EMPLOYMENT TRIBUNALS

Claimant: Miss N Rolph

Respondent: ISS Mediclean Limited

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 2nd, 3rd, and 4th November 2021

Before: Employment Judge Ayre, sitting with Tribunal members Ms H Andrews and Mr R Jones

Representatives:
Claimant: In person
Respondent: Mr S Moon, consultant

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for indirect sex discrimination succeeds. The respondent discriminated against the claimant by imposing a requirement that she have a satisfactory attendance record and dismissing her for not meeting that requirement.

2. The automatic unfair dismissal claim made under section 99 of the Employment Rights Act 1996 fails and is dismissed.

3. The clam that the respondent subjected the claimant to a detriment contrary to section 47C of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a Hospitality / Catering Assistant from 25 November 2019 until 5th March 2020 when she was dismissed with immediate effect. She had previously worked for the respondent until September 2019 when she resigned from her employment. There was then a break in her service until November 2019. This claim is concerned with the second period of employment only.

2. By a claim form presented on 23 May 2020, following a period of Early Conciliation that started on 7 May 2020 and ended on 21 May 2020, the claimant brought claims of sex discrimination, automatic unfair dismissal and that she was subjected to detriments.

3. In summary, the claimant alleges that during her second period of employment with the respondent, between 25 November 2019 and 5 March 2020, she was subjected to detriments because she exercised her right to take time off under section 57A of the Employment Rights Act 1996 ("the ERA"), that she was indirectly discriminated against because of her sex, and that her dismissal on 5th March 2020 was automatically unfair contrary to section 99 of the ERA because the reason or principal reason for the dismissal was related to the claimant taking time off under section 57A of the ERA to care for her children.

4. The respondent defends the claim. It says that the claimant was dismissed because she failed her probationary period

The Proceedings

5. The claimant represented herself in the proceedings. At the start of the first day of the hearing the claimant joined the Cloud Video Platform by telephone rather than by video. She explained that she was having an anxiety attack as a result of seeing her former colleagues on the video.

6. We agreed that the claimant would join the hearing via telephone link whilst we discussed preliminary matters and the issues. Thereafter, the respondent's witnesses, by agreement, turned off their cameras except when they were giving evidence, and the claimant was able to participate in the proceedings.

7. We also adjusted the start and finish times of the hearing to enable the claimant to take her children to school and pick them up again afterwards.

8. We heard evidence at the hearing from the claimant and, on behalf of the respondent, from Mrs Elaine Green, Retail Supervisor, Mr Lee Clarke, Head of Retail at Derby Hospital and Mr Mark Robinson, Head of Patient Catering.

9. There was an agreed bundle of documents running to 358 pages.

10. At the start of the hearing the issues that fell to be determined by the Tribunal were discussed and agreed.

The Issues

11. The issues that fell to be determined were as follows: -

Indirect sex discrimination (s19 Equality Act 2020)

a. Did the respondent apply the following provision, criterion or practice ("PCP") to all employees, both male and female:

    i. A requirement that employees have a reasonable or satisfactory level of attendance?

b. Did that PCP put female employees at a particular disadvantage when compared with men?

c. Did the PCP put the claimant at a substantial disadvantage? The substantial disadvantage relied upon by the claimant is an inability to meet the attendance requirements because she is a single parent with no family support and a child with a disability. The claimant's inability to meet the requirement ultimately led to her dismissal.

d. Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim? The legitimate aims relied upon by the respondent are:

    i. A requirement for the respondent to meet its contractual obligations towards its client; and
    ii. Its duties towards other employees.

e. In deciding the question of proportionality the Tribunal will decide:

    i. Was the treatment an appropriate and reasonably necessary way for the respondent to achieve those aims;
    ii. Could something less discriminatory have been done instead; and
    iii. How should the needs of the claimant and the respondent be balanced?

Automatically unfair dismissal (s 99 ERA)

12. Was the reason or principal reason for the dismissal related to time off under s57A of the ERA?

Detriment under section 47C of the ERA

13. Did the respondent do the following things:

a. Did Lee Clark tell the claimant to climb ladders and clean air vents whilst food was out on display?
b. Did Lee Clark tell the claimant to get on her hands and knees and clean a storage room?
c. Did the respondent leave the claimant to work all day in the coffee shop on the tills without training and without anyone else in the coffee shop?
d. Did the respondent give the claimant extra work to do – specifically, putting paper cups out.

