EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104612/2020

Final Hearing Held by Cloud Video Platform (CVP) on 21, 22, 26 and 30 July and 24 August 2021

Employment Judge M Sutherland
Tribunal Member J Lindsay
Tribunal Member A Matheson

Miss Sharon Craig	**Claimant** **In person**
Symbiosis Pharmaceutical Services Ltd	**Respondent** **Represented by:** **Ms D Reynolds,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

1. The complaint of direct sex discrimination does not succeed and is dismissed.

2. The complaint of automatically unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. The claimant made complaints of automatically unfair dismissal in respect of working time under Section 101A of the Employment Rights Act 1996 ('ERA 1996') and of direct sex discrimination under Section 13 of the Equality Act 2010 ('EA 2010').

2. Following discussion the claimant confirmed that she was asserting that the sole or principal reason for her dismissal was either that she refused to comply with a requirement to work on Sunday 21 June 2020 in breach of her entitlement to weekly rest under Regulation 11 of the Working Time Regulations 1998 ('WTR 1998') (Section 101A(1)(a) or she refused to forgo that right (Section 101A(1)(b) ERA).

3. Following discussion the claimant confirmed that she alleged that she was treated less favourably than the male Team Leaders in May 2020 when Scott Wear blamed her for a critical piece of equipment going missing and also throughout her employment when Scott Wear excluded her from team briefings. The claimant confirmed that the following assertion was given as background supporting information only: that until April 2020 Scott Wear would give instructions via Steven McIlleney, a member of her team, rather than to her. The claimant confirmed that she was not asserting that her dismissal amounted to direct sex discrimination.

4. The claimant appeared on her own behalf. The respondent was represented by Ms D Reynolds, Solicitor.

5. Parties had prepared a joint bundle of documents. Following discussion additional documents were lodged during the hearing and the claimant was given additional time to consider these documents.

6. The claimant gave evidence on her own behalf and led evidence from Lori Beveridge. The respondent led evidence from John McCormick, Lorraine Den-Kaat and Scott Wear.

7. The respondent prepared written submissions which were expanded upon in oral submissions. The claimant prepared written submissions in

response which were expanded upon in oral submissions. A hearing on submissions was held on the morning of 24 August with the members' deliberations taking place in the afternoon. At the start of hearing on submissions the claimant advised that she had recently tested positive for COVID but was sufficiently well to participate in the remote hearing. Having regard to the claimant's status as a litigant in person the respondent gave submissions first.

8. The issues to be determined are as follows –

Section 101A ERA 1996

a. Was the sole or principal reason for the claimant's dismissal either that she refused to comply with a requirement to work which the respondent imposed (or proposed to impose) in contravention of Regulation 11 WTR 1998 (namely uninterrupted rest of not less than 24 hours in each 7 day period) or that she refused to forgo that right?

Section 13 EA 2010

b. Was the claimant treated less favourably than the respondent treats or would treat others because of her sex?

9. The following initials are used by way of abbreviation in the findings of fact -

Initials	**Name**	**Role**
EW	Elaine Wardlaw	Component Prep Team Member
IC	Ian Corrigan	Component Prep Team Member
JM	John McCormick	Operational Development Director
LDK	Lorraine Den-Kaat	HR Manager
SM	Stephen McIlleney	Component Prep Team Member
SW	Scott Wear	Manufacturing Manager

Findings in fact

10. The Tribunal makes the following findings in fact:-

11. The respondent manufactures sterile pharmaceuticals for clinical trials and commercial use within a licenced facility. The claimant was employed by the respondent as a Manufacturing Team Leader for Component Preparation from 30 September 2019 until 26 June 2020. The claimant initially had four direct reports in her team including SM, IC, EW. The claimant reported to SW, Manufacturing Manager. Two other Manufacturing Team Leaders (both of whom were male) also reported to SW along with three other roles (all of which were performed by females). SW reported to JM, Operational Development Director. The claimant was interviewed for the role by SW and JM.

12. The Competent Prep Team operated three pieces of equipment: the washer, the autoclave and the oven. The purpose of the claimant's role was to organise and coordinate the Component Preparation Team to ensure effective, efficient, compliant and safe process delivery. The claimant's role was distinct from that of the other Manufacturing Team Leaders who were responsible for core manufacturing rather than component preparation. The work of the component preparation team fed into the work of the core manufacturing teams.

