Case No. 2304821/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs D Mankai

Respondent: (1) Intercash (Croydon) Ltd
(2) Peter Stent

HELD AT: London South ET by Cloud Video Platform

ON: 9, 10, 11 and 12 August 2021
14 and 15 October 2021 (in chambers)

BEFORE: Employment Judge Barker
Mrs R Serpis
Mr J Havard

REPRESENTATION:

Claimant: In person
Respondent: Mr Piddington, counsel

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant's claims of direct age and race discrimination and victimisation on the grounds of sex fail and are dismissed. They were presented to the Tribunal outside of the primary time limit and were not presented within such further period as is just and equitable.

2. The claimant was unfairly dismissed by the first respondent due to a procedurally unfair dismissal, but would have been fairly dismissed in any event had a fair procedure been followed. She has therefore suffered no financial losses as a result of this unfair dismissal.

3. The claimant's claims for breach of contract and unlawful deductions from wages against the first respondent fail and are dismissed.

REASONS

1. The claimant was employed by the first respondent from 6 December 2004, latterly as branch manager of the first respondent's Canterbury branch, until she was dismissed by reason of redundancy on 4 August 2019. Early conciliation with the first respondent was from 8-9 October 2019 and with the second respondent was on 24 October 2019 only.

2. By a claim form presented to the Tribunal on 31 October 2019, the claimant brought complaints against the respondents of:
    - Unfair dismissal;
    - Age, race and sex discrimination;
    - Holiday pay;
    - "other payments" and
    - Other claims, which were listed as "*victimisation, failure to raise grievance, failure to provide breakdown of how redundancy payment was calculated, unlawful deductions from wages, breach of contract of employment, breach of company loan agreement, wrongful dismissal, breach of implied duty of trust and confidence, 3 unpaid holidays, unfair dismissal, failure to provide 2 payslips*."

3. The claimant further requested a "*basic award of £25,000, aggravated damages of £47,000…injury to feelings of £35,000, rent in Canterbury from September till June 2019 £6642, 10% uplift in today's money, 25% uplift due to employer's behaviour and non-compliance, interest of 8% a year*".

4. The claimant, while working for the respondent in 2018-2019, completed her Graduate Diploma in Law and subsequently completed her Legal Practice Course. She is currently employed as a paralegal. From May 2011, during her employment with the respondents and with the second respondent's approval, the claimant also worked as a police and court interpreter.

5. At a case management preliminary hearing on 18 September 2020, Employment Judge Hyams-Parish ordered that the parties attend a further preliminary hearing to consider the respondents' applications that the claimant's claims be struck out or be the subject of a deposit order, because they had no/little prospects of success. The judge notes "*Much of today's hearing was spent discussing and understanding the claims brought by the Claimant*" which he then listed in some detail, concluding "*I have indicated my concerns about the merits of certain of the above claims but this can be addressed at the next preliminary hearing*".

6. The claimant wrote to the Tribunal on 23 September 2020 withdrawing her claims for unpaid holiday pay, a failure to provide payslips, and breach of the company loan agreement following the case management discussion and those withdrawn complaints were dismissed by the Tribunal.

7. At a preliminary hearing on 14 January 2021 Employment Judge Sage refused the claimant's application to strike out the respondents' response by noting:

"*It would be inappropriate to strike out a response merely because the claimant disagreed with the respondents' defence. It is for the Tribunal to make findings of fact in relation to disputes in relation to the evidence*."

8. Employment Judge Sage considered the claimant's complatins concerning the respondents' disclosure, which she set out in 11 points in her case management order. This included an explanation of why documents which the claimant had sent to the respondents were included in the respondents' disclosure – that this had been done in error. The claimant also made an application for costs, which was refused.

9. Employment Judge Sage made a deposit order against the claimant on two grounds:

    a. That despite attempts at the previous case management hearing and before her on that occasion to clarify the claimant's age and race discrimination claims, this had not been done and the claimant had not been able to say which of her four comparators were relied on in relation to a particular timeframe. The judge concluded that the claims were vague and therefore had little reasonable prospect of success; and
    b. The claimant had only referred to differences in race/age and differences in treatment and was not able to refer to any evidence which would suggest that the differences in treatment were because of race or age. Therefore the judge concluded that the claims had little reasonable prospect of success.

10. The claimant wrote to Employment Judge Sage on 10 February 2021 and 16 February 2021 to complain about her conduct of the hearing and for reconsiderations of decisions made by her. These were:
    a. That EJ Sage failed to consider her application to strike out the responses;
    b. That she was not able to make representations before orders were made;
    c. That the deposit orders were made in error; and
    d. That the strike out orders made be reconsidered.

11. Employment Judge Sage provided a detailed response of 14 July 2021 to these complaints. The response included a further explanation for the deposit order (this having been explained in the record of the preliminary hearing sent on 13 February 2021) as follows:

> *"Although it is noted that you believe that your case has "great prospects of success" however this was not a view I came to on the evidence and the submissions before me. It was noted that the claim dates back to 2005 when you were a Cashier, in order to show discrimination you must compare yourself with a person in a role where there is "no material difference", three of the four comparators were not in the same role. It is accepted that one was in the same role. The second reason I believed that a deposit was appropriate in this case was because the burden of proof is on a claimant to show not only a difference in race/age and a difference in treatment, it must be shown that the difference*

in treatment is because of race and age. There was nothing to show that the reduction in your working time by 15 minutes in 2005 was because of your race and age and you could not state why you believed this to be the case. It was for those reasons that it was concluded that the discrimination claims had little reasonable prospect of success."

12. Notwithstanding this, the claimant sent to the Tribunal on Sunday 8th August 2021 at 8.44am, the day before the first day of the final hearing, an application again to have the responses struck out.

13. The application consisted of 30 pages, including 5 pages of complaints of procedural irregularities on the part of the respondents. These were:

    a. A failure to disclose her comparators' contracts and a failure to comply with case management orders in time;
    b. "*the respondents have been conducting the proceedings and a very complicated case preparation under false pretences as if the respondents 2 ET3 response had been accepted by the Tribunal when in fact it was not presented in time…and the Tribunal did not accept the ET3 response from respondent 2. This latter point of misconduct amounts to perverting the course of justice by misleading the Court*."
    c. "*the respondents based their defence on the ET3 grounds of resistance on something what is not true"*, the details of which then ran to more than four pages of submissions disputing the respondents' defence.

14. The claimant's application was dealt with by the Tribunal on the first day of the final hearing. The Tribunal told the claimant that there had been an administrative error in relation to the filing of the respondents' ET3 forms and that no letter had been sent in relation to the second respondent's ET3, but it was clear from the Tribunal file, the hearings on 18 September 2020 and 13 January 2021 that the ET3 had been accepted. The proceedings had been conducted on that basis for some considerable time. There had been no prejudice to the claimant in not receiving this letter and this was not a valid basis to strike out the responses.

15. Furthermore, as had already been explained by Employment Judge Sage, it would be inappropriate to strike out a response merely because the claimant disagreed with the respondents' defence. It is for the Tribunal to make findings of fact in relation to disputes in relation to the evidence.

16. Finally, although the claimant is correct that parties' need to comply with case management orders in time, again there was not sufficient evidence that the hearing had been prejudiced by these failures. In relation to failures of disclosure, the respondents' counsel told the Tribunal that there were no outstanding issues of disclosure and that the claimant had spent a long time with Employment Judge Sage discussing appropriate requests for disclosure and these new requests had been made after that and after the order for disclosure made after the hearing in January 2021.

17. The claimant told the Tribunal that she had asked for copies of the contracts of certain of her former colleagues to be disclosed and that these were "*vital*" to show their hours of work and detailed job descriptions. The Tribunal told the claimant that the wording of contracts of employment were not determinative of an issue, as much may turn on how the first respondent's business operated in practice. This was particularly true due to the long period of time over which the events in her claim took place and the fact that many of the staff members were long-serving. The Tribunal told the claimant that the issue of disclosure of these contracts could be revisited after she had been cross-examined if it became apparent that it would assist the Tribunal to see them.