14. If so, was the reason for the treatment related to the fact that the claimant had taken time off under section 57A of the ERA?

Remedy

15. Did the respondent fail to provide the claimant with a written statement of employment particulars contrary to section 1 of the ERA?

16. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

17. If so, did the respondent unreasonably fail to comply with it by not hearing the claimant's appeal?

Findings of Fact

18. The claimant was employed by the respondent from 25 November 2019 to 5 March 2020. The respondent has a contract to provide catering services at Derby hospital and the claimant worked on that contract. She had previously worked for the respondent but resigned from her employment in September 2019.

19. The claimant is a single parent and has two school aged children. One of those children has additional needs and requires extra support from the claimant.

20. In October 2019 discussions took place between the claimant and Elaine Green, Retail Supervisor, about the claimant returning to her old job [p.127]. There was a conflict of evidence as to who approached who about the job, but it has not been necessary for us to resolve that conflict as it is not relevant to the issues that we have had to determine.

21. On the 5 November 2019 the claimant met with Lee Clark who had joined the respondent on 2 September 2019 as Head of Retail. During that meeting the claimant seemed to regret having resigned and told Mr Clark that she enjoyed her work and needed to earn money for her children. Mr Clark was aware that the claimant had taken time off during her previous period of employment with the respondent, but wanted to give her an opportunity as he was sympathetic to her position, having been raised by a single parent himself.

22. Mr Clark knew that there had been some issues with the claimant's absence during her previous employment, and during the meeting he told her that she would need to reduce the number of absences from work. He explained that the claimant would need to work a probationary period and she assured him that she would do what she could, and that her attendance would improve. Mr Clark also told the claimant that, as he had children himself, he understood that she may need extra time off during school holidays, but that she would need to sort out some childcare. He asked her if she had made arrangements for childcare and she told him that she had done.

23. The claimant was ambitious and wanted to progress to become a supervisor. Mr Clark did not have a vacancy in his team at the time, but wanted to give the claimant an opportunity as she had been a good performer when she previously worked for the respondent.

24. Mr Clark offered the claimant a job as Catering Assistant, working five hours a day, four days a week. It was agreed that the claimant's hours of work would be from 9am to 2pm on Monday, Tuesday, Thursday and Friday each week.

25. Mr Clark sent the claimant an offer letter [p.128a] which stated that the offer was subject to receipt of satisfactory references, proof of entitlement to work in the UK, Occupational Health clearance and a three month probationary period. It was agreed that the claimant would start work on Monday 18th November 2019.

26. The claimant was not provided with a contract of employment at the start of her second period of employment with the respondent, and there was no evidence before us of her having been provided with a copy of the respondent's policy on carer's leave.

27. Before the claimant could start work she was required to complete some paperwork [p.29]. There was a short delay in the claimant completing this paperwork, which delayed her start date by a week, so that her employment started on 25 November 2019.

28. There was a dispute of fact as to whether the claimant was provided with a contract of employment/written statement of employment particulars at all during her second period of employment. The claimant said that she had not received a contract. Mr Clark's evidence was that he had given the claimant a contract [pp.154-161] in person on the 8th January 2020 and asked her to sign and return it. There was a copy of the contract in the bundle and this included an 'issue date' of 8 January 2020. Mr Clark told us that he was '100% certain' he had given the claimant her contract on this date because he had been given several contracts to hand out that day, and had given them all out.

29. On balance, we prefer Mr Clark's evidence on this issue, and we find that the claimant was provided with the contract set out at pages 154-161 of the bundle on or shortly after the 8th January 2020.

30. The respondent has an absence line, which is also known as the 'sick line'. Where an employee is off sick they are required to ring the absence line or contact their department or manager to let them know that they won't be in. This contact should be made no later than 30 minutes after the employee is due to start work. Where an employee calls the absence line, a note is made of the call and of the reason for the absence.

31. There was some evidence before us that the claimant did have other people who could provide childcare if required, in the form of a babysitter and her sister. We accept, however, the claimant's evidence that it was difficult for her to find someone to look after a child who is unwell, particularly at short notice.

