length of, and the reasons for, the delay (see **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23**).

60. The burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

FINDINGS OF FACT

61. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before us. The relevant findings of fact that we have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before us and which were before the Tribunal and the witnesses.

The Respondent and the commencement of the Claimant's employment

62. The Respondent is an operator of a large number of hospitals and Health Fitness and Wellbeing Gyms. One of the gyms is situated in Nottingham. The Claimant commenced employment with the Respondent at that gym on 29th March 2016. At that time she was working as a Front of House Client Service Adviser on the gym reception.

63. The Claimant is a mother of two young children and at the time that she was working on reception she was working 16 hours per week.

64. A vacancy arose at the gym where the Claimant was working for a Duty Manager position. There are two aspects to a Duty Manager's role. The first part is centred around sales for which there are applicable targets and the second part is to deal with the gym itself such as opening up the building to ensure that it is ready for members to attend and dealing with appropriate staff issues. The Duty Managers are all line managed by the Deputy General Manager and at the material time with which we are concerned that was David Edgeley. There is an overall General Manager who is responsible for the gym as a whole. At the time that we are concerned with that was John McGuinness who line managed Mr. Edgeley.

65. The Claimant applied for the Duty Manager role and was interviewed by Mr. McGuinness. She was successful in her application and promoted accordingly, beginning her new role in November 2017. The date of her promotion is a key one for reasons that will become clear later. Upon her promotion she received a pay increase and began to work 40 hours per week. The Claimant was aware at the time that she applied for the Duty Manager position that those were the hours of work to be undertaken each week.

66. The Claimant performed well in her role and was viewed as a "top performer". It is clear that she was very good at her job and that it to her credit particularly given that she had no previous sales experience. We are satisfied that she was highly regarded by the Respondent and by Mr. McGuinness particularly. Indeed, as we have already observed above it was Mr. McGuinness who interviewed the Claimant and promoted her.

The 2018 pay review

67. In April 2018 there was a pay review which affected the Duty Managers. Prior to that point a briefing document had been issued to managers, Mr. McGuiness included, which dealt with the entitlement to a pay review. Within the eligibility portion of that document it is made plain that employees were not entitled to a pay review if they received a pay increase on or after 1st October 2017. That meant that the Claimant was not eligible to a pay review because she had been promoted to Duty Manager after that date and had accordingly already received a pay increase.

68. Whilst Mr. Castillo asserts that as a "top performer" the Claimant should have received a 3% or 4% pay increase, that ignores the fact that that scale was only applicable if the employee met the eligibility requirements to have a pay review and for the reasons that we have already stated she did not.

69. Mr. McGuiness recognised that the Claimant was ineligible for the April 2018 pay review but he nevertheless took steps to try to secure her a pay rise in all events. In this regard, Mr. McGuinness emailed his line manager and the other Director who dealt with pay reviews and the relevant parts of his email said this:

"Kayleigh Green – promoted from reception to DM last year. Top performer and would be on less than other DM's which would be unfair and could be seen as discrimination in a male office plus compression element.

I think given the total payroll budget for 2018 we can stand to the additional £475.80."

70. We accept the evidence of Mr. McGuinness that he was told by his line manager that the Claimant could not have the pay increase that was proposed and, of course, as we have already observed above she was not eligible under the terms of the review document. Mr. Castillo did not appear to accept that it was not Mr. McGuinness who made the decision and suggested that he had changed his position after the Claimant made a later flexible working application. We do not accept that argument. There is no evidence to support it and it flies in the face of the fact that Mr. McGuinness was seeking authorisation for the pay increment that he proposed in his email.

71. Mr. McGuinness did not consider that it was fair that the Claimant did not receive something and as a result he organised for her to be given a one off payment equivalent to a 1% pay rise. He did that without seeking authorisation for the Claimant and she actually therefore received more than she was entitled to under the Respondent's pay review policy.

72. The other two Duty Managers received a 2% pay increase. Both are male. The Claimant was the only female Duty Manager within the team at the gym. However, there is no suggestion that they did not meet the eligibility requirements under the pay review scheme and as such their circumstances were not properly comparable to the Claimant.

73. The Claimant was later sent a link by a friend to a job advertisement for a Duty Manager role at the gym. That advertisement had a higher rate of pay to that

that the Claimant was receiving and, as we understand it, was at the rate which the other two Duty Managers were receiving after their pay increases.

74. She raised that matter in an email to Mr. McGuiness. He replied to say that he agreed with the Claimant and that he would take steps to try and resolve the matter. He emailed his line manager the same day referring to their previous discussions and asking for permission to increase the Claimant's salary.

75. The Claimant's salary was later increased to the same amount as the other Duty Managers and as per the salary in the advertisement and that was confirmed to her by letter dated 30th April 2018 (see page 94d of the hearing bundle).

Flexible working arrangements

76. On 13th March 2018 the Claimant emailed Mr. McGuinness about her working hours. Her email said this:

"Been thinking long and hard about this for the past few weeks and ive (sic) *decided i* (sic) *need to reduce my hours due to family commitments,*
I feel like i (sic) *don't* (sic) *get enough time with the children.*
Also with my Grandad being ill ive (sic) *got to make time to take him for his radiotherapy which starts soon.*
Ive (sic) *lost my babysitter at the moment so childcare is a nightmare with not having set shifts.*
Would it still be possible to carry on my role as duty manager but reduce by one 8 hour shift a week?
I hope you can understand and i (sic) *can still keep my position im* (sic) *willing to help with the extra shift when people are off on annual leave."*

77. Mr. McGuinness replied to the Claimant the following day so say that they could discuss matters in more detail later that day. The Claimant is critical that that email was a short one and she felt that her commitment to the role was being questioned but given that a discussion was proposed, we see nothing wrong with the brevity of the message nor can we see anything that suggested a questioning of her commitment. There was a conversation between the Claimant and Mr. McGuinness about her request. As the Claimant was due to take a period of annual leave Mr. McGuinness asked her to have a think about matters during that time and see how she felt when she returned to work.

78. On 4th April 2018 the Claimant emailed Mr. McGuinness again in relation to her working arrangements. By this time the Claimant's partner, Ryan Castillo, had secured a new job as a Prison Officer. As part of that role he was required to undertake a 12 week training course. Mr. Castillo undertook care for his and the Claimant's children whilst she was at work but would be unable to do so with the same regularity as was normal for the duration of his training. That was limited to that 12 week period and after that stage he would again be in a position to resume his usual childcare provision.

79. The Claimant therefore sought revisions to her working arrangements during that 12 weeks and her email to Mr. McGuinness in that regard said this:

"For the next 12 weeks Ryan is going to be training for his new job.
Im (sic) *going to struggle with child care as his hours for the training are mostly till* (sic) *5 and i* (sic) *have no one to pick up the children.*
Is it possible that
Monday i (sic) *do the early.*
Tuesday-Thursday i (sic) *do an 8-4*
Friday i (sic) *can do any mid or late.*
Weekends ill (sic) *still be fine to do.*
This is also a reason why i (sic) *need to drop a shift as childcare will be hard. Sorry to be a pain.*
Once Ryan has done his training his hours will be more like ours and working round eachother (sic) *should be easier."*

80. Mr. McGuiness replied later the same day. We consider his response to have been in reasonable and positive terms. His email said this:

"Happy to work with you on this. I'll (sic) will try to accommodate as fully as I can but will need you to also work with me to make it feasible for both parties. I will be sending out the rota for the next 4 weeks tonight to reflect your request let me know ASAP of any issues."

81. The Claimant replied to say that she understood and that it had to be "cool with the guys too". That was a reference to the other Duty Managers.