18. At the conclusion of the claimant's evidence at the end of day 2, the issue of disclosure of the contracts was revisited and the Tribunal ordered that further efforts be made by the respondents, given the claimant's insistence that these were vital, to disclose the contracts overnight. At the start of day 3, the Tribunal admitted an addendum bundle in evidence, "R1", which contained the contracts of employment of three of the claimant's four comparators Anne Dowson from 2000, Marcelo Neuwert from 2000, and Suryedev Heera ("Dave") from 2003. The fourth contract of Mrs Smith could not be located.

19. At the start of the second day of the hearing, the Tribunal was told that none of the claimant's three witnesses (Mrs Smith, Mr Cuttress and Ms Bryan), whose statements had been served on the respondents and were before the Tribunal, were willing to appear to answer questions. This had not been raised on the previous day when timetabling was discussed with the parties. The claimant told the Tribunal "*I'm not saying that there is witness intimidation…* " but said that the second respondent had contacted the witness Mrs Smith to discuss her appearance at the Tribunal.

20. The respondents' counsel told the Tribunal that on the contrary, Mrs Smith had contacted the second respondent and that she had told him that she had spoken to the claimant on the telephone about the case, but had not been made aware that the contents of their conversation were being recorded to be put in a statement and that she had not agreed to attend the Tribunal on the claimant's behalf.

21. The claimant was cross-examined under oath about the witness statements she had served in the proceedings. It was put to her that the statements of Mr Cuttress and Ms Bryan in places contained identical wording to the claimant's statement. It was put to her that she had not told the witnesses that she was taking evidence for a Tribunal, which she denied. The Tribunal explained to the claimant that very little weight can be attached to statements of individuals who do not attend to be cross-examined. Furthermore, given the close similarity in wording in the statements when compared with that of the claimant's statement, the Tribunal concludes that, at least in part, these statements are not an accurate account of the testimony of these witnesses and they have not been taken into account in our findings of fact.

22. The hearing proceeded as follows. On day 1, the hearing started at 11am due to technical issues and the Tribunal sat until 12.30. The morning on that day was used in dealing with the claimant's applications, including to strike out the responses and timetabling of the following days. The claimant joined the hearing on her mobile phone and the sound quality, although adequate, at times necessitated a pause or

for the claimant to adjust her phone . She agreed to find headphones for the rest of the hearing and assisted the Tribunal by doing so from the start of day 2 when she could be seen and heard clearly. The Tribunal took the rest of day 1 to read the witness statements and bundle of over 500 pages. The Tribunal ensured that the claimant had a hard copy of all the documents.

23. At the start of day 2, the Tribunal took time to ensure the parties agreed the list of issues drafted by the respondents' counsel. The claimant's request for further disclosure was also discussed and the parties agreed to deal with the issue as set out in this judgment. The claimant was sworn in at 10.45am and her evidence concluded (having taken an hour for lunch) at 15.50. We resumed at 16.05 and the respondent's representatives agreed, following a request by the Tribunal, to use their best endavours to disclose the contracts requested by the claimant overnight.

24. On day three the respondents' addendum bundle of contracts was admitted in evidence. The claimant requested a 30 minute adjournment to consider them, which was granted from 11.05-11.30 The second respondent was cross-examined by the claimant all day, with lunch for an hour, until 4pm. Thereafter there was a discussion about the partial redaction of a document in the bundle said to be privileged under s111A Employment Rights Act 1996, with the Tribunal asking the respondents' counsel to consider its position on this partial redaction and whether it could be said to be misleading the Tribunal.

25. At the start of day 4, the issue of the s111A letter was discussed. The claimant had an unredacted copy and asked for one further sentence to be read out and noted in evidence, which it was. The parties confirmed that it would not be necessary to recall the second respondent to speak to this issue. The Tribunal then discussed closing submissions and agreed that the hearing would adjourn to allow parties to finalise closing submissions and exchange these in writing at 1pm, read the other parties' and reconvene at 2pm.

26. At 2.05pm on day 4, the claimant made an application to amend her claims to include a claim of automatic unfair dismissal due to a TUPE transfer. When the Tribunal told her that an adjournment would be necessary to allow the respondent to make submissions on this point and further evidence and witnesses may be needed, the claimant considered this and withdrew that application. The Tribunal on the claimant's request adjourned again to allow her more preparation time and closing submissions were heard at 2.35pm. The Tribunal adjourned to deliberate and met again for two days in chambers to reach its unanimous decision.

27. The evidence and submissions put forward by the parties has been considered by the Tribunal in this judgment. If the following findings of fact are silent in relation to some of that evidence and those submissions, it is not that it has not been considered by the Tribunal, but that it was insufficiently relevant to the issues that the Tribunal had to decide.

Issues for the Tribunal to decide

28. The respondents' counsel provided the Tribunal with a draft list of issues. The Tribunal took some time at the start of the second day to go through this with the

claimant. The list below was agreed by the claimant. These are the issues which it was agreed the Tribunal would decide:

29. By virtue of the Orders of Employment Judge Sage dated 14 January 2021:

- The tribunal has no jurisdiction to consider the claimant's breach of contract claim in respect of an alleged failure to consider her grievance and/or an alleged failing to provide a breakdown of her redundancy pay
- The claimant's claim for unauthorised deductions in relation to a loan agreement has been dismissed upon withdrawal
- The claimant's claim for holiday pay has been dismissed upon withdrawal.
- The claimant's claim for failing to provide payslips has been dismissed upon withdrawal.
- The unfair dismissal and unauthorised deduction from wages claims against the second respondent have been struck out.

30. The outstanding claims and issues arising therefrom have been summarised below, identifying in square brackets which respondent such claims are against.

31. Unfair Dismissal [R1 only]: It is agreed that the claimant was dismissed with effect from 4 August 2019. It is agreed that the reason for dismissal was redundancy. Was the procedure adopted by the first respondent reasonable having regard to the size and administrative resources of the first respondent (s.98(4) Employment Rights Act 1996)? In particular the claimant maintains that there was insufficient consultation and there was a lack of transparency. In the event that the Tribunal make a finding that the procedure was unfair, would the claimant have been dismissed in any event (*Polkey v AE Dayton Services Limited [1987] IRLR 50*)?

32. Direct Discrimination (s.13 Equality Act 2010) on the grounds of race (s.9) and/or age (s.5 Equality Act 2010) [R1 and R2]:

a. The claimant relies upon her nationality as Eastern European and relies upon her age as 41 years of age. She relies upon the following comparators: Anne Dowson, Dave Heera, Carole Smith, Marcello Neuwart
b. The respondents deny that the comparators identified by her are true comparators.
c. Did the respondents treat the claimant less favourably than they treated or would treat the comparators? The less favourable treatment relied upon is a reduction of her contractual hours from 9 hours per day to 8 hours and 45 minutes per day with effect from July 2005. The respondents accept that the claimant's basic contractual hours were reduced from 9 hours per day to 8 hours and 45 minutes per day but denies that this was less favourable treatment.
d. In any event, the claimant appears to accept that she was paid as if she were working 9 hours per day until 2018.
e. If found to have amounted to less favourable treatment, was such treatment because of the claimant's race and/or age? If the reason

was her age, was it a proportionate means of achieving a legitimate aim.

33. Victimisation on the grounds of sex (s.27 Equality Act 2010) [R1 and R2]:
    a. Did the claimant do a protected act? She relies upon an alleged complaint in respect of travel expenses in April 2019. The respondents maintain that the email in respect of travel expenses was dated 4 May 2019 and deny that this amounts to a protected act.
    b. Did either respondent subject the claimant to a detriment? She relies upon the reduction in her sick and holiday pay to reflect her working 8 hours and 45 minutes per day with effect from April/May 2019. The respondents accept that from April 2018 the claimant's holiday and sick pay was calculated on the basis of her working 8 hours and 45 minutes per day. The respondents deny that this amounts to a detriment as it reflected her normal remuneration within the meaning of s.221-224 Employment Rights Act 1996.
    c. Was any detriment found to have occurred because of the alleged protected act? The respondents maintain that the change was as a result of them realising that the first respondent had previously been overpaying the claimant for holiday.