13. The claimant had a three month probationary period which she passed.

14. The respondent conducts annual performance reviews. On 13 February 2020 SW held a performance review meeting with the claimant to agree her annual performance objectives. Those objectives included immediate provision of daily prep status updates (including progress on activities and resource planning) and completion of specified training in certain Standard Operating Procedures (SOPs) to specified competencies by March 2020 (including Gowning to Level C ('competent'); Cleanroom Cleaning Procedure to Level C; and Operation of the Autoclave to Level C). Completion of the training to the specified competence was required to be recorded in a training record. A trainer signature was required to verify the competency level.

15. The claimant considered it unnecessary for her to achieve Level C given her role as Team Leader and that it was sufficient for her to achieve Level S ('supervisory') – on the rare occasion she needed to perform the procedures a member of her team could supervise her because they always worked in pairs.

16. Most employees achieve Gowning competence within two months but some employees take longer than four months. The claimant was given a period of six months.

17. On 10 February 2020 SW raised an issue with the claimant regarding NCAAB filters not having been built by Component Prep on time which he described in his email to her as a "bit of a mess" and asked "How did we miss this?"

18. The claimant had a period of bereavement leave from 17 February to 23 March 2020. The respondent allowed the claimant additional time for completion of her training in light of the bereavement leave (although the claimant was not advised of this).

19. There were not team wide briefings (i.e. meetings) involving the whole of manufacturing. There was no schedule of meetings with the Team Leaders but rather such meetings took place as required. SW would brief Team Leaders and sometimes Team Members including SM directly (rather than through the Team Leaders). There were material differences between the work of Component Prep and Core Manufacturing. This generated differences in the nature and frequency of the briefings with the relevant Team Leaders. SW had less interaction with the claimant than he had with the other Team Leaders because of the material differences in their roles.

20. On 22 April 2020 SW raised an issue with the claimant re ACRAK and a failure to transfer equipment. He noted in the relevant email a failure to communicate and that avoiding delay was critical.

21. Towards the end April 2020 SM, a member of the claimant's team, was dismissed by the respondent for insubordination and bullying of the claimant.

22. On 30 April 2020 a non-sterile component left the Component Prep area and ended up in a clean (i.e. sterile) room within Manufacturing. The incident was very serious because of the risk of contamination. In May 2020 SW raised with the claimant that as Component Prep Team leader she ought to have reported the incident to SW as her line manager but failed to do so. SW also raised the incident with the relevant Manufacturing Team Leader.

23. By May 2020 the claimant had achieved the required competency in respect of some of the specified SOPs but had not achieved the required competency in respect of all of the procedures including Gowning, Clean Room Cleaning and Operation of the Autoclave.

24. The claimant's training record showed that she had achieved Level S in Gowning on 7 May 2020. The claimant then passed the Level C assessment in May 2020 but did not complete her training record and there was no trainer signature to verify that she had achieved Level C. Without this verification the claimant was not considered to have achieved Level C in Gowning. The claimant had completed her training record to show that she had achieved Level C in Operation of the Autoclave on 6 April 2020 but this had not been verified by a trainer. Without this verification the claimant was not considered to have achieved Level C in Operation of the Autoclave. The claimant had not achieved Level C in Clean Room Cleaning.

25. In early June 2020 the respondent were awarded a contract to manufacture sterile filled vials for clinical trials of the AstraZenica COVID-19 vaccine ('the AZ contract'). Fulfilment of the AZ contract generated significant additional work for the Component Prep Team from mid-June onwards prior to commencement of manufacture of the filled vials. The claimant and her team worked additional hours in June. The claimant considered that there ought to have been a second shift within Component Prep (like there was in Core Manufacturing).

26. On 3 June 2020 SW raised an issue with the claimant re BEDAC referring in the relevant email to "a few scheduling near misses recently" and the need to "avoid a situation like yesterday reoccurring." He stated "the prep

activities you are responsible for scheduling and sequencing have not been planned properly." He further stated "being in a situation where the team responsible for sterilising materials are not aware of what is required and for when, is really concerning. To then leave site and assume someone else would take responsibility and sort everything for the prep of this batch is completely unacceptable. Moving towards prep for AZ, we cannot drop the ball like this again. Please prepare a schedule detailing the next two weeks planned prep activity and send to me by Friday…I do not want to be in a position like yesterday, where we may not be able to progress a formulated manufacture".