82. The Claimant's request had been copied by her to Mr. Edgeley and he emailed Mr. McGuinness the same day to indicate that he could try to accommodate it. The email said this:

"I could probably accommodate this and basically put Kayleigh on Wayne's old shifts but I will market it to her as we are working the rota round her so she will have to be flexible with weekends etc possibly working a few in a row.

What do you think?"

83. Wayne was not a Duty Manager. He had left employment and was not going to be replaced.

84. The Claimant is critical of that email and the reference to marketing it to her so that she worked additional weekend shifts. Weekend shifts were generally arranged in a rota so that the Duty Managers worked one each in rotation. We see nothing wrong with Mr. Edgeley's approach in his email as some flexibility might be required in respect of cover for other Duty Managers if necessary and he was doing all that he could to deal with the Claimant's request.

85. Mr. McGuinness replied to Mr. Edgeley to say that he should have a conversation with the Claimant to "help her out through the 12 weeks."

86. Later that same day Mr. Edgeley circulated the rota which had been referred to in the email from Mr. McGuinness. The Claimant emailed Mr. Edgeley and Mr.

McGuiness the following day indicating that she could not work some of the shifts that she had been put down for on the rota. Her email said this:

"5 shift i (sic) *will not be able to do as i* (sic) *have no childcare at all.*
I cant (sic) *take the children to breakfast club at school till 7.45 a.m. and i* (sic) *need to do pick ups most days*
On 18th i (sic) *cant* (sic) *do the late i* (sic) *need to drop off and pick up.*

25th i (sic) *need to do drop off and pick up.*

26th i (sic) *will have no child care till 7.45 and need to do pick up.*

2nd need to do drop off and pick up.

3rd no childcare till 7.45 and need to do pick up
I fully understand i (sic) *need to come to work but my children are my number 1 priority they are too young to be left at home or walk home from school alone."*

87. Mr. Edgeley replied the same day asking the Claimant if she would call him. His email said this:

"Do you want to give me a call when you are free. It's easier to discuss what we can do over the phone rather than email tennis lol"

88. The Claimant takes issue with the word "lol" at the end of the sentence and it appears to be suggested that this was indicative of the fact that Mr. Edgeley did not take her childcare needs seriously. We do not agree with that. Whilst it was not a particularly professional way to end an email it is plain that Mr. Edgeley did take matters seriously because he took steps to ensure that the rota was changed to accommodate the Claimant. Indeed, the Claimant was not able to take us to any occasion within that 12 week period when she was asked to work a shift that she was unable to undertake due to childcare commitments and where her requests for shift amendments were not granted.

89. Mr. McGuinness also replied to say that it would easier to discuss the matter directly between the Claimant and Mr. Edgeley. As we have already observed, the shift situation was resolved and the Claimant was not asked to work a shift that made her childcare situation difficult during Mr. Castillo's prison officer training.

90. On 18th April 2018 the Claimant made a flexible working application (see pages 83 and 84 of the hearing bundle). Although it is dated 14th April 2018, we are satisfied that it was not sent to the Respondent until 18th April when it was emailed to Mr. McGuinness (see page 85 of the hearing bundle). Despite being on annual leave at the time Mr. McGuinness replied to the Claimant within the hour, copying in Mr. Edgeley. The email set out that Mr. McGuinness would discuss the matter with Mr. Edgeley when the latter returned to work the following week and that they could then start to formulate a plan around her request. He indicated that there was likely to be "some form of consultation then a formal process" and that he would seek advice from Human Resources ("HR").

91. The Claimant requested in that application to reduce her hours to 32 hours per week – that is to drop one shift as she had previously referred to in her emails to

Mr. McGuinness. The reasons given by the Claimant at that stage for making her application were as follows:

"I would like to reduce to 32 hours as I feel I need to do this for my family. I'm finding with my shifts I'm not seeing the kids as much as I would like, also with my Grandad being unwell they need my help more."

92. It is clear to us that the purpose of the Claimant's flexible working application was because she was missing family time and needed to help out other family members because of her grandfather's illness rather than as a result of a need to arrange childcare. The latter was reflected also in her earliest email where she had referred to needing to take her grandfather to radiotherapy appointments. We also note of course that the arrangements as to childcare would revert to normal after Mr. Castillo had completed his training and shifts were organised during that 12 week period to accommodate the Claimant's needs.

93. Mr. McGuinness did seek HR advice a few days later and his email said this:

"Can I just get a bit of guidance on this.

Kayleigh was on FOH[1] and promoted to sales DM[2] last November.

Sales DM isn't a part time role for me and needs to be a 40hr fulfilment so I wont (sic) *be approving this request. I just want to make sure thats* (sic) *ok and were* (sic) *within our rights to deny?*

There may be an option for her to go back on reception in a higher capacity but need to discuss that with PW[3] first.

Ill (sic) *be meeting with her for an initial consultation on Thursday.*

(and just for the record, the bit where she says she hadn't heard anything was because when she first submitted it I spoke to her and asked her to think about it while she was on holiday in case it was due to the work load and rota issues at the time, she never came back to me when she came back to work but ive (sic) *discussed that with her already)."*

94. Mr. McGuinness was not able to recall what, if any, advice he received back from HR. We accept the evidence of the Respondent that the Duty Manager role required those managers to work full time hours to meet the needs of the business but that Mr. McGuiness was happy to explore other ways that the Claimant's request could be accommodated such as a return to reception duties whilst still maintaining her Duty Manager salary. However, as we shall come to that did not happen as no final flexible working meeting ever took place.

95. Mr. McGuinness had a one to one with the Claimant on 23rd April 2018 (see page 88 of the hearing bundle) where the application was discussed and that they would have a further meeting about it. Matters were left that the Claimant would consider Mr. Castillo's rota and come up with some ideas. The Claimant is critical that matters were left in her court but she made no complaint about that at

[1] Front of House.
[2] Duty Manager.
[3] A reference to his own line manager.

the time and of course the Respondent would not have been aware what Mr. Castillo had been put on the rota to work.

96. Mr. McGuinness wrote to the Claimant on 23rd April 2018 inviting her to a meeting to discuss her flexible working application along with himself and Mr. Edgeley. The letter indicated that the Claimant would be informed of Mr. McGuinness's decision by no later than 10th May 2018 although, as we shall come to, that did not in fact happen.

97. The meeting took place on 26th April 2018 and the notes of that meeting appear in the bundle at pages 91 and 92. We accept that they are an accurate account of what was discussed.

98. At the meeting Mr. McGuinness indicated that he did not want to lose the Claimant but we do not accept, as is suggested, that that was any indication that she was being in some way exited from the business as she now suggests. Indeed, when asked whether anything that had been said worried the Claimant she replied in the negative.

99. Mr. McGuiness asked the Claimant to think about a solution and how a reduction in hours would fit in with the Respondent's business model. He then arranged to meet again with the Claimant on 5th June 2018 to discuss matters further and informed her that she would be told of his decision by no later than 12th June 2018 (see page 90 of the hearing bundle). Again, as we shall come to that did not happen either.

Car Accident

100. On 5th May 2018 the Claimant and Mr. Castillo took their children on a family day out. Unfortunately, whilst the Claimant was driving home they were involved in a serious car accident with the vehicle being written off. That event, quite understandably, had a profound effect on the Claimant which was still evident even at the time of the hearing before us some years later. Given the seriousness of the accident she was worried, and continues to be plagued, with thoughts of what might have happened to her children.

101. Mr. Castillo informed Mr. Edgeley of the accident and the latter expressed his hope that the Claimant was ok and to let him know how she had got on when she had seen a doctor (see page 94e of the hearing bundle).