34. Jurisdiction for the discrimination complaints: Any act occurring on or before 9 July 2019 in respect of the first respondent is said to be outside the primary limitation period of 3 months provided for in s.123(1) Equality Act 2010 (having regard to the extension of time provided by the early conciliation rules). Any act occurring on or before 24 July 2019 in respect of the second respondent is said to be outside the primary limitation period of 3 months provided for in s.123(1) Equality Act 2010 (having regard to the extension of time provided by the early conciliation rules).

35. Was the reduction in contractual hours, said to have occurred in July 2005, a one off act with continuing consequences, or conduct extending over a period (s.123(3)(a) Equality Act 2010)? Was the alleged reduction in sick and holiday pay, said to have occurred in April/May 2019, a one off act with continuing consequences, or conduct extending over a period (s.123(3)(a) Equality Act 2010)? Do the direct discrimination and victimisation claims collectively amount to conduct extending over a period? Would it be just and equitable to extend time for the claimant to bring the complaint?

36. Breach of Contract [R1 only]:
    a. Did the claimant have a contractual entitlement to work and be paid for at least 36 hours per week, namely 9 hours paid work per day on 4 days per week?
    b. Was her contract varied to reduce her normal hours to 35 hours of paid work per week, namely 8 hours and 45 minutes per day on 4 days per week?
    c. Was she demoted in September 2018?
    d. Did any variation or demotion amount to a fundamental breach of the claimant's contract of employment?
    e. Did the claimant affirm any breach?

37. Unlawful Deduction from Wages [R1 only]:

    a. What was the amount properly payable to the claimant in respect of wages? She maintains that she was entitled to be paid for 36 hours per week. The first respondent maintains that she was entitled to pay (and was paid) for the hours actually worked, save for an unpaid break of 30 minutes per day.
    b. Did she receive the sums properly payable? Despite maintaining that her hours were reduced, the claimant accepts that for the majority of months prior to June 2018 her pay slips record that she was paid the equivalent of 36 hours per week. She has failed to identify the alleged deductions.

38. Jurisdiction for the Unlawful Deduction from Wages Complaint:

    a. Was the claimant subjected to a single or series of deductions?
    b. Was there any break in any series of deductions?
    c. Was her claim brought within 3 months from the date of payment of the wages from which the last alleged deduction was made (s.23(2) Employment Rights Act 1996)?
    d. Was it reasonably practicable for her to commence her complaint within three months of the relevant deduction?
    e. If not, was the claim commenced within such further period as the tribunal consider reasonable?
    f. In any event, by virtue of s.23(4A) Employment Rights Act 1996 the tribunal is "not to consider so much of [the Claimant's claim] as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint".

39. Jurisdiction Breach of Contract Complaints: The claimant's claim was commenced within three months of the effective date of termination (4 August 2019) as required by Article 7(a) Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Were her claims brought within 6 years of the alleged breach as required by s.5 Limitation Act 1980? In particular the Respondent maintains that the Claimant's alleged breach of contract for reducing her working hours is stated to have occurred in July 2005, 14 years prior to her claim, and consequently is statute barred.

Findings of Fact

40. The first respondent's business was that of running bureaux de change in the south-east of England. It had branches in central London (Oxford Street), Wimbledon, Kingston, Croydon, Canterbury, Alton and Brixton. Some were in stand-alone shop premises and others were within large department stores. The respondents' evidence, which we accept, was that the opening hours of those stores varied depending on the seasons and the opening hours of the department stores where they were located.

The claimant's contractual terms, her hours of work and the wages properly payable to her

41. The claimant commenced work with the first respondent on 6 December 2004 at its Oxford Street branch. She was hired as a cashier, but having accepted the job contacted the second respondent Mr Stent within a few months of starting work to ask him to reconsider her job title. She wrote again on 22 August 2005 asking for a pay rise. The Tribunal finds on the basis of the evidence before us that he responded positively to both requests. By 12 October 2005, in a letter to the claimant advising her of a salary increase, the claimant is referred to as "Senior Cashier".

42. She wrote again to the second respondent on 29 October 2007 asking him to give her a higher pay rise than she had been offered, and the second respondent did so, raising her pay from £9.25 per hour to £10 per hour instead of the £9.60 offered. The claimant was promoted to assistant manager in September 2008.

43. The evidence in the bundle is that the claimant continued to receive regular pay rises and promotions throughout her employment, until 2018. It was undisputed that she became the manager of the Canterbury branch in 2009 and was the only member of the first respondent's staff to progress from cashier to manager. We find that the claimant's relationship with the respondents and the second respondent in particular was, until her dismissal in 2019, generally a positive relationship and one based on trust. The second respondent's management style was one in which he trusted his staff to run the business and did not interfere in their doing so or question their decisions. He clearly did not consider that his role was to provide close oversight or hands-on management. We find that many of his employees were long-serving and there was not a high turnover of staff.

44. The claimant's contract of employment was dated January 2005. In the section on hours of work it states:

> "*Your normal working week will be of 36 hours spread over four days and your hours of work (as set by the Branch Manager) will normally be between 9.30am and 8.15pm on weekdays (including Saturdays) less 30 minutes for lunch and from 11.30am till 6.15pm on Sundays. These hours may be varied as necessary by the branch manager.*
>
> *You are required to work additional hours as authorised and as necessitated by the needs of the business. You have agreed to waive your right to work no more than the maximum number of hours prescribed by law to accommodate this.*
>
> *Your annual holiday entitlement is four working weeks (144 hours) paid holiday each Holiday Year which runs from 1st April to 31st March."*

45. The claimant's evidence was that when working at Oxford Street, she and her manager, Anne Dowson, recorded a 9 hour day on their timesheets. The claimant worked 4 days a week at that time, although the Tribunal finds that the terms of her contract relating to her working hours (set out above) do not guarantee her a 9 hour day, four days per week. They refer to her hours being added to "*as necessitated*

by the needs of the business" and her hours being "*varied as necessary by the branch manager*".

46. The claimant accepted that her average weekly working hours amounted to 36 hours per week and she often worked overtime, especially at busy times of the year. She was not able to tell the Tribunal when she considered that she had earned less than 36 hours per week.

47. What we find is that if the claimant wanted to alter her working hours, she was able to do so. In the bundle is a letter dated 20 February 2008. In it is the claimant's request to change her working hours. She writes that as she is expected to work Sundays from now on, and the bureau is only open for 6 hours on a Sunday,

> *"if I work 4 days per week it will not be possible for me to make even the basic hours, which will reflect strongly on my wages…. I would like to ask you to let me work 5 days per week… I am really very willing to work extra hours… I would appreciate if you would let me work at least 1 extra day in 4 weeks rota to make my basic 144 hours…"*

48. The claimant's evidence was that the respondents never replied to this letter. The respondents' evidence was that it was assumed that the reply was given orally. In any event the claimant's evidence was that she was paid on the basis of 144 hours per month (plus overtime) and all holidays and bank holidays were paid on the basis of 9 hours per day.

49. There was evidence before the Tribunal from the claimant that the first respondent's employees were allowed to claim an extra 30 minutes per day for cashing up time, irrespective of whether they worked for the whole of the 30 minutes. The claimant's evidence was that Anne Dowson did this for the entire time that the claimant worked with her, from 2004-2009.

The reduction in the claimant's daily working time and the reasons for it

50. Mr Stent wrote to the claimant on 2 March 2005 informing her that the Oxford Street branch was due to close, because the Allders department store in which it was situated was also to close. She was offered alternative employment in the respondent's other branches. In April 2005 she moved briefly to Croydon and thereafter in June 2005 moved to Wimbledon where she remained for a number of years.