27. On 5 June 2020 Billy Russell, Manufacturing Engineer, raised an issue with the claimant, regarding the washer cycle noting in the relevant email "this could easily have been avoided if there had been a little bit of discussion in advance". JM asked BR to copy in SW noting to SW "goes back to the lack of planning/critical thinking here". SW replied to JM noting "starting to be a recurring theme here" and noting "this does look like its heading only one way". SW raised issues with the claimant noting in the relevant email "Moving into a really hectic time, this needs to be fixed and a rapid improvement with immediate effect". SW advised JM who noted "The multiple issues are starting to stack up and now impact us. Probably Elaine and Steven were covering most of this and now this is leaving her [the claimant] exposed even more".

28. In early June 2020 SW was very concerned about the claimant's ability to perform her role and its impact on their ability to fulfil the AZ contract. He was concerned about her failure to provide updates on current and planned activities. He believed she was failing to perform the duties of her role and ought to be dismissed for poor performance. In early June he raised this with JM who in turn raised the issue with the Board.

29. The claimant's hours of work were Monday to Friday 7:00 AM to 3:00 PM (37.5 hours). Any additional time was normally recompensed by time off in lieu. The claimant did not normally work on a Saturday or Sunday.

30. During the period Monday 8 to Friday 12 June 2020 the claimant worked an additional 5 hours. During the period of Monday 15 to Friday 19 June

2020 the claimant worked an additional 6.5 hours. The claimant agreed to work on Saturday 20 June. On Thursday 18 June SW asked the claimant by telephone whether she would work the Sunday too. She refused stating that she was knackered and she had worked late all week – SW did not comment on her refusal. On Friday 19 June 2020 SW repeatedly asked the claimant for her plan for the weekend's preparation work.

31. On Saturday 20 June 2020 SW emailed the Component Prep Team and the Manufacturing Team and asked if anyone was available to support prep activities on Sunday. On Saturday 20 June the claimant worked 5 hours 15 minutes (from 7am – 12.15pm) for which she was paid overtime. On Saturday 20 June SW asked the claimant via EW if she would work the Sunday 12-4pm and the claimant replied via EW saying she was not available. The claimant did not work Sunday 21 June 2020.

32. On 23 June 2020 SW asked the claimant for her plan for the rest of the week. SW was frustrated about her failure to provide a plan of activities.

33. During the period Monday 22 to Friday 26 June 2020 the claimant worked an additional 1.5 hours. On Tuesday 23 June 2020 SW emailed the manufacturing team to ask them to consider working overtime or change their hours in order to complete a delayed manufacturing batch. On 23 June SW emailed the claimant asking whether Competent Prep team would work additional hours to support the back shift. The claimant replied advising that when she'd asked before they hadn't been keen but she would ask and let him know. SW emailed later that day asking if she had managed to speak to her team. The claimant replied that their response was the same as when she'd previously asked them.

34. On 25 June 2020 JM and SW discussed the issue of the claimant's performance and her possible dismissal with LDK, HR Manager. LDK advised that there was no requirement to adopt a formal procedure because she had less than two years' service. JM was not aware that the claimant had been asked and refused to work overtime on Sunday 21 June. In light of his discussions with SM and LDK, JM took the decision to dismiss. It was agreed that SW as her line manager would meet with her to advise her of the decision.

35. On 26 June 2020 the claimant was invited to a meeting with SW. She was advised that her employment was being terminated with immediate effect due to her poor performance. She advised having manufactured every batch on the production schedule. She asked for examples of where she had failed and he replied “It is what it is”. He did not provide her with any examples. She received a letter dated 29 June 2020 confirming the decision to dismiss her with one week’s pay in lieu of notice which stated that her employment “has not worked out”.

36. There were no formal warnings prior to her dismissal. There was no formal investigation report. She was not advised that she could be accompanied to the meeting. HR did not attend. There was no right of appeal. The claimant considered the lack of process to be unfair.

37. At the time of her dismissal the claimant’s gross salary was £36,000.

38. Following the termination of her employment with the respondent, the claimant made a number of applications for work each week until offered alternative employment. She was upset about having to find another job. The claimant secured alternative employment in August 2020 which did not start until 2 November 2020.

Observations on the evidence

39. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.