102. Mr. McGuinness was also concerned about the Claimant and expressed that in a message that he sent to her after she sent him a text message the following day to say that she would not be in work on 7th May 2018. Mr. McGuinness also set out that he had tried to call her but she had not answered and he could not leave a message and so he asked her to contact him. We do not accept that the Claimant was badgered by Mr. McGuinness as she appears to suggest nor do we accept that he should not have contacted her in the aftermath of her car accident. He was concerned for her and was entitled to ask her to contact him so that he could see how she was and when she might be able to return to work. All of that is in our view perfectly normal.

103. The Claimant was given a statement of fitness for work ("Fit Note") citing stress and a road traffic accident which she submitted to the Respondent (see page 97 of the hearing bundle).

104. The Claimant did not telephone Mr. McGuiness as he had requested and therefore on 14th May 2018 he wrote to her about that. That letter bears setting out in full as the Claimant takes significant issue with it. The letter said this:

"I write in respect of your continued absence from work following your car accident on Saturday 05 May 2018. I have received your medical certification.

I have tried unsuccessfully to contact you via Telephone and text message in order to discuss your illness and gain a better understanding of your condition with a view of supporting your return to work.

Please can you make arrangements to contact me as soon as possible so that we can discuss this further."

105. That was clearly a standard letter and whilst we accept that it may have upset the Claimant because she had submitted a Fit Note and Mr. Castillo had spoken to Mr. Edgeley, objectively there was nothing wrong with the content of the letter or the fact that it was sent.

106. The Claimant sent an email to Mr. McGuinness setting out the steps that she and Mr. Castillo had taken to be in contact with the Respondent since the car accident and that she would continue to seek to contact him to discuss support for a return to work. She also updated him by email on 17th May 2018 by email and was issued the following day with a further Fit Note citing stress. There was nothing at that time to put the Respondent on notice that that stress related to work or to anything more than the upsetting effects of the car accident.

107. Shortly thereafter Mr. Edgeley completed an Occupational Health referral form for the Claimant (see page 102 to 105 of the hearing bundle). We say more about the report that followed later.

108. By late May 2018 the Claimant was in a position to return to work and on 29th May Mr. Edgeley circulated the rota. The Claimant emailed him to say that she could not undertake one of the shifts that she had been allocated because she would need to have completed the shift by 4.00 p.m. because of childcare. That was still during Mr. Castillo's period of training. Mr. Edgeley spoke to the Claimant over the telephone about the shift and also sent her an email to confirm the position (see page 105a of the hearing bundle).

109. Mr. Edgeley suggested that the Claimant take lieu time which she had built up so that she worked between 12 noon and 4.00 p.m. rather than switch the shifts of other people around. That would require the Claimant to use four hours of lieu time as she had been scheduled to work until 8.00 p.m.

110. Whilst the Claimant contends that she could have been placed on an early shift we accept the evidence of Mr. Edgeley, which accords with the content of his email to her, that he had not wanted to do that because of the responsibility that it entailed and also that the Claimant would have to open up and would have been alone in the health centre for some time at 6.00 a.m. before any other staff

members arrived. In this regard the early shift was a Duty Manager shift which would have involved the Claimant opening up the health centre on her own early in the morning and dealing with all of the other stressors that came with that role. Mr. Edgeley did not think that that was the best thing for the Claimant to ease her return to work given that she had been suffering from stress.

111. Whilst the Claimant contends that it was stressful to be placed on a sales shift (which was the alternative to a Duty Manager shift) we accept that Mr. Edgeley had the best of intentions. He candidly accepted in his evidence that he could have done things differently but the Claimant raised no issue at the time with undertaking a sales shift.

112. We also do not consider that it was inappropriate, as the Claimant contends, to be asked to use her lieu time rather than re-arrange the shifts of other members of staff to cover the hours that she could not work. Whilst the Claimant preferred to save her lieu time to have a whole day off work, her preference in that regard does not make the Respondent's actions inappropriate.

Telephone call with Mr. McGuinness

113. Upon receipt of the letter from Mr. McGuiness the Claimant telephoned him to discuss the same. We accept that the Claimant was told that Mr. Edgeley was also in the same room and that she was on loudspeaker and that he. However, we find that it is more likely than not that she did not fully take that in any may have said things that she might not otherwise have done if she had fully appreciated that Mr. Edgeley could therefore hear the content of the conversation.

114. We find that it would have been much better for Mr. McGuiness to have had that conversation with the Claimant in private. However, again this was not a mater that was dealt with to upset to embarrass the Claimant. It was simply a matter that Mr. McGuinness felt that Mr. Edgeley should be aware of the situation as the Claimant's line manager. It is clearly a matter which could and should have been handled much better but it was simply lack of judgment on Mr. McGuiness's part.

Occupational Health report and meeting with Mr. McGuinness

115. As we have already observed above in May 2018 Mr. Edgeley had completed an Occupational Health referral for the Claimant to identify, amongst other things, when she would be fit to return to work and whether any adjustments were needed.

116. The Claimant saw the report before it was sent to the Respondent and approved it with one very minor correction relating to the gender of her General Practitior. The relevant parts of the report said this:

"Kayleigh confirms that she is currently off sick due to signs and symptoms of stress which she attributes predominantly to work. She tells me that she was due to see her GP prior to her road traffic collision. She tells me that she has made a good recovery following the road traffic collision. She tells me that she feels that the stress is related to a culmination of issues including a request for fixed hours for a specified length of time to assist her in managing her work life balance which has not been granted and also concerns about equal pay. She tells me

that she has been to see her GP and he recommended support. She says that she was feeling better but has had her rota for next week and her request has not been granted again. She tells me that she feels unsupported with regards to her health and wellbeing and her work life balance at this time.

…….

In summary, Kayleigh is reporting signs and symptoms of stress which she attributes predominantly to work and her work life balance due to a change of home circumstances. She tells me that she has requested support but feels that she has not received this. I would recommend that a stress risk assessment is performed taking into account the HSE stress management standards".

117. The report also made recommendations that the Claimant be given fixed hours during Mr. Castillo's 12 week training period.

118. That report was sent to Mr. Edgeley and he in turn shared it with Mr. McGuiness as his line manager. He should not have done that, as he now accepts, without speaking to the Claimant first and seeking her consent. That was an error on his part as a reasonably new manager at the health centre and he was doing so to seek guidance from his own line manager.

Weekend shift

119. On 30th May 2018 Mr. Edgeley issued a rota which had the Claimant down as working a Sunday shift. The Claimant tells us that she arranged childcare for that shift but Mr. Edgeley thereafter sent around a revised rota where she was not working that particular day and was instead put down to work on the Saturday. We are satisfied that Mr. Edgeley simply made an error and that is plain on the email that he sent with the revised rota where he explained that he had forgotten that it was his turn to work the Sunday shift. He sent round the revised rota within a matter of only seven minutes. He was not aware that the Claimant had arranged childcare nor did she inform him of that or suggest that she had any difficulties working the revised shift.

120. That is the only incident which the Claimant has taken us to where there were any revisions made to the shifts that she had been rostered to work other than where those came in consequence of requests that she had made.

Return to work

121. The Claimant returned to work on 4th June 2018 working the 12 noon to 4.00 p.m. shift. Shortly after her arrival she emailed Mr. McGuinness indicating that she had arrived and he should let her know if he wanted to catch up.

122. Mr. McGuinness asked to meet with the Claimant at approximately 3.50 p.m. We do not accept that he did that to inconvenience the Claimant or make her late to collect her children. We accept that he generally found it convenient to have discussions towards the end of a shift when diaries were lighter and he had not thought that the meeting would overrun. However, again this is a matter which could have been handled better and it would have been preferable for the meeting to have taken place at the start of the working day in order to support the Claimant back into work and ensure that there were no time pressures.