51. The claimant's evidence was that, at the end of July 2005, after they moved to Wimbledon, Anne Dowson told her that her daily hours from that point on were to be recorded as 8.75 hours per day and not 9 hours per day. The claimant's interpretation of this was that she had lost 15 minutes of the 30 minutes of cashing up time. The claimant's witness statement notes "*She* [Anne Dowson] *was deducting 30 minutes for lunch and adding 15 minutes at the end of the day*" to the claimant's daily working time.

52. It was the respondents' evidence, which we accept, that the Croydon branch had longer opening hours than Wimbledon and was the first respondent's main

branch and consequently carried out extra tasks that other branches did not do, such as currency ordering from external suppliers. We find that the reduction in hours coincided with a move away from Croydon.

53. The claimant told the Tribunal that despite the move to Wimbledon, Anne Dowson continued to record her hours as 9 per day, even though they came and left the office at the same time. Her evidence was "*it felt I was being treated unfairly and less favourably than Anne Dowson*". She provides no evidence of this unfair treatment having been on the basis of her national origins or her age. She told the Tribunal that it just "*felt unfair*". The claimant's evidence was that she did not like Ms Dowson and Ms Dowson was not very nice to her.

54. The claimant raised it in 2005 with Laurie Clay, a senior manager, who she says told her he raised it with the second respondent. Subsequently Mr Clay told the claimant (as recorded in her statement) that the second respondent's response was that:

> "*from now on your hours will be 8.75 per day and Anne's remain 9 hours per day because she does not take her break and has a special arrangement with Peter Stent in regards to that*."

55. Mr Stent's evidence in cross examination was that all employees were paid for whatever hours they had recorded on their timesheets. We find that he trusted the employees to record their hours accurately and did not check to see if they in fact were accurate. He did confirm under cross-examination that his recollection was that Anne did not take a lunch break, although the claimant disputed this. We find that there was no evidence to suggest that Ms Dowson had systematically misrepresented her hours worked, but even if she had, this is not the basis for establishing that there was any less favourable treatment of the claimant on the basis of her race or age.

56. Furthermore, the Tribunal finds that it was within the scope of the first respondent's contractual rights as outlined above to make changes to the claimant's hours, and the reduction of 15 minutes per day did not reduce the amount earned by the claimant to less than 36 hours per week, having reviewed the payslips and P60s in the bundle. Certainly if this did result in a shortfall in the claimant's wages below 36 hours per week, this is not in evidence before us and the claimant cannot point to where it happened. We find that the first respondent maintained flexibility in its employees' hours of work to enable it to fit in with the operating environment and changing opening hours of, for example, the department stores in which some branches were situated. There was clear evidence that the claimant and others worked longer hours at Christmas, for example.

57. The claimant has not established on the balance of probabilities that she is entitled to recover a further 15 minutes pay a day since 2005, either as a breach of contract or as an unlawful deduction from the wages properly payable to her. She was entitled to be paid for the hours she worked. Even if the claimant had managed to establish that Ms Dowson was paid for time not worked of 15 minutes per day, this is not sufficient to show a contractual right to it on the part of the claimant or that she had any statutory right to it. An extra 15 minutes' pay for time not worked

is not contained anywhere in the claimant's contractual documentation nor has it been established through custom and practice and the passage of time. The additional 15 minutes is not wages "properly payable" to the claimant.

Evidence of direct discrimination

58. The claimant's evidence was that Anne Dowson and others who started work with the first respondent at the same time as her or earlier continued to record their daily working hours as 9 hours per day, such as Carole Smith, Dave Heera and Marcello Neuwert. There was no evidence before the Tribunal that any out of Ms Smith, Mr Heera or Mr Neuwert are alleged to have not recorded their hours accurately or not been paid for the hours they worked.

59. It is noted that Ms Dowson and Ms Smith are said to be white British and Mr Heera and Mr Neuwert are "Mauritian/British" and "Brazilian/British" respectively and are all said to be approximately 20 years older than the claimant.

60. Furthermore, they did not work closely enough with the claimant for their treatment by the respondents to be directly comparable. Mr Neuwert was recruited as Croydon branch manager in 2000 and his contract of employment was for 9.5 hours per day, less 30 minutes for lunch. He was promoted to be the respondent's compliance manager so did not have a customer-facing role.

61. Ms Dowson's contract of employment was before the Tribunal in the addendum bundle disclosed by the respondents and marked "R1". In it on page 17, the hours of work for Ms Dowson are stated to be "*normally 36 hours per week consisting of 9.5 hours per day less 30 minutes for lunch (unpaid)*". The wording of their contracts differ from that of the claimant set out above, which does not contain any reference to a minimum number of working hours per day.

62. Mr Heera's contract sets out his hours of work in the same terms as the claimant's.

63. The respondents' evidence was that Mr Heera and Mr Neuwert worked in the Croydon office, which was the respondents' main branch and which carried out extra duties, such as currency ordering, than the subsidiary branches. For that reason, the working hours were longer in Croydon than they were in, for example, Wimbledon or Canterbury. We accept the respondents' evidence in this regard.

64. Carole Smith's contract could not be located by the respondents, due to the passage of time. This was accepted by the Tribunal.

65. The evidence before the Tribunal was that the claimant recorded her hours accurately and was paid for the hours she worked. The alleged deduction being put forward by the claimant as direct discrimination, unlawful deductions from wages and breach of contract is the loss of the extra 15 minutes' added on time to her day, reduced from 30 minutes.

66. The claimant was promoted to assistant manager of Wimbledon in September 2008. She was promoted to branch manager of Canterbury on 18 September 2009

and was entirely responsible for rotas, staff management and timesheets. She worked overtime and was paid for it. We accepted the evidence of Mr Stent which was that the claimant was responsible for filling in her own timesheets and had she claimed for additional hours, he would have paid her for them.

67. The claimant's undisputed evidence was that on her promotion to assistant manager and then branch manager she was told by Laurie Clay to continue to report her hours as Anne Dowson had done in Wimbledon, which is 8.75 hours for a working day and 9 hours for holidays and sick days.

68. In conclusion, we find that the evidence before us leads us to find the following facts. There is no evidence to suggest that Anne Dowson reduced the claimant's hours because of the claimant's race or age. The reduction in hours had the effect of reducing the added-on period of 30 minutes to 15 minutes. We find that the claimant was paid for the hours she worked but that the extra 15 minutes was an exception to this rule, as she was paid for it whether she worked for the whole 15 minutes or not.

69. It may be that Ms Dowson was regularly paid for hours she did not work. This is entirely possible although there was no evidence before the Tribunal to allow us to make a definite finding of fact that this was the case. Mr Stent trusted his staff and was happy with his arrangements with Ms Dowson. He supported decisions made by Ms Dowson relating to the claimant. He was unperturbed by the suggestion in cross-examination that Ms Dowson took a long lunch break on occasion to meet her sister. There is no evidence that his support, or Ms Dowson's decisions, were based on the claimant's protected characteristics.

70. They evidence before the Tribunal as to the reason why Ms Dowson did what she did was that of the claimant, that Ms Dowson was not a particularly pleasant manager and did not like the claimant. That does not establish discrimination but instead is merely suggestive of a personality clash or strained working relationship and in any event, after September 2009 she no longer worked with Ms Dowson and was entirely in charge of her own working hours.

71. The other evidence before the Tribunal as to the reason why the claimant's hours were changed was from the respondent, which was to do with the different working hours in the branches where the claimant worked, which we accept.

72. There was no evidence to suggest that the difference in treatment of Mr Neuwert or Mr Heera was on the grounds of race or age. They did not work in the same branch as the claimant. Mr Neuwert had been promoted to work as a full-time compliance manager and Mr Heera worked at the "head office" branch in Croydon. There is no evidence to suggest that they were given favourable treatment because of their race or age. There was also no evidence that Mrs Smith was given favourable treatment because of race or age.

73. The claimant told the Tribunal that she only discovered the disparity between the hours recorded for her and for Anne (and others on the older contracts) when she was given access to an online system at the first respondent in May 2016. However, even then, she did not report it or raise it with the second respondent.