40. On the whole the claimant gave her evidence in a measured and consistent manner and there was on the whole no reasonable basis upon which to doubt the credibility and reliability of her testimony. There were occasions on which the claimant gave her evidence in a self-serving manner as noted below. (For example, the claimant asserted that SW “just expected us to work weekends routinely” when in fact she was only asked to work a weekend (both Saturday and Sunday) once). In the circumstances the claimant came across on the whole as credible and reliable.

41. Lori Beverage gave very limited evidence but the evidence she gave was in a measured manner without hesitation.

42. Scott Wear answered questions in a full and measured manner and without material hesitation. He did not seek to answer in a self-serving manner. His answers were consistent with the contemporaneous documentary and other evidence. He came across as both credible and reliable. The only exception to this was his confidence that he had not telephoned the claimant on Thursday 18 June 2020 which we considered was misplaced in circumstances where it was possible that he had phoned and had simply forgotten.

43. John McCormick answered questions in full and measured manner and without material hesitation. He did not seek to answer in a self-serving manner. His answers were consistent with the contemporaneous documentary and other evidence. He came across as both credible and reliable.

44. Lorraine Den-Kaat gave limited evidence. What evidence she gave was given without material hesitation and she came across as both credible and reliable.

45. The claimant did not give any detail in her ET1 claim regarding her claim for direct sex discrimination. In her Further Particulars the claimant stated: “[SW] Tried to blame me for a critical piece of equipment going missing even though it was another male Team Leader's member of staff that moved it, said Team Leader wasn't challenged on this”. It was not in dispute that: on 30 April 2020 a non-sterile component left the Component Prep area and ended up in a clean (i.e. sterile) room within Manufacturing; that the incident was potentially very serious and could have had implications for their licence; and that in May 2020 SW raised the issue with the claimant as Component Prep Team leader stating that she ought to have reported the incident to SW as her line manager but failed to do so. SW stated in evidence that he also raised the incident with the relevant Manufacturing Team Leader. The claimant had not been aware of this when she submitted her claim and Further Particulars.

46. In her Further Particulars the claimant stated: “Scott Weir would regularly have team briefings with his 2 other male team leaders & would exclude my team in those meetings; Scott Wear would address Steven Mclleney (This is the employee who was dismissed in April) to give any instruction to do a task rather than myself who was the Team Leader of the Prep Team.” It was not in dispute that there were not team wide briefings (i.e. meetings) involving the whole of manufacturing. It was not in dispute that there was no schedule of meetings with the team leaders but rather such meetings took place as required. It was not in dispute SW that would brief Team Members including SM directly (rather than through the Team Leaders). The claimant was understandably irritated by this given her role as Team Leader. The claimant stated in evidence that SW didn’t have any interaction with her but it was apparent that SW did have interaction with her although less than he had with the other Team Leaders. It was accepted by the claimant that there are material differences between the work of Component Prep and Core Manufacturing. This generated differences in the nature and frequency of the briefings with the relevant Team Leaders.

47. The claimant repeatedly stated in evidence that she did not have any issue with SW until SM left towards end April 2020. The claimant did not raise these issues of alleged sex discrimination with SW or with HR. The claimant had raised other issues about SM’s behaviour with HR.

48. SW gave clear and reasoned evidence that by early June 2020 he was very concerned about the claimant’s ability to perform her role and its impact on their ability to fulfil the AZ contract. He gave clear and reasoned evidence that she was failing to perform the duties of her role by providing updates on current and planned activities. Those concerns were raised by him at the review meeting in February and subsequently and this is supported by the contemporaneous documentary evidence. The claimant noted that no issue had been raised during her probation which had been confirmed but these concerns had arisen after her probation. Furthermore, these concerns had arisen and were raised with her prior to her refusal to work overtime on Sunday 21 June. By early June he believed she was failing to perform the duties of her role and ought to be dismissed for poor

performance. There was no reasonable basis upon which to doubt his belief as genuine.

49. Both SW and JM gave clear and reasoned evidence that in early June SW raised his concerns regarding her performance with JM who in turn raised the issue with the Board. The contemporaneous documentary evidence supports that her performance and dismissal was being considered by SW and JM in early June.

50. The claimant asserted that SW "just expected us to work weekends routinely". There was no evidence to this effect. The claimant was only asked to work a weekend (both Saturday and Sunday) once. The claimant never worked a whole weekend. The claimant only worked one Saturday. The claimant's assertion that SW just expected them to work weekends routinely was not credible.