Week One

32. The claimant's first day of work was Monday 25 November 2019. She worked Monday and Tuesday that week, and on Wednesday 27 November she sent a text message to Lee Clark saying that she was unable to come into work the next day because she did not have enough money to pay for transport to work. She told Mr Clark that she would call in sick the following day.

33. Mr Clark replied asking how much the claimant's travel costs were. The claimant told him that it cost her £8.90 to get to and from work, and Mr Clark told her that he was happy to help and would transfer £10 into her bank account [p.136-8].

34. The claimant came into work on Thursday 28 November but was almost an hour late for work. She sent a text message to Elaine Green at 9.48 am saying that she would be at work in ten minutes [p.139]. She did not give any reason for the delay.

35. The claimant was due to work, exceptionally, on Saturday 30 November 2019. On the afternoon of Friday 29 November, she sent a text message to Elaine Green saying that she would not be able to work the following day as she did not have anyone to look after her daughter [p.139].

Week Two

36. The claimant worked on Monday 2nd and Tuesday 3rd December. Wednesday was her non-working day, and on Thursday 5th December at 6.58 am she sent a text to Elaine saying that she could not get into work because Sky had taken £160 out of her account, and she could not borrow the money to get into work [p.140]. The claimant told Elaine that she would be in work the following day, Friday 6th.

37. The claimant did not attend work on either Thursday 5th December or Friday 6th December. She could not recall why she had not gone into work on the 6th, but thought it was either due to money or to a lack of childcare. Given that there was no evidence before us of the claimant having received any money between 5th and 6th December, it seems

likely to us that the claimant's absence on 6th December was due to her financial situation.

38. The claimant did not contact the respondent to tell them that she would not be in on Friday 6th December, and her absence that day was therefore unauthorised. During week two of her employment the claimant was therefore absent for two out of the four days that she was due to work, and on one of those days she failed to contact the respondent at all to let them know that she would not be in.

39. We find, based on the evidence before us, that none of the claimant's absences during the first two weeks of her employment were related to childcare.

Week Three

40. The claimant worked on Monday 9th and Tuesday 10th December. She did not work on Thursday 12th December and could not recall the reason for her absence that day. There was no evidence before us of the claimant contacting the respondent that day to inform them that she wouldn't be in, so her absence on the 12th was therefore unauthorised. The claimant did work on Friday 13th December, so in week three of her employment the claimant worked for three out of four days.

Week Four

41. On Monday 16th December, after 9 am (the time at which she had been due to start work), the claimant sent a text message to Elaine saying that she could not come in because one of her children was unwell and she did not have a babysitter [pp.140, 146]. This was the first time the claimant was off for a childcare related reason. She remained off work for the whole of that week.

42. Mr Clark had been due to carry out a probationary review meeting with the claimant on 16th December. As the claimant did not attend work that day, he carried out the review in her absence, which we find surprising. The note of the review [p.143] shows that Mr Clark scored the claimant as 'excellent' in all areas except attendance, in which she was scored as 'fair'. The note also contains the comment that "*Need to ensure you are able to get to work for each shift.*" There was no evidence before us that Mr Clark gave the claimant a copy of the probationary review form or that he discussed it with her.

Week Five

43. On Monday 23 December the claimant sent a text message at 10.45 am (almost two hours after she was due to start work) saying that her babysitter had let her down. She did not work that day. She did work on Tuesday 24th December, and was on holiday on Thursday 26th. On Friday 27th she did not attend work due to childcare issues.

44. Elaine Green met with the claimant on 24th December to carry out an appraisal and development review [pp.148-151]. The review, which was signed by the claimant, recorded her commenting that she

enjoyed her job, and that the thing that had motivated and engaged her the most was the managers. She also noted that she was experiencing childcare issues, and that the key area for development was her timing, attendance and childcare.

Week Six

45. The claimant did not work at all during the sixth week of her employment. She sent a text to Elaine on the evening of Sunday 29th December saying that she would not be in the following day because her sitter had cancelled on her. The next morning, she sent a further text saying that she would not be able to come to work at all that week, and would only be back the following Monday when her children went back to school.