She said that she raised it informally with Laurie Clay that summer and once she became pregnant in October 2016, she was nervous to do so as she was scared for her job. She admitted that she only raised it after she was made redundant in May and June 2019. When it was put to her in cross-examination that every time she raised something with Mr Stent, she got a positive response, she admitted that this was the case and that she did not think that Laurie Clay "*had any malicious intentions*". She also told the Tribunal that Mr Stent "*is a nice person, he doesn't even know he is discriminating*."

The claimant's alleged demotion from September 2018 onwards, reduction in pay and complaints about travel expenses

74. In September 2018 the first respondent's Canterbury branch was forced to close due to the sudden closure of Nasons, the department store in which the branch was located.

75. The second respondent's evidence, which we accept, was that this did not cause the staff of the Canterbury branch to be made redundant, as the respondents' intention was to find other premises and reopen in Canterbury. In the interim period, the claimant was asked to provide cover in Croydon for one of the cashiers, as was her colleague from Canterbury, Mr Hill. She accepts that she did not work full time in Croydon during this period. Indeed, for the 25 weeks that the claimant worked in Croydon from September 2018 to May 2019, she rarely worked more than one or two days per week.

76. The claimant told the Tribunal that she began her Graduate Diploma in Law, which was a full-time course although it only required her to attend two days per week. She was also still doing freelance interpreting work for HMCTS at this time. We find that it suited the claimant well to continue to be paid but to carry out such little work for the respondents.

77. It was Mr Stent's evidence to the Tribunal that he reduced the claimant's monthly working hours from 144 to 140 in September 2018 out of fairness to the other two former Canterbury employees who were on new contracts, so that all of those who were ex-Canterbury members of staff who were working less than their usual hours were paid for the same number of hours per month. He told the Tribunal that, given how little the claimant was working during that time, he did not consider this unfair. He said that he reduced her daily rate of annual leave and sick pay to 8.75 hours per day as he had discovered that she was being overpaid sick pay and holiday pay based on her usual working hours.

78. Despite the closure of the Canterbury branch, the claimant was still given a pay rise on 22 October 2018 to £14 per hour. She is addressed as "Manager Canterbury Branch" in the letter.

79. The claimant maintains that at this time she had been demoted to the role of "cashier" by the respondents.

80. The claimant told the Tribunal that between October 2018 and April 2019 she did not receive her payslips from the first respondent. The second respondent's

evidence, which was not disputed by the claimant, was that they had been left in Croydon for her to collect every month, but she had not collected them. We accept Mr Stent's evidence in this regard.

81. She told the Tribunal that she received all of her payslips for this period in May 2019 and discovered that she had been paid only for 140 hours per month and sick pay and holiday at the rate of 8.75 hours per day. She did not dispute that her wages had been paid regularly into her bank account from September 2018 to April 2019.

82. The claimant's allegation to the Tribunal was that this reduction in pay was an act of victimisation because she did a "protected act", in that she complained to the second respondent that her colleague from Canterbury, Graham Cuttress, had been claiming mileage of 35p per mile to drive from home to the Alton branch where he had been temporarily working, whereas she had been told by Laurie Clay to claim a flat fee of £20 per day and then £30 per day, which resulted in a significant shortfall as opposed to claiming a mileage rate per mile.

83. The evidence of Mr Stent was that the claimant herself had suggested to Mr Clay that she claim £30 per day and that, given that she had been a branch manager, he would have expected her to know what the mileage rates were for the company. His evidence was that the respondents had assumed that £30 per day was favourable to the claimant. In any event, once the claimant complained (in April) the shortfall of £577.84 was paid into her bank account on 7 May 2019. This evidence is not disputed by the claimant.

84. It was the claimant's case that the reduction in her holiday and sick pay from 9 hours per day to 8.75 as reflected in the payslips provided to her in May 2019 was because she complained of different treatment between her and Mr Cuttress in the payment of travel expenses.

The respondent's business difficulties and the claimant's dismissal

85. Mr Stent's evidence, which we accept, was that the first respondent intended to reopen the Canterbury branch. The closure of the branch was unexpected and unwanted at the time and was caused by the closure of Nasons, an issue outside the control of the respondents. The respondents' evidence was that they sought new premises thereafter and continued to do so into March and April 2019. We accept this evidence. The claimant viewed new premises in Canterbury in March 2019.

86. However, the first respondent was experiencing an increasingly difficult trading environment influenced by increasing regulation and changed lending criteria on the part of banks. This was communicated to the claimant and other staff in a letter dated 3 April 2019 in which the respondents referred to talks with a potential buyer for the business, Fexco.

87. By 8 May 2019 the respondents wrote to the claimant informing her that Canterbury would not be reopening and that she would be made redundant on 4 August 2019 but that she would not need to attend work after 2 June 2019. The letter noted that the respondents continued to seek a buyer for the remaining

business. The evidence of the second respondent was that this was achieved in early July 2019 but that the Kingston branch also closed and all staff at that branch were made redundant. His evidence was that they needed to make an "*incredibly quick sale*" to save the rest of the business from collapse. This evidence was not challenged by the respondent and we found Mr Stent's evidence generally to be credible, straightforward and consistent and so we have no reason not to accept this evidence also.

88. Mr Stent accepted that the claimant had been placed in a pool for selection for redundancy of one in early May, being the only branch manager at Canterbury, and as no alternative jobs were available at that level he did not carry out any consultation with her about the redundancy, although he did keep her updated as to the business's banking issues and his search for alternative premises in Canterbury, as shown by the letter of 3rd April 2019 and her visit to potential premises a month earlier.

89. We accept, however, that the claimant felt that she was given "*no clear explanation of what was going on"* as she stated in her letter to the respondents of 7 June 2019.

90. The claimant did not complain about being placed in a pool of one and did not challenge the availability of suitable alternative employment at the time she was given her notice of dismissal. Indeed, her primary complaint then (and still to this Tribunal) was that she had not been made redundant earlier. In the letter she sent in response to her notice of dismissal, which was undated but sent between 8 May and 4 June 2019, she wrote

"I gladly accept the redundancy and I do understand that since Canterbury branch closure in September last year, I was made redundant automatically, the reason being that you could not offer me a position equivalent to the Branch Manager's position that I held in Canterbury."

91. The claimant however did complain at the time and complains to this Tribunal that she was provided with inadequate information and that there was inadequate consultation over her redundancy by the respondents.

92. That there was no consultation is accepted by the second respondent, giving evidence on behalf of the first respondent. The information given by the respondents to the claimant consisted, on the evidence before the Tribunal, of information about the first respondent's banking issues in September 2018, a visit to the possible new premises in March 2019 and a letter in April 2019, before she was given her notice of dismissal in a letter dated 8 May 2019.

93. The letter in April 2019 did contain a considerable amount of information about the banking difficulties, the first respondent's difficulties with the increased regulation in their operating sector, that the decision had been taken to sell the business, and the search for a buyer. Mr Stent wrote:

"…I am hopeful that a conclusion can be reached that ensures the successful continuation of the business, with little change ensuing for the vast majority who work within it."

94. This was, however, the only reference in the letter to the possible need for redundancies. The claimant's next contact with Mr Stent was via Laurie Clay, and related to the mileage repayments which were claimed for in emails dated 4th May 2019. There was no discussion on 4th May, from the evidence before the Tribunal, of possible redundancies. The next contact was the claimant's letter of dismissal on 8th May 2019.

95. The evidence of Mr Stent was that there were no alternative vacancies at the first respondent. His evidence, which we accept, was that everyone who had worked at the Canterbury branch was dismissed and that subsequently the Kingston branch also closed and all who were employed in Kingston were dismissed.

96. The claimant subsequently raised a grievance in correspondence sent to the respondents after 8 May 2019. The grievance did not contain a request for reinstatement or re-engagement. The respondents responded in a letter said to amount to a "protected conversation" as per S111A Employment Rights Act 1996. The Tribunal understands that the redacted parts of the letter included an offer of settlement of the dispute by the respondents, which the claimant refused. It is the claimant's case that the respondents failed to deal with her grievance. However, we find that it is clear from the tone and content of the letters that as the offer of a compromise had been rejected, that the claimant would pursue the matter through litigation and we find that it was not unreasonable of the respondents to try to deal with the grievance in that manner, on a "without prejudice" basis.