51. In her ET1 claim the claimant stated that "He also had asked me to work the previous Sunday 21st June as overtime which I refused to do as all week Mon to Friday I'd worked late to get the job done & also done overtime on Sat 20th June". In her Further and Better Particulars the claimant stated: "Scott Wear had asked me on Thurs 18th June if I'd work Sunday to which I said no because I was coming in to work Saturday the 20th. He never said anything at that point on my refusal, however later on Saturday the 20th June after I'd worked said overtime he asked Elaine Wardlaw to message me & ask me again if I would work Sunday 21st June to which I replied to her that I wouldn't as I'm not working 7 days per week & I'm entitled to one day off rest period." The claimant stated in evidence that when he asked her on Thursday 18 June if she would work the Sunday she replied: "No, I'm absolutely knackered. I've worked late all week". SW was confident that the claimant was mistaken and that there had been no telephone conversation because he would generally ask by email. The claimant stated in evidence that when asked on Saturday 20 June via EW she replied via EW that she was not available. The claimant relied in evidence upon contemporaneous text messages which she had sent to a friend in which she stated: "Scott asked me on Thursday if I could do Sunday & I told him NAW....After I left he got Elaine to message me about 3:00 PM to see if I could do Sunday 12-4pm… I was like NAW" ; "I told him

Thursday I wasn't doing Sunday cause if I worked late all week plus I was coming in Saturday…place is a complete shambles with this AstraZeneca stuff." The respondent was under pressure of time regarding preparations for the AZ contract and it was a challenging time for Manufacturing and therefore for SW and the claimant.

52. In the circumstances and having regard to the above it is considered more likely than not: that SW asked the claimant by telephone on Thursday 18 June whether she would work that Sunday and that she refused stating that she was knackered and that she had worked late all week; that SW did not comment on her refusal; that later on Saturday 20 June SW asked the claimant via EW if she would work the Sunday and the claimant replied via EW saying she was not available; that the claimant did not say to SW that she had a right 1 day off rest a week or words to that effect; and that the claimant did not advise SW that his requests to work the Sunday were in breach of her right to time off or words to that effect.

53. There was no contractual requirement to work overtime and overtime was considered to be voluntary. Staff including the claimant could and did refuse requests to work overtime. Whilst being asked more than once about working overtime on Sunday 21 June amounted to some limited pressure to agree it was apparent that the claimant felt readily able to refuse and did so. SW's request about working overtime did not amount to a requirement to do so.

54. About 3 weeks elapsed between SW and JM considering her performance and dismissal in early June and taking the decision to dismiss on 25 June. That delay was explained by the following factors: the pressure of work following award of the AZ contract; collation and consideration of the relevant documentary evidence; and seeking advice from HR. In the circumstances the period of three weeks did not amount to an unreasonable delay and was not a basis upon which it could be inferred that another an intervening event was the real reason for dismissal.

55. The claimant asserted that issues with her performance were not brought to her attention and that she was shocked to be dismissed for poor performance. In her words "I don't have any performance issues; I had

manufactured every batch on the production schedule I needed to". SW considered that she would not have done so without management intervention. Issues with her performance had previously been brought to her attention by SW and others. However there was no formal capability management process entailing formal warnings, etc. In the circumstances the claimant was shocked to have been dismissed without a formal process.

56. The claimant sought to challenge the performance issues as unfounded. She accepted that SW and JM genuinely believed that there were issues with her performance issues but asserted that they their beliefs were based upon erroneous information because they didn't know the all of the facts.

57. There was a significant delay between the claimant's successful appointment to her new role and her start date. The claimant was evasive when responding to questions about that delay and her possible absence on holiday despite express reference to such a holiday by her new employer.

The law

Direct Discrimination

58. Section 13(1) of the Equality Act 2010 ('EA 2010') provides: "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."

59. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

60. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. "It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without

asking the reason why" *(Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337*)*

Less favourable treatment

61. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.

62. Under Section 23 of EA 2010 there must be no material differences between the relevant circumstances of the Clamant and their comparator. The comparison must be like with like (*Shamoon*).

63. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

The reason why

64. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).

65. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not a necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred (*Shamoon*).

66. The reason why may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Protected characteristic

67. Sex (i.e. gender) is a protected characteristic.

Standard of Proof

68. Proof of facts is on balance of probabilities. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Burden of Proof

69. Section 136(2) of EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions".

70. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).

71. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935)

Stage 1 – prima facie case

72. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).

73. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of "something more".

74. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinary be by reasonable inference from primary facts.

75. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal." (*Efobi v Royal Mail Group* [2019] EWCA Civ 19, CA)

76. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the respondent's explanation, or the absence of any such explanation *(Laing v Manchester City Council* [2006] ICR 1519*, EAT and Efobi)*. (The respondent's explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts" (*Madarassy*). "In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" *(Igen; Hewage)*.

Stage 2 – rebutting inference

77. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).

78. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be "in no sense whatsoever" because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).

79. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Time Limit

80. Under Section 123 a complaint of direct discrimination may not be made after the end of the period of three months starting with the date of the act or such period as the tribunal thinks just and equitable. The three-month time limit may be subject to an extension of time to facilitate ACAS Early Conciliation.

Remedy

81. If there has been direct discrimination the tribunal may make a declaration, order payment of compensation (including injury to feelings) and/or an make an appropriate recommendation (which addresses an adverse affect on the claimant of the complaint) (Section 124 EA 2010).

Automatically unfair dismissal - working time activities

82. In a claim for ordinary unfair dismissal under Section 98 the tribunal must identify the reason for dismissal and the tribunal must then consider determine whether the dismissal was fair – whether the employer acted reasonably in treating that reason as a sufficient reason in the

circumstances. In a claim for automatically unfair dismissal the tribunal must identify the reason for dismissal and if it is for a prohibited reason that dismissal is automatically unfair – the tribunal cannot determine that the dismissal was fair.

Qualifying Service

83. Where an employee is dismissed for an automatically unfair reason, the requirement for two-year qualifying service does not ordinarily apply Section 108 ERA 1996.

Burden of proof

84. Where an employee has qualifying service the employer has the burden of proving the reason for dismissal. If employer fails to prove its reason, the tribunal may still accept that the true reason was not the prohibited reason (*Kuzel v Roche Products Ltd* [2008] IRLR 530).

85. Where an employee does not have qualifying service, the burden is on the employee to prove balance of probabilities a prohibited reason for dismissal (*Smith v Hayle Town Council* 1978 ICR 996, CA*).*

Dismissal by reason of working time activities

86. Section 101A of ERA 1996 provides that "An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee— (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998 [or] (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations…"

87. There must be (a) a requirement imposed (or proposed) in contravention of the Working Time Regulations ('WTR') or (b) a right conferred under the WTR.

88. The employee's refusal (a) to comply, or (b) to forgo, must be explicit and not amount to say mere non-compliance with an instruction (*Ajayi & Anor v Aitch Care Homes (London) Ltd* UKEAT/0464/11). It is not necessary for

the employee to positively assert that right - victimisation for alleging infringement of a statutory right is addressed by Section 104 (*McLean v Rainbow Homeloans Ltd* Appeal No. UKEATS/0019/06/MT). However there must be something that signifies that the refusal related (a) to a breach, or (b) to forgoing a right, under the WTR (*Gale & Ors v Mid & West Wales Fire Service* UKEAT/0365/14). The statute affords protection from victimisation for specific activities related to the WTR (*Pazur v Lexington Catering Services Ltd* UKEAT/0008/19*).*

89. The employee's refusal must be the sole or principal reason for dismissal. A reason for dismissal is a set of facts known, or beliefs held, which operate on the mind of the decision-maker which cause them to take the decision. Material influence is insufficient. Where the decision maker does not have knowledge of the refusal, but the line manager does, consideration should be given as to whether the line manager manipulated the evidence before the decision maker because of the refusal *(**Royal Mail Group Ltd v Jhuti*** 2020 ICR 731, SC*).*

Remedy

90. If the claimant has been unfairly dismissed the tribunal may make an order for re-instatement or re-engagement and/or make an award of compensation.

Working time regulations 1998 – weekly rest

91. A worker is entitled to uninterrupted rest of not less than 24 hours each week or if his employer so determines two such rest periods in a fortnight (Regulation 11 (1) and (2)). Weekly rest is in addition to daily rest of 11 hours each day unless justified by objective or technical reasons. A week starts at midnight between Sunday and Monday (Regulation 11(6)). The right to daily rest may be disapplied in certain circumstances (Regulation 21) in which case there is an entitlement to compensatory rest (Regulation 24).