123. Mr. Edgeley was also in the meeting taking notes. In that way it was no different to the flexible working meeting. As we have already observed above, we do not accept the Claimant's account of the meeting which we consider to be wholly exaggerated. We do not accept that Mr. Edgeley placed himself in a chair so as to block the door or that Mr. McGuinness was shouting or aggressively questioning her.

124. We find that Mr. McGuinness did express some surprise and concern at the content of the Occupational Health report and that he considered some parts of what had been said to be unfair because he genuinely considered the issues about equal pay and hours of work to have been resolved. We also find that the Claimant was upset that Mr. McGuinness had a copy of her Occupational Health report because she had believed that it would only be sent to Mr. Edgeley as her line manager.

125. We do not accept that either Mr. McGuinness or Mr. Edgeley acted inappropriately during that meeting. However, matters did become heated on the Claimant's side and we accept that she raised her voice and before abruptly leaving the meeting accused Mr. McGuinness of not "giving a shit" about her car accident.

126. The Claimant's evidence was that she would never have been able to return to work after this meeting and, indeed, she did not as she was signed off work with stress on the same day for a period of two weeks. A further Fit Note was issued to the Claimant on 21st June until 31st July 2018 and she continued to be signed off sick until her later resignation.

127. Towards the start of the meeting Mr. McGuinness had handed the Claimant a letter inviting her to a further meeting to discuss her flexible working application. That letter was incorrectly dated as 23rd April 2018 but we are satisfied that that was simply because it was created from the same letter as had been sent to the Claimant previously, but with the date of the meeting having been altered.

128. The Claimant contends that this letter was inappropriate and caused her to feel that she had done something wrong and that she was being pressured out of the business. This was as a result of the fact that the letter referred to the Claimant being able to have a representative at the meeting. However, other than the date of the meeting the letter was identical in every way to the two earlier letters that the Claimant had received about her flexible working application of which she made no complaint. That included being invited to have a representative present. The Claimant was not able to provide a reasonable explanation as to why it was only that one letter where she found the identical content to be objectionable.

129. After the meeting, the Claimant emailed Mr. Edgeley saying that there was too short notice for her to prepare (the meeting having been scheduled for the following day) and that she had no time to arrange representation. It is telling that the Claimant mentioned nothing in that email about the aggression or inappropriate behaviour that she now says Mr. McGuiness and Mr. Edgeley exhibited during the meeting. Mr. McGuiness rearranged the meeting to 11th June 2018 although it never in fact took because the Claimant took a further period of sick leave and never returned to work prior to her resignation.

130. The Claimant contends that she was investigated by the Respondent as a result of what she had told Occupational Health. We do not accept that to be the case. The only issue in that regard is that Mr. Edgeley had used the Respondent's note pad entitled "Investigation Meeting Notes". Whilst Mr. Castillo was at pains to take Mr. Edgeley to the many other sources of paper that he could have used such as one of Mr. McGuinness's notebooks or paper from a printer, that misses the point that the paper used was the exact same paper that had been used to record the flexible working meeting. It is not suggested that the Claimant was being investigated in terms of her flexible working application and again her evidence was unable to explain why the use of the same paper was objectionable in one meeting but not in the other.

131. Earlier in the day and before the meeting with Mr McGuinness and Mr. Edgeley there had been a team meeting at which Mr. McGuiness had made rather robust statements about targets. The Claimant contends that that was mainly directed at her. Whilst that may have been her impression given that she felt nervous about her return to work, we do not accept that it was the reality and Mr. McGuiness was simply directing his words to all members of the sales team in an attempt to motivate them to hit their targets. Mr. McGuiness had no reason to single the Claimant out because he viewed her as a top performer.

Discussion with Mr. Castillo

132. After the incident in the office Mr. Castillo attended the health centre, where he was a member, to train. Mr. McGuiness sought him out and asked to have a conversation with him in his office. Mr. Castillo was not unknown to Mr. McGuiness because as well as being a client of the health centre he had also attended a job interview for a position there and had been interviewed by Mr. McGuiness.

133. We accept that Mr. McGuiness initiated the conversation with Mr. Castillo because he was concerned that the Claimant had been upset when she left the meeting. He did refer in terms to whether Mr. Castillo was angry with him but we accepted his evidence that that was because if his wife had been upset then he might well have reacted negatively and thought that Mr. Castillo might do the same.

134. The Claimant contends that during that meeting Mr. Castillo was told private and confidential information about her. She would not be drawn in cross examination as to what that was said to be which we found somewhat unusual given, if it was true, she must have been told about that by Mr. Castillo. Similarly, Mr. Castillo's witness statement did not provide any detail about that issue either despite it being in reality the only allegation on which he could provide any direct evidence.

135. We therefore do not find that anything inappropriate occurred or that Mr. McGuiness divulged and personal or confidential information. However, we do accept that Mr. Castillo did make the comment, as Mr. McGuiness contends, that it was "just Kayleigh being Kayleigh". We take that to mean that she had overreacted. Although Mr. Castillo denied having made that comment we preferred the evidence of Mr. McGuiness and note that he was not challenged at all on that part of his evidence in cross examination.

Grievance and appeal

136. After speaking with HR, the Claimant raised a grievance on 12th June 2018.

137. The grievance was a lengthy document running to some six pages and we do not therefore set it out here in full but it covered the following issues:

- Flexible working hours;
- Basic pay – which referred to the equality of pay with the male Duty Managers issue;
- The letter from Mr. McGuiness about contact;
- The call where the Claimant had been on speakerphone;
- Unfair and last minute shift changes;
- The team meeting on 4th June 2018;
- The letter handed to the Claimant on 4th June 2018;
- The return to work meeting;
- The sharing of the occupational health report;
- Being verbally attacked and bullied about the report contents;
- Being investigated about the content of the report; and
- The conversation between Mr. McGuiness and Mr. Castillo where it was said that confidential information had been shared.

138. The Claimant dedicated only a short paragraph to the meeting with Mr. McGuiness and Mr. Edgeley and it bears setting out in full because it caused us to have considerable doubts as to the credibility of her evidence. That paragraph said this:

"On Monday 5th June 2018[4] again, as I was preparing to leave the business to go home I was asked by David (DGM) if we could do my return to work and he said we had to do it in John's office.

As I entered the office, John was also in there with his Diary and a pen as if to make notes.

During the time David was talking to me John was also taking notes and questioning me. This whole process caused me to feel uneasy and bullied. I felt pressured and intimidated as I know this is not the normal procedure, or at least the procedure I had been taught/informed of by John."

139. As we have already touched upon above, the Claimant did not set out in the detail that she now does as part of these proceedings about how she feared for her safety and believed that she was going to be physically attacked so that she was forced to flee the office. We are satisfied that there has been significant exaggeration in respect of the Claimant's evidence on this point during the course of these proceedings. The grievance letter was the perfect place to set those matters out and we did not accept the Claimant's evidence that she did not do so because she was scared for her job. By that point the Claimant had already determined that she was not going to return to work for the Respondent and that nothing could be done to remedy the situation.

[4] This should in fact by 4th June 2018.

140. The Claimant's grievance was passed to Damion Groom who is a Senior General Manager for the Respondent. We are satisfied that he was independent and an appropriate person to deal with the matter.

141. The Claimant attended a grievance meeting with Mr. Groom on 27th June 2018. We are satisfied that the notes of the meeting which appear at pages 126 to 139 of the hearing bundle are an accurate account of what took place.

142. The Claimant was given full opportunity by Mr. Groom to set out all of the details of her grievance and we did not accept that there was any barrier to her doing so. Particularly, we do not accept that the note taker at the meeting was friends with Mr. McGuinness and therefore likely to report back to him as the Claimant contends. The Claimant did not make any complaint about the note taker to Mr. Groom.