The Law

Breach of Contract

97. Where an employer breaches the terms of an employee's contract of employment, the employee has three courses of action open. She can waive the breach and carry on working without further protest, in which case she will be deemed to have acquiesced in the change to the terms and conditions of her contract. Alternatively, she can inform her employer that she is accepting the breach of contract and if that breach is a fundamental breach, that she considers herself to have been dismissed. If the employee chooses this option, she must communicate to her employer within a reasonable time that she considers herself to have been dismissed, by clear words or clear conduct. Finally, the employee can continue to register her objection to the breaches of contract and work under protest, but she must continue to register her objection at regular intervals, or else she will be deemed to have acquiesced in the breach.

Unlawful deductions from wages

98. The provisions on protection of wages are in Part II of the Employment Rights Act 1996. Section 13(3) states

"where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion"

99. Section 27(1)(a) defines "wages" as "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*."

Discrimination, the burden of proof, time limits and jurisdiction

100. Section 136(2) Equality Act 2010 states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. This means that once there are facts from which an Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof is then on the respondent to prove a non-discriminatory explanation for any less favourable treatment. Section 136(3) states that this does not apply if the person shows that he or she did not contravene the relevant provision.

101. Direct discrimination: Did the respondent carry out acts which treated the claimant less favourably that it treated or would treat a comparator, being a person not of the claimant's race or age in not materially different circumstances? Was that less favourable treatment because of the claimant's race or age? (s13 Equality Act 2010).

102. The comparator must not share the claimant's protected characteristic and there must be "*no material difference between the circumstances relating to each case*" when considering whether the claimant has been treated less favourably than a comparator, as per s23(1) Equality Act 2010. It is also possible for a claimant to construct a purely hypothetical comparison if no suitable actual comparator is available.

103. Victimisation: As per s27 Equality Act 2010,

"(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."

104. Discrimination complaints are subject to the time limits set out in the Equality Act 2010 at s123(1), 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 to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable."

105. Section 123(3) Equality Act 2010 make special provision relating to the date of the act complained of as follows:

"For the purposes of this section…conduct extending over a period is to be treated as done at the end of the period"

106. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a "just and equitable" basis.

107. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once she knew of the possibility of taking action. The Tribunal should also take into account the merits of the claim.

108. It is not the case that it is never just and equitable to extend time where there is no good explanation for the delay. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA* held that any explanation put forward by the claimant is a matter that the Tribunal should consider but is not the deciding issue of whether or not the Tribunal should extend time.

109. In discrimination claims, a claimant must engage with ACAS Early Conciliation before an ET1 can be submitted. The ACAS Early Conciliation must begin within three months of the date of the act complained of.

Unfair Dismissal and Redundancy

110. Section 139(1) Employment Rights Act 1996 states:

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

the fact that his employer has ceased or intends to cease—
to carry on the business for the purposes of which the employee was employed by him, or
to carry on that business in the place where the employee was so employed, or

the fact that the requirements of that business—

for employees to carry out work of a particular kind, or
for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

111. For a dismissal to be fair by reason of redundancy, there must be a redundancy situation at the respondent's business. Dismissal has to be within the range of reasonable responses, as per section 98(4) of the Employment Rights Act 1996. It is for the Tribunal to decide whether the actions of the respondent in these circumstances fell within or without the range of reasonable responses. The question for the Tribunal is whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the redundancy situation as a sufficient reason for dismissal. This is to be determined in accordance with equity and the substantial merits of the case. It is not for the Tribunal to decide whether they would have thought it fairer to act in some other way than an employer has done in a redundancy situation. The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. (*Williams v Compair Maxam Limited* [1982] IRLR 83).

112. *Williams and Compair Maxam* also sets out additional factors for the Tribunal to consider in deciding whether a dismissal by reason of redundancy is unreasonable contrary to section 98(4) of the Employment Rights Act. Those criteria are:-

- Have there been objectively chosen selection criteria fairly applied;
- Were employees adequately warned and consulted;
- Was alternative work available or was there a failure to seek alternative work on the part of the employer;
- If a union was present was a union involved and consulted. In the claimant's case no union was present and so this issue did not fall to be considered.

113. Procedural failure on the part of the employer can render a dismissal unfair under section 98(4) but the question of whether the employee would still have been dismissed if a fair procedure had been followed is relevant to the amount of compensation payable.

114. *Polkey v A E Dayton Services Limited Ltd [1987] IRLR 503 HL* established the principle that a Tribunal may find that even though a dismissal would have taken place**,** adherence to fair procedures would have delayed its implementation such that a claimant can be paid compensation on the basis of the later dismissal date.

115. When faced with a redundancy situation an employer must apply fair selection criteria when deciding which employees are to be made redundant. Generally speaking, employers are allowed to adopt the selection criteria which are most suitable for their businesses. The "range of reasonable responses" test is applicable to the selection of the pool from which the redundancies were to be drawn. (*Hendy Banks City Print Limited v Fairbrother and Others* UKEAT/0691/04/TM);

116. In *Taymech v Ryan* EAT/663/94 it was held that the question of how the pool should be defined is primarily a matter for the employer to determine and it will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem.

117. In *Heron v Citylink-Nottingham [1993] IRLR 372* a failure to consult the individual whom it was proposed to dismiss was not justified by the employer's belief that the employee was the only person who could be made redundant. Even in an apparently clear case there may be factors known to the employee but unknown to the employer which could cause the employer to change his mind, such as that the employee is willing to accept a lower paid job or a more junior post.

118. *Mugford v Midland Bank [1997] IRLR 208 EAT*, states that where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

Application of the Law to the Facts Found

Claims for Breach of Contract and Unlawful Deductions from Wages

119. The first claim is for a reduction in daily working time. There are two factual elements to the first allegation, which are (1) that the claimant's daily working hours were reduced in July 2005 from 9 hours per day to 8.75 hours and (2) that a notional 30 minutes time which was allegedly added on to the claimant's working day was reduced to 15 minutes in July 2005.

120. Although the claimant has told the Tribunal that she has lost wages as a result, she has not identified where she was paid less than 36 hours per week during her employment. Her claims for lost wages appear to be focussed on the loss of an additional 15 minutes' pay per day from July 2005.

121. The respondents agree that the claimant's daily working hours were reduced from 9 hours per day to 8.75 hours per day in July 2005. It was the second respondent's evidence that this was permitted under the terms of the claimant's contract. The respondents' evidence was that this was done in response to different working hours in different branches where the claimant was working. When she moved from Croydon to Wimbledon, the Tribunal was told that the working day was shorter.

122. However, the evidence before us was that the claimant still worked 36 hours per week despite the shorter working day. We find that the claimant received her weekly wage based on 36 hours per week and if this working time varied, we find that it varied with her agreement. We also find that the respondents were entitled under the terms of the claimant's contract to reduce her daily working time to 8.75 hours per day, in response to changing circumstances.

123. There is, as stated in our findings of fact above, no evidence that the claimant had the right to be paid for an additional 30 minutes per day in her contract of

employment. She was told that her hours were 36 per week normally spread over four days, with a 30 minute unpaid break for lunch. She would have to work 9.5 hours per day to be paid for 9 hours, or 9.25 hours per day to be paid for 8.75 hours.

124. Her evidence was that she in fact was initially allocated, along with Anne Dowson, an extra 30 minutes' pay at the end of the day for cashing up time, for which she would be paid whether she worked all of it or not. Therefore in Oxford Street for example, if the claimant worked for 9.5 hours, a 30 minute lunch break would be deducted but then 30 minutes' time would be added back on at the end of the day.

125. When her hours were reduced, the Tribunal understands that the practice was that the claimant worked for 9 hours, deducted the unpaid 30 minute lunch break but added back on 15 minutes at the end of the day instead of 30 minutes. It is this reduction in the extra 15 minutes that the claimant considers means that she was underpaid.