Week Seven

46. The claimant worked on Monday 6th and Tuesday 7th January 2020. On Thursday 9th January at 7.13 am she sent a text message to Lee Clark saying that there had been an incident involving racism towards her son the previous day and that she had to go into the school for a meeting to discuss it [p.162]. She did not go into work on either the 9th or 10th January and could not remember why she had been off on Friday 10th. There was no record of her having reported her absence on the 10th.

47. The claimant therefore only worked two days out of four during the seventh week of her employment.

Week Eight

48. The claimant attended work on Monday 13th January, and arranged to work Wednesday 15th rather than Tuesday 14th. She did not attend work on the 15th, and shortly after 10 am that day Lee sent her a text message asking whether she was coming into work [p.165].

49. The claimant did not reply to Lee until the following day [p.166] when she texted him saying that the ceiling in her kitchen had '*come thru*' and that she needed to stay at home whilst the repairs were carried out. She told Lee that she had telephoned the 'sick line' to report her absence.

50. The claimant was off for three out of her four working days that week, and the reason for her absence was that her ceiling had fallen through, so was not childcare related.

51. Whilst the claimant was at work on Monday 13th January Lee Clark gave her a letter [p.164] headed 'First Absence Review Meeting'. That letter stated that the claimant's absence level was "*now such that it is a matter of concern to the Company*" and invited her to a meeting on Thursday 16th January to discuss the position. The claimant denied having received this letter, but on the 16th, the date that the meeting had been due to take place, she sent a text message to Mr Clark in which she wrote that: "*I no we had a meeting this morning*". We

therefore find, on balance, that Mr Clark did give her the letter inviting her to a meeting.

Week Nine

52. The claimant worked three days this week – Monday 20th January, Tuesday 21st and Thursday 23rd. The meeting that had been due to take place on 16th January was rearranged for Monday 20th. Mr Clark completed an 'appraisal' form in which he recorded that the claimant wanted to progress to supervisor in the future [p.144].

53. He also completed a return-to-work form in relation to the claimant's absence the previous week [p.168-170]. The claimant was told that her attendance needed to improve to at least 90% over the next few weeks. Mr Clark did not go as far as to warn the claimant that she may be dismissed if it did not improve, but did explain that her current absence levels could not be tolerated.

54. During the meeting on 20th the claimant asked if she could change her hours of work, so that she would only work three days a week for a 3 month period [pp.171-2]. Mr Clark agreed to the claimant's request, so that going forward the claimant would only work Tuesdays, Thursdays and Fridays. It was also agreed that, as punctuality had been an issue, her start time would be changed from 9am to 9.30am.

55. One of the claimant's colleagues had offered the claimant a bicycle so that she could come into work more quickly and cheaply, and the claimant said that she was considering the option.

56. Following the meeting Mr Clark gave the claimant a letter confirming what had been discussed [pp.173-174]. The letter stated, amongst other things, that the claimant's probationary period would be extended by 4 weeks and that she needed to significantly reduce the amount of her absence days, to achieve 100% attendance wherever possible. The letter also stated that the claimant's attendance would be monitored over the next four weeks and that a formal review would take place on 17th February. The letter warned the claimant that if her absence levels failed to improve, further action may be taken, including the "*failure of your probation period and employment with ISS*.

57. The claimant told us that she had not received this letter. Mr Clark was certain that he had delivered the letter to the claimant by hand. On balance we prefer Mr Clark's evidence on this issue and find that he did deliver the letter to her.

58. On Tuesday 21st January, the day after the claimant had been warned that her absence levels needed to improve and her start time had been delayed to give her more time to get into work, the claimant was late for work.

59. The claimant did not attend work on Friday 24th January because her daughter was off school. She rang the respondent's absence line to report her absence.

Week Ten

60. In the week commencing 27th January 2020, the claimant worked all three days that she was due to work.

Week Eleven

61. The claimant worked one day this week, Tuesday 4th February, and did not attend work on either Thursday 6th or Friday 7th February. She did not contact her employer on the 6th to tell them that she would not be in. She told us in evidence that the reason she didn't call in was because she could not get through to the catering office when she tried to call in. She did not, in our view, make sufficient attempts to contact the respondent to inform them of her absence.

62. On 7th February the claimant called the respondent's absence line and told the respondent that she was off because her daughter had an ear infection [pp.179-181].