143. All that the Claimant said to Mr. Groom about Mr. McGuiness and the meeting of 4th June was that she thought that his tone had been aggressive and that he was angry. Again, it is telling that she did not mention any of the extreme behaviour that she now relies upon and made no mention of being in fear for her safety. Again, had that happened the Claimant would clearly have told Mr. Groom about that and we did not accept her explanations as to why she did not do so.

144. Mr. Groom also spoke with Mr. McGuiness on 27th June 2018 and Mr. Edgeley on 3rd July 2018.

145. Mr. Groom wrote to the Claimant on 10th July 2018 with the outcome of her grievance. He dealt with each aspect of the grievance in turn. As to the flexible working issues he upheld that aspect of the grievance as whilst he indicated that Mr. McGuiness had hoped to resolve matters informally, he found that the Claimant should have been told about the formal flexible working application process when she initially raised the issue.

146. The issue about equal pay was not upheld on the basis that Mr. Groom concluded that it had already been rectified by Mr. McGuinness. He also rejected the aspect of the grievance about the letter from Mr. McGuiness whilst she was off sick on the basis that he considered it appropriate to send it because there had been no contact from the Claimant.

147. Mr. Groom indicated as to the telephone call aspect of the grievance that he was unable to make a finding on the point because Mr. McGuiness and Mr. Edgeley had said that she was aware of the presence of the latter and that she was on speakerphone during the call. He concluded that as this differed from the Claimants account, he was unable to make a finding about it.

148. He also concluded that it was reasonable for the Claimant to have been asked to use her lieu time when she could not work her full shift and that Mr. Edgeley had made a mistake when he issued the rotas on 30th May 2018 and she had not suggested any difficulty in completing that Saturday shift.

149. Mr. Groom did not uphold the part of the grievance that related to the team meeting on the basis that he was satisfied that all members of the team had been

present when Mr. McGuinness addressed them and nothing was directed to the Claimant personally.

150. He also did not uphold the part of the grievance about the Claimant's return to work meeting and that it was not unusual given the nature of her absence for Mr. McGuiness to have been present.

151. Mr. Groom did, however, uphold the Claimant's grievance about being asked to attend the flexible working meeting because he concluded that she should have been given a minimum of 48 hours notice. He also upheld the complaint about Mr. McGuiness having been provided with a copy of the Claimant's Occupational Health report because he was satisfied that her permission should have been sought before that was done. He did not, however, make any finding as to what had occurred at the meeting where the report was discussed as a result of the fact that there were differing accounts. He did, however, conclude that there was no investigation in respect of the Occupational Health report and did not uphold that part of the grievance.

152. He also did not uphold the part of the grievance about Mr. McGuiness having spoken to Mr. Castillo because he did not consider that he was able to make any finding on that point without independent evidence.

153. We consider the conclusions which Mr. Groom reached to be entirely fair and reasonable given the information which was available to him. Mr. Groom informed the Claimant of her right of appeal and the way in which that should be exercised.

154. The Claimant appealed against Mr. Groom's grievance outcome. Her appeal letter said this:

"I would like to appeal the decision made.

Nuffield Health have committed a serious breach of contract and as a result I am being bullied out of the business. I have been bullied, harassed and the stressed (sic) *at work and this has not properly been addressed. I feel this is because I am female and that they have something against me.*
I feel my grievance is not been (sic) *taken seriously. I am currently seeking legal advise* (sic) *as the way I have been treated has effected my mentally, personal* (sic) *and financially.*
I have been signed off work due to stress related anxiety and stress, which has effected (sic) *my day to day living. I have also suffered a loss of earning, future earnings and my pension."*

155. The Claimant's appeal was passed to David Richardson, Hospital Director. Mr. Richardson worked in a completely different part of the business. He was therefore independent and sufficiently senior to deal with the appeal.

156. Mr. Richardson met with the Claimant on 29th August 2018. The Claimant was represented at that meeting by a Trade Union representative. The notes of the meeting are at pages 152 to 158 of the hearing bundle and we are satisfied that they are an accurate account of what was discussed. Again, we are also satisfied that the Claimant was given the opportunity to say anything that she needed to say at that meeting to put forward her appeal and her point of view.

157. As to the return to work meeting, although the Claimant described Mr. McGuiness as "raging" she again did not provide the detail that she did in these proceedings about her being in fear for her safety and having to escape from the room. Again, there is no reason for the Claimant to have left out that detail and we conclude again that she has exaggerated what happened as the matter progressed and particularly during the course of these proceedings.

158. Mr. Richardson asked the Claimant during the meeting what personal information it was said had been divulged by Mr. McGuiness to Mr. Castillo at the gym. That was on the basis that Mr. Groom had not been able to make a finding about that issue. The Claimant did not provide that information but her Trade Union representative said that Mr. Castillo would send in a statement for Mr. Richardson to consider. That never in fact happened and we were not provided with any explanation about why he had not done so when Mr. Bownes raised that in cross examination.

159. At the conclusion of the appeal meeting Mr. Richardson asked what could be done as it was made plain by the Claimant's Trade Union representative that there was a clear lack of trust and bridge building had to be done. The Claimant raised that trust had totally gone and she did not know how she could make things work. Mr. Richardson asked if there were any other local gyms that the Claimant could transfer to but she replied that there were none. He also indicated that the Respondent would need to arrange a mediation session and made plain that they wanted the Claimant to return to work.

160. Mr. Richardson wrote to the Claimant on 5th September 2018 with the outcome of her appeal. Whilst on the whole Mr. Richardson agreed with the conclusions that Mr. Groom had reached, there were a number of areas where he departed from those conclusions and partially upheld the Claimant's appeal.

161. The first of those was about the call that the Claimant had with Mr. McGuiness whilst on speakerphone. He concluded in that regard that the Claimant should not have been put on speakerphone and Mr. McGuiness should have taken the call alone. He also upheld part of the grievance relating to flexible working as he concluded that the Claimant should have been provided with a copy of the flexible working policy and an explanation of how it worked. He indicated that he would recommend that her application was revisited upon her return to work and that rotas should be provided with more than two weeks notice.

162. Mr. Richardson also concluded that the return to work meeting could have been dealt with more sensitively and perhaps on a one to one basis and therefore partially upheld this part of the appeal.

163. Mr. Richardson concluded the appeal letter by setting out the recommendations that he intended to make which were as follows:

"As discussed with you during the hearing, I believe a mediation session between yourself and John and yourself and David would be beneficial and will enable you to return to work. As previously mentioned, I also feel we need to address your flexible working application as a matter of urgency. I will liaise with the Senior General Manager of your region to facilitate this."

164. We are satisfied that the way in which Mr. Richardson dealt with the appeal and the conclusions and recommendations which he reached were both fair and reasonable to the Claimant. Particularly, it is difficult to know what else he could have been expected to do other than propose mediation to enable the Claimant to return to work.

165. He had explored other proposed solutions such as a move to a different health club but the Claimant had rejected that because of the travel that would be involved. Therefore, as the Respondent was committed to seeing the Claimant return to work mediation was the only sensible proposal to try and rebuild the bridges that the Claimant's Trade Union representative had referred to at the appeal meeting.

Resignation

166. On 1st October 2018 the Claimant emailed Mr. Richardson tendering her resignation. Her letter of resignation said this:

> *"I would like to inform you that I am resigning from my position as Duty Manager with immediate effect from Nuffield Nottingham. Please accept this as my formal letter of resignation. I feel I am left with no choice but to resign in light of the fundamental breach of contract, bullying, breach of trust and confidence and that none of these issues have been satisfactorily resolved. I have lost all trust and confidence in the business. It is unreasonable that the company accepts that it is okay for a General Manager to discuss and employee* (sic) *concerns with anyone other than the employee without the consent of the employee. The above experiences has* (sic) *effected my mental health and well-being."*

167. The Claimant's evidence was that she elected to resign at that point because she had reached the end of her Fit Note.