126. There is no evidence before us from which we could conclude that the claimant was entitled to a 15 minute or 30 minute additional period of pay. The evidence of the respondents was that she was paid for the hours that she worked. Had she worked a 9 hour day, she would be paid for it, less a 30 minute lunch break. Whatever arrangement Anne Dowson had with the second respondent is irrelevant to the claimant's own contractual entitlement to the same or a similar arrangement – another employee's entitlement is no basis for her entitlement in a breach of contract claim as employees are free to negotiate their own terms with their employer, if the employer agrees.

127. In any event, any changes to the claimant's wages or working hours were accepted by her in 2005. Although she queried it with Mr Clay, she did not do so past the end of 2005, even on the claimant's own evidence. Even if there had been a contractual entitlement to the 30 minutes, which there was not, the claimant has long acquiesced in any breach of that theoretical entitlement.

128. In terms of whether there has been an unlawful deduction from wages of 15 minutes' pay per day, the claimant has not established that the 15 minutes was ever wages "properly payable" to her, for the reasons set out above. The claimant has not identified an occasion where she was paid less than 36 hours per week prior to September 2018. In September 2018 she provided cover in the Croydon branch and worked only between one and four days per week. The wages "properly payable" to her from September 2018 onwards were the wages agreed between her and the respondents, which were that she would be paid 140 hours per month but not required to work 140 hours per month, but would be required to provide cover in Croydon when necessary.

129. The claimant's second claim for breach of contract is that she was demoted to cashier in September 2018 after the closure of the Canterbury branch. It was accepted by the respondents that she was asked to cover cashier's shifts in Croydon from September 2018 until her dismissal. The claimant alleged that her colleague from Canterbury, Mr Cuttress, was placed in the Alton branch as the manager and that this should have been offered to her. The second respondent's

evidence was that he had assumed that she would not want to travel long distances to Alton because of her childcare and that the cover for the Alton manager was only a few days for the manager's holiday.

130. It was, we find, made clear to the claimant while she was working in Croydon that it was expected to be a temporary measure while new premises were sought in Canterbury, as discussed above. She was given a pay rise in October 2018 and the letter informing her of this was addressed to her as the "Manager, Canterbury Branch" and was paid at her manager's rate of pay.

131. We find that there was no breach of contract in 2018 and no demotion of the claimant at that time.

The claimant's claims for direct discrimination and relevant time limits

132. It is the respondents' case that the Tribunal has no jurisdiction to determine any alleged act of discrimination occurring on or before 9 July 2019 in respect of the first respondent as this is said to be outside the primary limitation period of 3 months provided for in s.123(1) Equality Act 2010 (having regard to the extension of time provided by the early conciliation rules).

133. Similarly, the respondents allege that any act occurring on or before 24 July 2019 in respect of the second respondent is said to be outside the primary limitation period of 3 months provided for in s.123(1) Equality Act 2010 (having regard to the extension of time provided by the early conciliation rules).

134. The Tribunal must also decide whether the reduction in contractual hours, said to have occurred in July 2005, was a one off act with continuing consequences, or conduct extending over a period (s.123(3)(a) Equality Act 2010)?

135. It was the claimant's evidence that, although the reduction in hours occurred in July 2005, she did not discover until May 2016 when she was given access to the Find My Shift online system that the respondent's other employees (her comparators) who started work at the same time as her or before her were still being paid for 9 hours per day. Although this may be correct for some of her comparators (namely Mr Neuwert, Mr Heera and Mrs Smith) it is not correct for Ms Dowson, as the claimant worked with Ms Dowson continually from 2005 to 2009 and her evidence was that she knew that Ms Dowson was still recording a daily working time of 9 hours per day from 2005 onwards.

136. The claimant's evidence was that:

- She did not realise in 2005, or in 2016, that she had been discriminated against. She knew that something was unfair about her treatment, but did not realise this amounted to unlawful discrimination;
- She became pregnant in October 2016 and did not want to complain then, as she was fearful that she would lose her job. She only complained in 2019 after she had been given notice of her dismissal. She raised the issue of her hours with Laurie Clay several times informally, but never complained of discrimination; and

- She only realised she had been subjected to unlawful discrimination after she began studying law in 2017.

137. In relation to whether the act of reducing her hours in 2005 was an ongoing act of discrimination, or a single act with ongoing consequences, we find that it is clearly the latter. The decision was taken by the respondents in 2005 to reduce the claimant's hours. The claimant's hours remained at 8.75 per day (subject to overtime and agreed variations in that daily amount) until her dismissal, although as regards holiday pay and sick pay she was paid at 9 hours per day (as she accepted) until 2018.

138. Even if the claimant's case is taken at its highest and May 2016 is taken as the time from which limitation starts to run, the claimant waited three years, until after her dismissal, to raise the issue of discrimination with the respondents.

139. We find that, had the claimant seriously considered that she was the subject of unlawful discrimination, she would have raised the issue with Mr Stent at the time as she raised other issues with him. She was never, on the evidence before us, punished in any way for raising issues with him or with Mr Clay.

140. The claimant also had access to the first respondent's Equal Opportunities Policy, dated January 2005, which stated amongst other matters

> *"Any employee who believes he or she may have been unfairly discriminated against is encouraged to use our grievance procedure.*"

141. We do not accept that the claimant was not aware of "discrimination" as a concept prior to 2017. Even if she was, she still waited a considerable time after that to raise the issue.

142. We find on the basis of the evidence before us that the claimant, for the whole of her employment with the first respondent, was alert to any possible disadvantage she may have been subjected to, whether by way of pay, job title or expenses and raised this with the respondents, largely with a positive outcome for her. We do not accept that the claimant was not able to raise the issue with the respondents prior to May and June 2019 for fear of the consequences. The complaints have not therefore been brought within the primary time limit in the Equality Act 2010, but have they been brought within such further period as the Tribunal considers to be just and equitable as per s123 Equality Act 2010?

143. In considering whether it is just and equitable to extend time to consider the claimant's claims, we have considered the balance of prejudice to both parties in doing so. We accept that there is prejudice to the claimant in not allowing the claims to be heard. However, the passage of time since the reduction in hours took place in 2005 means that the evidence relating to that period of time is significantly less reliable and the prejudice to the respondent in having to explain decisions taken 16 years ago is significant.

144. We have also considered the merits of the claim, and found the claimant's claims to be unmeritorious. Although the claimant has established evidence of

difference in treatment between her and her comparators, she has not been able to establish facts from which we could conclude, in the absence of an explanation from the respondents, that the difference in treatment was in any way whatsoever because of her age or race. Other than the claimant making a bare assertion that she knew that the difference was due to discrimination, no evidence (or evidence of a suspicion) of unlawful discrimination is before us.

145. The claimant alleges that, taken with the victimisation claim, there has been one continuous act of discrimination and that because this did not end until August 2019 her claims have been brought in time. We do not consider the allegations of direct discrimination to be a continuing act and so do not accept this submission.

146. Therefore, we conclude that the Tribunal has no jurisdiction to consider the claimant's claims of direct discrimination because they were presented outside the primary time limit, and it is not just and equitable to extend time for their presentation.

The claimant's claim for victimisation and relevant time limits

147. The claimant's claim for victimisation is that she made a protected act in April and May 2019 by pointing out a difference in treatment between herself and her male colleague Mr Cuttress, in relation to the payment of expenses. The respondent agreed to reimburse the claimant the difference in the expenses within a few days of her request.

148. The claimant's evidence to the Tribunal was that she pointed out this sex discrimination to Laurie Clay and that consequently a 15 minute deduction was made to her holiday pay and sick pay rates.

149. The respondent's evidence, which we accept, was that the reduction in the rate was made in 2018 before the conversation about travel expenses. The deductions related to pay periods from October 2018 to May 2019. The claimant received her payslips all in one go for this period and alleges that deductions were made retrospectively after she complained about the mileage payments. She acknowledged that the salary payments were made monthly between October 2018 and May 2019.