Submissions

Respondent's submissions

92. The respondent's submissions were in brief summary as follows:

a. The claimant was not a credible witness because of inconsistencies in her evidence. In the event of a disputed fact the respondent witness evidence should be preferred.

Direct Discrimination

b. The onus is upon the claimant to adduce evidence from which discrimination can be inferred (*Efobi*) and she has failed to do so.

c. SW treated the claimant the same as the male Manufacturing Team Leaders in respect of the missing critical component.

d. SW treated the claimant the same as the male Manufacturing Team leaders in respect of giving instructions direct to team members. Any differences in treatment regarding briefing Team Leaders varies according to the role.

Automatically unfair dismissal

e. A refusal must be explicit and cannot be inferred from mere non compliance (*Ajayi*) The broad reason for the refusal being a breach or assertion of a right must also be explicit (*Wladyslaw Azur v Lexington Catering Services Ltd UKEAT/0008/19*).

f. Little weight should be given to the claimant's texts because of internal inconsistencies and her tendency to exaggerate. Accordingly the evidence of SW should be preferred over that of the claimant such that there was no request to work overtime on 18 June 2020. In the event that she was so requested she did not assert a right or a breach connected to WTR. She did not state she wanted a day off and in any event such statement is not synonymous with 24 hours rest where there is a shift system.

g. By 5 June 2020 SW had formed the view that the claimant could not continue in her role. Between 5 June and 25 June JM reviewed all the relevant materials and spoke to HR. On 25 June 2020 JM met with SW and EDK, HR to discuss her performance. The claimant's refusal to work overtime on Sunday 21 June was not discussed at that meeting. JM took the decision to dismiss in light of discussions at that meeting.

h. It is not for the tribunal to determine whether there were issues with the claimant's performance but rather whether that was the reason for dismissal.

i. The claimant did not believe that she was dismissed because of her refusal to work overtime: the claimant sent a text to her friend after dismissal stating: "I refused to work the Sunday…I'm thinking I could also use this as I have asserted a statutory right for a 24hr rest period".

Remedy

j. The claimant failed to provide any documentary evidence that she took steps to mitigate her losses. The claimant failed to provide satisfactory explanation why her new job did not start until 2 November.

k. The claimant has not accrued two years' service and is not therefore entitled to compensation for loss of statutory rights.

l. The claimant would have been dismissed for poor performance in any event.

m. The ACAS Code does not apply to a claim for dismissal by reason of assertion of a WTR right.

n. There is no claim for injury to feeling and there was no evidence of injury to feelings attributable to the alleged direct discrimination.

Claimant's submissions

93. The claimant's submissions were in summary as follows:

a. In her 9 months of employment she delivered every batch and rig she was asked to deliver. She did not fail to delivery or miss shipment.

b. On commencement of her employment she was not given a training plan regarding which SOPs should be completed or when.

c. The respondent failed to call their Training Manager as a witness.

d. Following termination she did not have access to relevant emails (she confirmed not having requested these from the respondent because she did not know she could).

e. She achieved the gowning qualification in May hence why SW congratulated her.

f. If SW genuinely believed she had performance issues why wasn't a formal improvement plan put in place.

g. She had led a team of 80/90 people for five years without issue before joining the respondent – it's absurd to suggest she can't lead a team of four people

h. The real reason for her dismissal was her refusal to work Sunday 21 June. SW needed people to work seven days a week because of the whole of work. The component prep team worked one shift and were supplying a manufacturing team that worked two shifts. There ought to have been two component prep shifts but instead SW put pressure on her and her team to work overtime.

i. In Scott Wear's eyes she was bringing him issues rather than solutions & as a Manager it's his overall responsibility to Manage all areas

j. SW lied under oath when he said he didn't ask me to work overtime on Thursday 18 June. He did and the text messages and Lori

Beveridge corroborated this. Scott Wear knew at this point he couldn't force me to work over time.

k. There is no other evidence to show that Scott Wear spoke to Alan Easton regarding the piece of kit that went missing.

l. Scott Wear would fail to address her team or approach the male team member of her team to give instruction

m. SW described her shocked reaction to her dismissal. LDK admitted she was shocked. She was shocked because there were no issues with her performance

n. She had passed a three month probationary period with no extension, there was no additional training provided for any performance issues or no performance improvement plan discussed.

o. There were no verbal warnings, written warnings or anything at all documented on her employment file.

p. Having been taken to tribunal SW has been trawling through emails trying to justify his decision.

q. When she asked for examples of poor performance at the meeting on 26 June he was unable to give any. The dismissal letter from Symbiosis stated the reason for dismissal was that "things just didn't work out".

r. There was no investigation, no right to be accompanied to the dismissal meeting & no right of appeal. You also do not need to be employed for two years for the ACAS code of practice to be followed.

s. The real reason for dismissal was she refused to work on Sunday 21 June.

t. She was unable to take a holiday before staring work with her new employer because of the pandemic.