Week Twelve

63. The claimant worked two days this week. She was due to work also on Friday 14th February, but at 10.51 on Friday (approximately one hour and twenty minutes after she was due to start work) she sent a text message to Mr Clark stating that her daughter had banged her head in a fall, so she couldn't come in. The claimant did not, in our view, provide a reasonable explanation as to why she had not contacted the respondent earlier that day.

Week Thirteen

64. The week beginning Monday 17th February was school half term and the claimant was on holiday all of this week.

Week Fourteen

65. The claimant worked two days this week - Tuesday and Thursday. She was due to work on Friday also but sent a text message to Lee Clark on Friday morning saying that her daughter had been sick so she could not come in [p.187].

Week Fifteen

66. The week beginning Monday 2nd March was the last week of the claimant's employment. She worked on Tuesday 3rd, although she was late to work and did not contact Lee to tell him until after her shift was due to start [p.187].

Dismissal

67. The claimant came into work on Thursday 5th March and Mr Clark asked her to go into the office to speak to him and Elaine Green. Before speaking to the claimant that day he had reviewed the claimant's absence records and discussed the situation with the

respondent's HR department. The claimant had only worked 3 full weeks during the time that she had been employed and had been absent for approximately 40% of the time. Mr Clark noticed a pattern of the claimant being off on Fridays.

68. In addition to a high level of absence, the claimant was frequently late to work [p.113A]. The respondent's clocking in records showed that the claimant had been late to work on 60% of her working days, and that she continued to be regularly late to work after her start time was changed from 9 am to 9.30 am.

69. Mr Clark decided that the claimant's absence levels and timekeeping were unacceptable, and that as a result she had failed her probationary period and should be dismissed.

70. The claimant was taken by surprise by this meeting. She had not been warned that it would be taking place or had an invite letter. She was not offered the right to be accompanied, and did not know what the meeting was about, so could not prepare for it. She did not know that her employment could be terminated as a result of the meeting.

71. There were no minutes taken of the meeting. The meeting had originally been due to take place on 17th February, but the claimant was on holiday that week, and the respondent had also been the subject of a malware attack and did not have access to its systems.

72. There was a conflict of evidence as to what happened during and after the meeting on 5th March. Where there was a conflict of evidence, on balance we preferred the evidence of Mr Clark, who was a more reliable witness with good recall of the events, and whose account was supported by the documentary evidence.

73. Mr Clark told the claimant that her absence levels were unacceptable, and that he was giving her a week's notice of termination of her employment. The claimant walked out of the meeting, saying that she had work to do. Mr Clark followed her and asked her to come back to the office, which she did. Mr Clark told her that she did not have to work her notice and should leave the premises.

74. On 6th March Mr Clark wrote to the claimant confirming his decision [pp. 192-3].

75. The reason for the claimant's dismissal was her unacceptable absence level, which caused her to fail her probationary period. Not only was she frequently off work, but she also turned up late repeatedly. On two occasions she did not even tell her employer that she would not be coming in, and on others she notified them late. The reasons for the claimant's absence varied and included her ceiling falling down, not being able to afford the bus fare to work and childcare issues.

76. Mr Clark was sympathetic to the claimant's position as a single parent and took a number of steps to support her, including giving her money to pay for her bus fare and agreeing to reduce her working hours and change her start time to make it easier for her to get in to work on time.

Ultimately however he could no longer tolerate her very high level of absence, which showed no signs of improving despite the steps that were taken to support her.

77. Mr Clark dismissed the claimant because he did not see any improvement in her attendance and could not see any other way forward. He thought about the impact of the claimant's non-attendance on the team, and in particular on the morale of the team. The team was a small one. Thursday and Friday were the busiest days and the claimant was often off on Fridays.

78. The claimant was offered the right to appeal against the decision to dismiss her by writing to Mark Robinson, Head of Patient Catering. The claimant appealed against the decision [pp.206-7] but her appeal was not received by Mr Robinson. We accept the claimant's evidence that she did send in a letter of appeal, and we also accept Mr Robinson's evidence that he did not receive the appeal. The reason for this is unexplained, but we note that sometimes correspondence does go missing and is not received by the intended recipient.