150. Was this alleged reduction in sick and holiday pay, said to have occurred in April/May 2019, a one off act with continuing consequences, or conduct extending over a period (s.123(3)(a) Equality Act 2010)? Would it be just and equitable to extend time for the claimant to bring the complaint? The claimant says that the last act was in August 2019 when her holiday pay was on her payslip and that the claim is therefore in time.

151. We find that the reduction in sick pay and holiday pay took place before the complaint about travel expenses was made to the respondents. The decision to reduce was taken in September 2018 according to the second respondent, and his evidence was that the reduction was made because the respondents discovered that the claimant had been overpaid her daily rate for sick pay and holiday pay as it had been paid at 9 hours per day instead of 8.75 hours. This was a single act with

continuing consequences, not a continuous act. The time limits start to run from when the claimant became aware of the reduction, which was in May 2019, not the date of the last payment (August 2019).

152. Given that the complaint has been presented outside the primary time limit, has it been brought within such further period as the Tribunal considers just and equitable as per s123 Equality Act 2010?

153. There was no evidence before the Tribunal to explain why the claimant waited until October 2019 to begin early conciliation with the respondents. She had already referred to discrimination in her correspondence with the respondents in June 2019 and she was studying law at the time, so cannot be said to be unfamiliar with the concepts of discrimination and victimisation, or unable to conduct any research. Likewise the information about presenting a claim to the Tribunal is readily available to anyone with an internet connection and access to a search engine.

154. In considering whether to extend the time available for presentation of the victimisation complaint, we have considered the balance of prejudice and hardship to the parties in refusing or allowing the extension of time. Clearly, not allowing the claim to proceed causes hardship to the claimant. The respondents are not subjected to as much hardship in relation to the victimisation complaint as the evidence is much more recent and they have (as the issue is being decided at the final hearing) already had to prepare to address the issue in any event.

155. However, taking into account both the claimant's lack of a credible explanation for why this claim was presented late and also the merits of the claim (which we find to have little prospect of success), the balance of hardship and injustice falls in favour of not allowing the claim to proceed. In terms of the merits of the claim, our findings of fact were that the claimant may indeed have made a protected act, in that her complaint to Laurie Clay was one of a disparity in treatment. However, it is clear that the reduction in pay was decided upon and put into action a number of months before May 2019 and so cannot possibly be said to have been "because of" her complaint, as is required by the statute, because it happened before the complaint did. The victimisation claim is therefore presented out of time and is dismissed, as the Tribunal has no jurisdiction to consider it.

Unfair dismissal

156. The claimant's claim for unfair dismissal is made up of three elements. Firstly, she alleges that the decision to make her redundant in May 2019 was unfair, because she considers that she was actually redundant in September 2018 and should have been dismissed with a redundancy payment then, rather than being kept on and paid until August 2019. She claims consequential losses, including credit card interest and rent as a result of the delay in her dismissal between September 2018 and May 2019.

157. The decision to select staff for redundancy is a decision for an employer to take and will usually not be interfered with by the Tribunal. The respondents' evidence was that the sudden closure of the Canterbury branch in 2018 was due to circumstances beyond their control and that they sought new premises and

intended to re-open in Canterbury. It was many months before the business difficulties caused the respondents to take the decision to close Canterbury permanently, in April and May 2019. Therefore, the claimant was not, according to the respondents, redundant in September 2018. Instead, the claimant was kept on the equivalent of "short time", being paid for 140 hours per month and working between 1 and 4 days per week.

158. Had she wished to request a redundancy payment during that period, she would have had to comply with the rules in sections 147-154 Employment Rights Act 1996, whereby the employee must give the employer a written notice of intention to claim a redundancy payment in respect of lay-off or short-time. She did not do so. In the absence of this, the claimant had no right to be paid a redundancy payment in September 2018.

159. The second and third of the claimant's complaints in relation to her dismissal by reason of redundancy was that there was a lack of consultation and insufficient transparency. We accept that she was provided with information only in relation to the business difficulties (and not about redundancies) on 3 April and was given no information about the particular risk to her until her letter of dismissal.

160. The second respondent's evidence to the Tribunal was that consultation would "*not have got us anywhere*". We accept that Mr Stent was correct about the first respondent's financial and banking difficulties at the time and accept that consultation with the claimant would likely not have resolved those issues or eliminated the need for redundancies, but an employer's duties are to inform and consult, not just to consult.

161. Also, the respondents did not consider whether to apply a different pool for selection, such as all the branch managers, and apply selection criteria to choose one individual from all of those for dismissal. Mr Stent's evidence was that consultation would have been futile, which we find was also reference to consultation on the pool and on selection criteria.

162. We find that he applied his mind to the circumstances of the business at the time, and as Canterbury was already closed and he was under considerable pressure to find a buyer, concluded that those who were assigned to Canterbury should be made redundant and that the pool for selection was Canterbury staff only. In the claimant's case, the pool for selection was Canterbury branch managers, which only had the claimant in it. In the circumstances, was this decision about the pool one that a reasonable employer could have taken? We find that it was. Undergoing a process of consultation would have been time-consuming at a time when his efforts were concentrating on resolving issues concerning the sale of the business, the regulatory difficulties and banking issues and would not have led to any different approach to the situation being taken by him.

163. In any event, the clear evidence of the claimant was that she welcomed the notice of her redundancy. She does not complain to the Tribunal about the fact that she was dismissed per se, but on the contrary complains that she was not dismissed earlier.

164. Did the first respondent and Mr Stent inform and consult adequately? It is clear that they did not. There was very little information given about possible redundancies and no consultation. Even in the circumstances, there were opportunities that the respondents could have taken to keep the claimant better informed or for Mr Stent to delegate to Mr Clay to do so.

165. However, we find that had the respondent fully consulted with the claimant, she would have been dismissed in any event. Her evidence was that she welcomed the dismissal and wished it had happened in September 2018. Any consultation with her would, on the balance of probabilities, have led to her dismissal in any event for this reason. She would, we find, have been forthcoming in accepting any offer of redundancy, whether voluntary or otherwise, at an early stage in any consultation process. In the same way that she was confident in asking for pay rises or for compensation for underpaid travel expenses, we find that she would have asked to be dismissed with a redundancy payment as part of any consultation. This is consistent with her clear evidence to this Tribunal.

166. We find that, applying the principles as discussed in *Credit Agricole Corporate and Investment Bank v Wardle* [2011] EWCA Civ 545, had full consultation been carried out by the respondents, it would not have prolonged the expiry of the claimant's notice period and therefore would not have delayed the date of termination of her employment. Had the respondents begun consultation one or two weeks before 8 May 2019, we find that a request for voluntary severance would have been made promptly by the claimant (or acceptance of any proposed redundancy) and would not have delayed the claimant's dismissal.

167. Therefore, although the claimant's dismissal is unfair due to a lack of consultation, she has suffered no financial losses in consequence of this and does not receive an award of compensation.

168. The claimant has not complained of a breach of the statutory consultation obligations in the Trade Union and Labour Relations (Consolidation) Act 1992 in these proceedings and there was no evidence before the Tribunal that the respondents proposed to make 20 or more employees redundant at the time to which this claim relates.

Deposit Order

169. The terms of the deposit order made by Employment Judge Sage made on 14 January 2021, as set out above, were:

- That despite attempts at the previous case management hearing and before her on that occasion to clarify the claimant's age and race discrimination claims, this had not been done and the claimant had not been able to say which of her four comparators were relied on in relation to a particular timeframe. The judge concluded that the claims were vague and therefore had little reasonable prospect of success; and
- The claimant had only referred to differences in race/age and differences in treatment and was not able to refer to any evidence which would suggest

that the differences in treatment were because of race or age. Therefore the judge concluded that the claims had little reasonable prospect of success.

170. This Tribunal has determined primarily that the Tribunal had in fact no jurisdiction to hear the claimant's race and age discrimination claims, because they were presented out of time. The claims therefore fail for reasons other than those in the deposit order. As per Rule 39(5), there will therefore be no automatic payment of the amount of the deposit to the respondents and the deposit will be refunded to the claimant.

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Employment Judge Barker

Date: 02 November 2021