CONCLUSIONS

168. Insofar as we have not already done so within our findings of fact above, we deal here with our conclusions in respect of each of the remaining complaints made by the Claimant.

Indirect sex discrimination

169. The first complaint of indirect discrimination relates to the Claimant's email to Mr. McGuiness on 13th March 2018 where she asked to reduce her shifts by one per week.

170. The PCP relied on by the Claimant is the requirement to work full time. We take judicial notice of the fact that predominantly more women than men have primary responsibility for childcare and therefore a requirement to work full time places more women than men at a particular disadvantage.

171. However, we also need to consider whether the Claimant was placed at that disadvantage. We do not accept that she was. It is clear to us from the email itself that the purpose of the Claimant making her request was that she did not feel that she was spending enough time at home with the children. The issue is one of a work life balance and her wanting to spend quality time with her family.

172. Whilst that is understandable it is not an issue that predominantly affects more women than men. Whilst there was reference to childcare being a "nightmare", the Claimant's oral evidence was that prior to Mr. Castillo's 12 week training period there was no difficulty with childcare when she was working full time hours. Her later emails to Mr. McGuiness also indicated that after that 12 week period things would return to normal in terms of childcare arrangements and that was also consistent with her oral evidence before us.

173. It follows that this aspect of the claim fails and is dismissed because the PCP did not disadvantage the Claimant for childcare reasons but because she wanted to spend more time with her children. As we have observed, that does not affect more men than women or, at least, we have not been taken to anything by the Claimant or Mr. Castillo to demonstrate statistically that that is the case.

174. There is also the Claimant's request made on 4th April 2018. Mr. Castillo relies on the same PCP, namely the requirement to work full time hours. Again, we take judicial notice of the fact that that places more women than men at a particular disadvantage. We then go on to consider if that placed the Claimant at a particular disadvantage. Again, we are satisfied that it did not. The difficulty that the Claimant had was working certain shifts – a matter that we did explore with Mr. Castillo – outside school hours. It was not per se the requirement to work full time that placed her in difficulties. However, in all events the Claimant was never placed at a disadvantage because she has not been able to take us to one instance during that 12 week period where her requirements were not provided for in the shifts that she was allocated. That is with the exception of the shift when she was asked to use lieu time but, as we have already said, that was a perfectly proportionate and reasonable stance for Mr. Edgeley to have taken despite it not having been the Claimant's preference and it still saw her childcare needs being accomodated.

175. This aspect of the claim also fails and is dismissed for the reasons given above.

176. Insofar as the Claimant's application for flexible working made in May 2018 is concerned, this aspect of the claim also fails for the same reasons as the first indirect sex discrimination complaint because the purpose of the application was to allow the Claimant the opportunity to spend more time with her children as family time and not for the purposes of providing childcare when none was otherwise available.

177. We should say that had we not reached the above conclusions on all three complaints of indirect sex discrimination then we would have nevertheless dismissed them on the basis that we would have found the Respondent's objective justification defence to be made out. Whilst Mr. Castillo and the Claimant appear to have advanced matters on the basis that any flexible working application must automatically be granted if made by a working mother, that completely overlooks that the Respondent is entitled to consider whether the application can be accommodated and meet the needs of the business. We were satisfied from the Respondent's evidence that Duty Managers needed to work on a full time basis so as to meet the needs of the business although they were of course willing to explore other options to accommodate the request such as a return to reception duties. However, that was not possible because the final flexible working application meeting never took place.

178. There is a second strand to the Claimant's complaint of indirect discrimination. That is what the Claimant refers to as "unfair and last minute shift changes" in May 2018. The Claimant has in fact only taken us to one instance which was on 30th May 2018. Firstly, we would observe that that was neither unfair nor last minute. The reason that the shift was changed was simply as a result of an error on Mr. Edgeley's part. It was rectified just seven minutes later. It was also not last minute. The Claimant had only had the rota or seven minutes before it was changed and it was a further ten days before she had to work the Saturday shift in question.

179. Her email to Mr. McGuiness of 4th April 2018 made it plain that she was "fine" to do weekends and she gave no indication to the Respondent at the time that she had any difficulties in working the Saturday shift rather than the Sunday shift because she did not have childcare in place. We are satisfied that had that genuinely been the case then she would have made that plain as she did on other occasions.

180. The Claimant relies in respect of this aspect of the claim on the same PCP as for the other complaints. We are not satisfied that that is the correct PCP because a change in shifts ultimately has little if anything to do with working full time.

181. However, whilst we accept that changing shifts on a last minute basis may affect proportionately more women than men as a result of childcare provision, for the reasons given above this did not place the Claimant at that particular disadvantage because there is nothing to suggest she did not have childcare on that one isolated occasion.

182. It follows from what we have said above that all complaints of indirect sex discrimination fail and are dismissed.

Direct sex discrimination

183. The first allegation of direct sex discrimination is the issue of the Claimant's pay and the fact that she did not receive a pay increment under the pay review scheme.

184. The Claimant compares herself with actual comparators – namely the other two male Duty Managers who received a two percent pay increment compared to the one percent that the Claimant received.

185. However, to be actual comparators there must be no material differences between those individuals and the Claimant. In these circumstances there was a very plain material difference. Under the terms of the annual pay review employees were not eligible for a pay review if they had received a pay rise on or after 1st October 2017. The Claimant had had a pay rise upon her promotion to Duty Manager in November 2017. There is no suggestion that either of the two Duty Managers had had a pay rise on or after 1st October or that for some other reason they were met other criteria which made them ineligible under the scheme. As such, they are not appropriate comparators because their circumstances were materially different to the Claimant.

186. There being no actual comparator, it is necessary to consider the make up of a hypothetical comparator. That comparator would be a male Duty Manager who had also received a pay rise on or after 1st October 2017. That comparator

would also have been ineligible to receive a pay review and there is nothing at all to suggest that they would have been treated any differently to the Claimant. She has certainly advanced no facts from which we could draw any inferences about that.

187. This is a case where it is possible to simply move to the "reason why" the Claimant did not receive a two percent pay review. That was nothing to do with her sex but quite simply the fact that she was ineligible under the annual review scheme. In fact, the Claimant was treated more favourably than she should have been under that scheme when Mr. McGuiness arranged the one percent one off payment and later pushed for her to receive the full two percent.

188. As such, the decision not to initially give the Claimant a two percent pay award was not an act of direct sex discrimination and this part of the claim fails and is dismissed.

189. The second allegation of direct sex discrimination is the sharing of the Claimant's Occupational Health report by Mr. Edgeley with Mr. McGuinness. That was plainly inappropriate and it did subject the Claimant to detriment because it caused her embarrassment that that had happened without her knowledge and consent.

190. However, the Claimant has advanced no facts from which we could conclude that her sex had anything at all to do with Mr. Edgeley sharing the report with Mr. McGuinness other than her insistence on that point. That is not enough and the burden of proof has not shifted in respect of this allegation. However, in all events we accept the evidence of Mr. Edgeley that he acted as he did because he wanted to seek guidance from Mr. McGuiness. That, not the Claimant's sex, was the reason that the report was shared.

191. This allegation of direct discrimination therefore also fails and is dismissed.

192. The next allegation of direct discrimination is what is said to be the behaviour of Mr. McGuiness and Mr. Edgeley during the return to work meeting. This part of the claim fails on its facts because we are satisfied that the Claimant has exaggerated what happened at the meeting and she was not bullied by Mr. McGuinness or Mr. Edgeley. In fact, it was the Claimant who raised her voice and swore and not the other way around.