79. As Mr Robinson did not receive the appeal, no appeal hearing was arranged. The claimant did not take any steps to follow up on the appeal to find out what was happening.

80. There was no disciplinary process in this case. The respondent dismissed the claimant during her probationary period and did not dismiss her for misconduct. Similarly, no grievance was raised by the claimant during the course of her employment.

<u>The claimant's duties and alleged detriments</u>

81. The claimant worked in the respondent's catering team at Derby hospital. Her duties involved cleaning and serving food to customers.

82. As part of her role the claimant was on occasion required to clean air vents in the ceiling. This was a routine job and one which other employees were also required to carry out. It involved climbing a small step ladder with three steps and standing on the top of the step ladder to carry out the cleaning.

83. On one occasion the claimant was asked to clean a vent in the ceiling whilst there was food on display below the vent. The claimant raised an issue about this, suggesting that she should not be cleaning the vent whilst food was out on the counter. Mr Clark took on board the point made by the claimant, which he told us he considered to be a valid one and asked her to clean other vents instead.

84. When Mr Clark joined the respondent in early September 2019 he reviewed the catering area in which the respondent operated at Derby hospital, including the stock room. He put in place a new process whereby boxes containing stock such as cups and lids for cups were emptied where possible. In line with this new procedure the claimant was asked to take cups and lids out of boxes. She was not the only

employee asked to do this, and Mr Clark himself had spent half a day reorganising the stock room with Mrs Green.

85. The claimant was asked to clean the stock room. Other people were also asked to clean the stock room. Cleaning and deep cleaning is part of working in catering and it is normal for employees to be asked to carry out deep cleans, particularly during quiet times. She was not specifically told however to get on her hands and knees to do the cleaning.

86. There was a conflict of evidence as to whether the claimant was told to work in the coffee shop on one occasion. On balance we prefer the claimant's evidence on this issue and find that she was told to work in the coffee shop.

87. We accept the respondent's evidence that none of the above duties were given to the claimant as a 'punishment' because she took time off work. They were all part and parcel of the normal duties for employees in the claimant's position and there was nothing untoward in her being asked to carry them out.

<u>The number of and reasons for the claimant's time off work</u>

88. The claimant had time off work for a variety of reasons:

    a. On 5th December 2019 she did come into work because of financial reasons. This absence did not fall within section 57A of the ERA.

    b. She could not recall why she did not attend work on the 6th December. This absence did not fall within section 57A of the ERA.

    c. She could not recall why she did not attend work on 12th December. This absence did not fall within section 57A of the ERA.

    d. She was off for four days in the week commencing 16th December because her daughter was unwell. This absence did potentially fall within section 57A of the ERA.

    e. She was off on 23rd December because her babysitter let her down. This absence did potentially fall within section 57A of the ERA.

    f. She was off on 27th December for childcare reasons. This absence did potentially fall within section 57A of the ERA.

    g. On 30th and 31st December, and 2nd and 3rd January, she was off because it was the school holidays, and she did not have alternative childcare. This absence did potentially fall within section 57A of the ERA.

h. She was off on 9th January to attend a meeting at her son's school. This absence did potentially fall within section 57A of the ERA.

i. She could not recall why she was off on 10th January. This absence did not fall within section 57A of the ERA.

j. From 15th to 17th January she was off because her kitchen ceiling had collapsed. This absence did not fall within section 57A of the ERA.

k. On 24th January she was off because her daughter was unwell. This absence did potentially fall within section 57A of the ERA.

l. She was off on 6th and 7th February because her daughter had an ear infection. This absence did potentially fall within section 57A of the ERA.

m. On 14th February she was off because her daughter banged her head. This absence did potentially fall within section 57A of the ERA.

n. On 28th February she was off because her daughter was sick. This absence did potentially fall within section 57A of the ERA.

89. Of the fourteen periods of absence above, nine were potentially covered by section 57A of the ERA because of the reason for the absence, and five were not.

Notification of absence

90. On a number of occasions the claimant did not tell the respondent that she would not be attending work, or reported her absence late. This left the respondent in the position of not knowing whether the claimant would be coming in to work or not.