Discussion and decision

Direct discrimination

94. Direct discrimination arises where an employer treats an employee less favourably than a comparator because of a protected characteristic.

95. Direct discrimination requires a comparative exercise – was the claimant treated less favourably than her comparator in the same circumstances because of her sex. A difference in treatment and a difference in sex is not sufficient. There must be no material differences between the relevant circumstances of the claimant and their comparator. The comparison must be like with like.

96. Her complaint was that she was treated less favourably than the male Team Leaders because she was blamed for a critical piece of equipment going missing and the male Team Leader wasn't challenged on this. It was found as a matter of fact that the male Team Leader was also challenged on this and accordingly there was no less favourable treatment.

97. Her complaint was also that SW would regularly have team briefings with the male Team Leaders but not with her and her team and (by way of background supporting information only) that SW would address SM to do a task rather than her as Team Leader. It was found as a matter of fact that there were no team briefings and accordingly there could be no less favourable treatment in that respect. It was found as a matter of fact that SW would also address members of the male Team Leaders teams and accordingly this could not support her assertion of less favourable treatment. It was found that the nature and frequency of meetings with the Core Manufacturing Team Leaders was different to that of the Component Team Leader but they were not in the same circumstances. There were material differences between the work of Component Prep and Core Manufacturing which generated differences in the nature and frequency of the briefings. Accordingly there was no less favourable treatment in the same circumstances.

98. The respondent did not treat the claimant less favourably because of her sex and her complaint of direct sex discrimination is dismissed.

Automatically unfair dismissal - working time activities

99. In a claim for automatically unfair dismissal the tribunal must identify whether the reason or principle reason for dismissal was for a prohibited reason. The claimant does not have qualifying service and accordingly has the burden of proving that reason.

100. If the reason or principle reason for dismissal was the prohibited reason then the dismissal is automatically unfair. The Tribunal does not consider whether the employer acted reasonably in treating the reason as a sufficient reason.

101. The claimant's complaint was that the sole or principal reason for her dismissal was either that she refused to comply with a requirement to work which the respondent imposed (or proposed to impose) in contravention of Regulation 11 WTR 1998 (namely uninterrupted rest of not less than 24 hours in each 7 day period) or that she refused to forgo that right.

102. The claimant worked Monday to Friday 7am to 3pm. It was agreed that she would work overtime on Saturday 20 June from 7am to 12.15pm. She was asked to work overtime on Sunday 21 June 12-4pm. If the claimant had worked that overtime this would not have permitted her 24 hours uninterrupted rest that week but it would still have permitted her two such rest periods in a fortnight (given that she did not work either the weekend before or the weekend after). Accordingly there would have been no contravention of the WTR and she was not foregoing a right thereunder.

103. The claimant's refusal to work overtime was explicit. But it was given in response to a request not a requirement to work overtime. She refused this request stating that she was knackered and that she had worked late all week. It could reasonably be inferred that she was looking for a day off but not by way of assertion of her rights. There was not something that signified that her refusal related to a breach of a right to a day off or a refusal to forgo that right.

104. In any event, the claimant's refusal to work overtime was not the sole or principal reason for her dismissal. There was incontrovertible evidence that SW had raised issues with her performance and was contemplating

her dismissal prior to the refusal to work overtime. There was no reasonable basis upon which it could be concluded that SW manipulated the evidence relied upon in reaching the decision to dismiss because of her refusal to work overtime. There was no reasonable basis upon which it could be concluded that JM took the decision to dismiss her because of her refusal to work overtime.

105. The sole or principal reason for her dismissal was not for a prohibited reason and her claim for automatically unfair dismissal is dismissed.

Employment Judge:	**M Sutherland**
Date of Judgment:	**03 September 2021**
Date sent to parties:	**07 September 2021**