193. Whilst Mr. McGuinness did express concern about what the Claimant had told Occupational Health, there are no facts from which we could conclude that that was because of the Claimant's sex or that a male member of staff who had raised issue about matters that it was believed had already been resolved would not be subject to the same comments. Again, therefore, the burden of proof does not shift to the Respondent.

194. However, we are satisfied in all events that the reason that Mr. McGuiness made his comment was because he was concerned that the Claimant was raising matters that he genuinely believed to have already been resolved and could not understand why that was the case.

195. This allegation therefore also fails and is dismissed.

196. The next allegation of direct discrimination is that the Claimant was investigated in relation to the Occupational Health report. The sole basis for this aspect of the

claim is that the notes taken by Mr. Edgeley were written on investigatory meeting notes paper. As we have found above, that is simply because that was the paper which was to hand. It was no different to the flexible working meeting notes of which the Claimant makes no complaint. There was therefore no investigation of the Claimant. Insofar as the Claimant was told by Mr. McGuiness that he had concerns about the content of the report, that was not an investigation, but in all events there is nothing to suggest that that was because the Claimant was female. This allegation therefore also fails for the same reason as that directly above.

197. The final allegation of direct discrimination is said to be the conversation between Mr. McGuiness and Mr. Castillo in the gym. It is said that Mr. McGuiness disclosed private and confidential information to Mr. Castillo but as we have observed above we have never been told what that was alleged to have been. We heard no evidence from the Claimant's side about that and it was not put to Mr. McGuiness in cross examination what he was supposed to have divulged. This aspect of the claim therefore fails on its facts. We are satisfied that all that occurred was that Mr. McGuiness asked Mr. Castillo if the Claimant was alright because he was concerned about her after the meeting. That did not subject the Claimant to any detriment nor is there anything to suggest that it had anything at all to do with the Claimant's sex.

198. All acts of direct discrimination therefore fail and are dismissed.

Harassment

199. The first allegation of harassment is the letter that Mr. McGuinness handed to the Claimant at the return to work meeting inviting her to a further meeting to discuss her flexible working application. The main issue as to this letter, according at least to the Claimant's scott schedule, appears to be that she was invited to be accompanied by a work colleague or Trade Union representative.

200. The first question is whether the conduct was unwanted. It is difficult to see how that could be the case given that the Claimant had made a flexible working application and was aware that a further meeting was necessary to discuss it.

201. However, even if that was not the case it cannot reasonably be said that handing the Claimant the letter had the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The letter was simply intended to invite the Claimant to a further meeting with the intention of addressing the outstanding issues with regard to the flexible working application.

202. We are also not satisfied that it had that effect having regard to an objective, reasonable standard and the perception of the Claimant. Aside from the date of the meeting the letter was identical in terms to that which the Claimant had been sent previously and which she had taken no issue with. That included the invitation to be accompanied at the meeting. The Claimant has not been able to give us any reasonable explanation as to why the content of this letter amounted to harassment but that which was sent on an earlier occasion did not.

203. Finally, we are not satisfied that the handing to the Claimant of the invitation letter related to her sex nor has she or Mr. Castillo been able to assist us with that. Whilst predominantly more women than men might make flexible working

applications they are by no means confined to female workers. As such, we do not find that the letter or its contents related to the Claimant's sex.

204. Therefore, for all of those reasons this allegation of harassment fails and is dismissed.

205. The next act of harassment alleged is the sharing of the Claimant's occupational health report with Mr. McGuinness. We accept that this conduct was plainly unwanted. Whilst it did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her we accept that objectively it did have that effect on the Claimant. She found the situation embarrassing and distressing that her personal medical information had been shared without her knowledge or consent.

206. However, the sharing of the Occupational Health report was not in any way related to the Claimant's sex and again neither she nor Mr. Castillo have been able to provide any reasonable explanation as to why this is said to be the case other than it is because the Claimant is female which of course falls far wide of the mark.

207. It follows that this allegation of harassment also fails and is dismissed.

208. The next allegation of harassment relates to the Claimant's contention that she was "verbally attacked and bullied" as to the content of the Occupational Health report. This aspect of the claim fails on its facts for the same reasons as we have already set out above in respect of the complaint of direct discrimination.

209. However, even if that was not the case again there has been no reasonable explanation as to why such matters were said to be related to the Claimant's sex.

210. Therefore, this complaint of harassment also fails and is dismissed.

211. The next complaint of harassment is the allegation that the Claimant was investigated in relation to the content of the Occupational Health report. Again, this is a complaint which fails on its facts because there was no investigation for the reasons that we have already set out above. Moreover, again there is nothing at all to suggest that there was any link to the Claimant's sex as to the way in which the notes were written.

212. The final act of harassment also fails on its facts given that we are satisfied, as we have already set out above, that Mr. McGuinness did not, as the Claimant contends, divulge private work related or personal details to Mr. Castillo. Moreover, even had we found that to have happened there is no link to say that such matters related to the Claimant's sex and neither she or Mr. Castillo have been able to assist with that point.

213. It follows that all complaints of harassment fail and are dismissed.

<u>Victimisation</u>

214. The first question that we need to consider is whether the Claimant did a protected act or acts within the meaning of Section 27 Equality Act 2010. We can answer this in short terms because Mr. Bownes concedes that the information given to Occupational Health by the Claimant and as recorded in their report amounted to the doing of a protected act.

215. The first act of victimisation complained of is the letter handed to the Claimant at the return to work meeting inviting her to a flexible working meeting the following day. The first question is whether that letter subjected the Claimant to detriment. We remind ourselves that detriment in this context falls to be viewed as to something reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage.

216. We cannot see that the letter or its contents could be seen to be a detriment to the Claimant. Save as for the date of the meeting it was identical to the earlier letter that the Claimant had been sent on or around 23rd April 2018 about which she makes no complaint. The part which the Claimant contends was objectionable – namely the invitation to have a representative – was also included in the earlier letter and again the Claimant made and makes no complaint about that.

217. However, even had we found that the letter amounted to a detriment, other than assertion to that effect there is nothing at all to suggest that the content of the letter was materially influenced (or influenced at all) by what the Claimant had told Occupational Health and what was reflected in their report. It is clear that the reason why the Claimant was handed that letter was the desire of Mr. McGuiness to finalise the flexible working application which the Claimant had made at the earliest opportunity following her return to work from ill health absence.

218. That complaint of victimisation is therefore not well founded and it is dismissed.

219. The next complaint relates to Mr. Edgeley having shared the content of the Claimant's Occupational Health report with Mr. McGuiness. We are satisfied that this incident placed the Claimant at a detriment given that she was embarrassed and distressed to find that her confidential medical information and what she had told Occupational Health had been shared with Mr. McGuiness without her knowledge or consent.

220. However, neither the Claimant's evidence, Mr. Castillo's cross examination or his submissions have assisted us as to the reason that the Claimant says that the fact that she had done a protected act materially influenced the actions of Mr. Edgeley. Moreover, we are satisfied from the evidence that the reason why Mr. Edgeley shared the report was to obtain guidance from Mr. McGuiness. Whilst that was clearly misguided, we accept that Mr. Edgeley acted with what he thought were the best of intentions. This complaint of victimisation therefore also fails because Mr. Edgeley was not influenced, let alone materially influenced, by what the Claimant had told Occupational Health.

221. The next act of victimisation is what the Claimant has termed as being "verbally attacked and bullied" regarding the content of the Occupational Health report. This complaint fails on its facts for the reasons that we have already given above. Whilst Mr. McGuiness did express concern about what the Claimant had told Occupational Health, that was not because she had made complaints of discrimination but because he believed that the matters raised had already been resolved and wanted to understand why the Claimant felt otherwise.

222. Similarly, the last two complaints of victimisation – namely being investigated in relation to the content of the Occupational Health report and confidential information being divulged to Mr. Castillo – also fail on their facts for the reasons

that we have already given and the fact that again there is no link between the protected act relied upon and the acts complained of.

223. It follows therefore that all complaints of victimisation fail and are dismissed.

Jurisdiction

224. Although not strictly necessary as a result of the findings of fact that we have made, we turn finally to consider whether, if we had found any of the complaints to have been made out which were not presented within the relevant statutory time limit, we would have extended time to allow them to proceed. We deal with this matter only very briefly, however, on the basis that we have dismissed all of the Claimant's complaints on their merits.

225. The earliest "in time" complaint given the date on which the Claimant initiated ACAS early conciliation is 30th August 2018.

226. Whilst the Claimant contends that she was suffering from stress and depression there is no evidence that that prevented her from issuing proceedings. Indeed, she was able to engage in the grievance and appeal processes, including attending meetings, which would have been more taxing in nature than initiating early conciliation. The Claimant has also suggested that she was fearful for her job if she issued proceedings but we do not accept that as we are satisfied from the Claimant's own account that she never intended to return to work after the meeting with Mr. McGuinness and Mr. Edgeley in June 2018. There was nothing therefore that prevented her from taking steps to initiate proceedings at that time and there is therefore no good reason advanced as to why we should extend time.

227. Mr. Castillo was assisting the Claimant and was receiving advice from others who he said had been in similar situations. Mr. Castillo and the Claimant are clearly professional and intelligent individuals who would have been able to have the ability to research her rights and how to enforce them even if they were unable to obtain legal advice. There is no evidence that they did that but the opportunity was clearly there to enable them to do so in a timely fashion.

228. Given that position, any complaint predating the dates set out above had we found them to be well founded would have been dismissed because the Tribunal did not have jurisdiction to consider them and the Claimant has not advanced any good reason to persuade us that it would be just and equitable to extend time.

Constructive dismissal

229. Finally, we turn to the complaint of automatically unfair dismissal.

230. The question that we need to consider is whether the Respondent acted in such a way as to breach the implied term of mutual trust and confidence. The Claimant relies of course on the following events as to that alleged breach:

(a) The failure to allow the Claimant flexible working hours to allow her to maintain her childcare and work life balance;

(b) Not being given a two percent pay review along with the other Duty Managers;

(c) Being sent the letter by Mr. McGuiness which suggested that she had not been in contact with the Respondent;

(d) Mr. McGuiness conducting a telephone call with the Claimant at which Mr. Edgeley was also present;

(e) The letter and content of the letter inviting the Claimant to a flexible working meeting which was given to her at the meeting on 4th June 2018;

(f) Mr. Edgeley sharing the content of the Claimant's Occupational Health report with Mr. McGuiness;

(g) Being "verbally attacked and bullied" about the content of the report;

(h) Being investigated in relation to the content of the report;

(i) Mr. McGuiness disclosing confidential information about the Claimant to Mr. Castillo; and

(j) The outcome of the Claimant's grievance appeal where it was suggested that she enter into mediation with Mr. Edgeley and Mr. McGuiness.

231. We do not accept that those matters, either singularly or cumulatively, were such as to breach the implied term of mutual trust and confidence as the Claimant alleges. Particularly we would note the following:

a. The Claimant knew of the requirements of the role before she applied for it and the hours of work that it entailed. The Respondent was entitled to consider the needs of the business and were not responsible for making adjustments to the requirements of the Duty Manager position to accommodate the Claimant's desire to spend more quality time with her children. Working a full time role of this nature does not equate to a lack of work life balance. In respect of the issues of childcare, on all occasions that the Claimant needed flexibility over the 12 weeks of Mr. Castillo's training period that was accommodated by the Respondent and they were actively considering her flexible working application;

b. The reason that the Claimant was not given the pay award of two percent was because she was not entitled to it under the pay review scheme. She had already been promoted and received a pay increase just a few months earlier and as such was not entitled to the award. Despite that, Mr. McGuiness treated the Claimant more favourably than he needed to have done by pushing the Respondent for a two percent award even though she was not entitled to one, giving her a one off payment equivalent to a one percent pay rise and then pressing for a further payment when the Claimant drew his attention to the salary level set out in the job advertisement that she had sent to him. The Claimant was not in these circumstances treated less favourably than the other Duty Managers;

c. Objectively there was no issue with Mr. McGuiness sending the Claimant a "non-contact" letter. He had asked the Claimant to contact him and she had not done so. As a manager he was entitled to require the Claimant to make such contact to discuss her well being and when she might be able to return to work. In our experience that is common and standard practice;

d. It was insensitive of Mr. McGuiness to have his telephone call with the Claimant on speakerphone with Mr. Edgeley present and it would have been better for him to have had that conversation in private. However, he understood that the Claimant was aware that Mr. Edgeley was also in the room and that she was on speakerphone and we are satisfied that that was conveyed to her, it is possible that she did not take it in. It would have been better to have had the discussion as a one to one but this is not a matter so serious when taken either in isolation or cumulatively with other issues which was destructive of trust and confidence;

e. There was nothing wrong with the letter that was handed to the Claimant on 4th June 2018 inviting her to the flexible working meeting. It was in identical terms to that which the Claimant had previously received, including being able to bring a representative, and she makes no complaint about those other letters. The Claimant should have been given more notice of the meeting but as soon as she requested that, Mr. McGuiness agreed and rescheduled it;

f. It was wrong of Mr. Edgeley to share the content of the Occupational Health report with Mr. McGuiness without seeking the Claimant's consent to do so – a fact that he readily acknowledged at the hearing before us. However, that action was not of itself or coupled with any other issue destructive of trust and confidence and we note of course that the Claimant had readily discussed personal information with Mr. McGuiness previously during their earlier telephone conversation;

g. The Claimant was not "verbally attacked and bullied" over the content of the Occupational Health report;

h. She was also not investigated over the content of the same report;

i. Mr. McGuiness did not disclose confidential information to Mr. Castillo; and

j. The decision of Mr. Richardson was entirely fair and reasonable on the facts before him. He was keen to ensure that the Claimant could return to work and explored what options could be available to facilitate that. The Claimant had said that she was not able to work at a different gym and the only other option available was to consider workplace mediation. That was, in our view, a positive and not negative step. It remains unclear what, otherwise, the Claimant expected Mr. Richardson to do to resolve matters.

232. For those reasons, we do not accept that by looking at an objective assessment it could reasonably be said that the Respondent's conduct was sufficiently serious to amount to a breach of the implied term of mutual trust and confidence.

233. Moreover, the last straw that the Claimant relies on was of course the appeal outcome of Mr. Richardson. This is one of those cases where that last straw was, for the reasons already set out, entirely innocuous and therefore did not entitle the Claimant to resign and treat herself as dismissed.

234. Furthermore, we are not satisfied that the Claimant resigned in respect of that matter in all events. She had already determined in June 2018 that she was not going to return to work for the Respondent after the meeting with Mr. McGuiness and Mr. Edgeley. She nevertheless continued in their employment and continued to accept sick pay and to any degree that we had found that there was any earlier breach or breaches, the Claimant's actions affirmed it. The Claimant's eventual resignation was only prompted, on her own evidence, by the expiration of her Fit Note.

235. For all of the reasons that we have given, the claim therefore fails and is dismissed in its entirety.

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Employment Judge Heap

Date: 11th July 2021
JUDGMENT SENT TO THE PARTIES ON

20 July 2021
FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.