91. On the 16th December the claimant sent a text message at 9.06 am to say that she would not be in that day. She did not say how long she expected to be off and did not contact the respondent on 17th December when she was also due to be working. On 18th December she notified the employer that she would not be back in for the rest of the week.

92. On 23rd December the claimant sent a text message to her employer at 10.45 (1 hour and 45 minutes after her shift was due to start) informing them of her absence. She did not in our view notify the respondent as soon as reasonably practicable of her absence. She did however call the absence line to say that she would be off the following week due to childcare issues and hoped to be back at work on 31st December.

93. The claimant called the absence line again on 30 December to say that she would be off until 7th January due to childcare.

94. The claimant reported her absence on 9th January 2021 but did not tell the respondent when she would be back at work, and there was no evidence of her having contacted the respondent the following day when she did not come in.

95. On 24th January the claimant reported her absence, but there was no evidence of the claimant having informed her employer of when she would be back at work.

96. On 6th and 7th February she did not inform her employer of her absence as soon as was reasonably practicable because she did not notify the respondent of her absence until the 7th February, the second day of absence.

97. On 14th February she did not contact her employer as soon as reasonably practicable about the absence because she sent a text message at 10.51am, 1 hour and 21 minutes after she was due to be at work.

98. On 28th February the claimant contacted her employer at 08.23 to say that she would not be in. This was, in our view, as soon as reasonable practicable.

The Law

Indirect sex discrimination

99. Section 19 of the Equality Act 2010 states as follows:

"(1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

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

(3) The relevant protected characteristics are - …sex…"

100. Section 136 of the Equality Act (burden of proof) requires the claimant in a discrimination claim to adduce prima facie evidence from which the tribunal could conclude, in the absence of an alternative explanation, that the employer has discriminated against the claimant. If the claimant produces prima facie evidence of discrimination the

burden passes to the employer to prove that no discrimination has occurred. If the employer does not discharge that burden, the discrimination claim succeeds.

Automatic Unfair Dismissal

101. Section 99 of the Employment Rights Act 1996 provides that:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –
(a) The reason or principal reason for the dismissal is of a prescribed kind, or
(b) The dismissal takes place in prescribed circumstances…

(3) A reason or set of circumstances prescribed under this section must relate to –
…
(c) Time off under section 57A

102. Where an employee does not have two years' continuous service and therefore cannot claim ordinary unfair dismissal, as is the case here, the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason, lies with the claimant. *Smith v Hayle Town Council 1978 ICR 996*.

103. The Tribunal should not however impose too high an evidential burden on the claimant. If there is a lack of direct evidence as to the employer's motives for dismissing the employee, a tribunal can draw 'reasonable inferences from primary facts established by the evidence or not contested in the evidence'. The Tribunal's reasoning must show that it has reached its conclusion on the balance of probabilities, having considered the evidence and any other options, rather than simply accepting the reason put forward by the employee in default of a convincing explanation from the employer.

Section 57A of the Employment Rights Act 1996

104. Section 57A(1) sets out five circumstances in which an employee is entitled to take a reasonable amount of time off during working hours to take 'necessary' action. The relevant ones to this case are: -

a. To make arrangements for the provision of care for a dependant who is ill or injured (S.57A(1)(b);
b. Because of the unexpected disruption or termination of arrangements for the care or a dependant (.57A(1)(d); and
c. To deal with an incident involving a child of the employee which occurs unexpectedly in a period during which an educational establishment is responsible for the child (S.57(a)(1)(e)).

105. Section 57A(2) provides that the right to time off does not apply unless the employee tells her employer the reason for her absence as soon as reasonably practicable, and, except where the employee can't

tell the employer of the reason for absence until after she has returned to work, tells the employer how long she expects to be absent.

106. If the employee does not comply with the notice requirements contained in section 57A(2) then the employee's time off will be treated as unauthorised.

107. The government has published online guidance entitled "Time off for family and dependants" which gives examples of how the time-off provisions might apply in practice, and which we have taken into account in reaching our decision.

108. When considering cases falling within section 57A(1)(b) a distinction is made between the time at which the dependant falls ill (to which the right to time off applies), and the period during which the dependant is ill (during which the right arguably does not apply). It is a question of fact to be determined by the Employment Tribunal on the circumstances of each case, as to which category it falls into.

109. The online guidance suggests that the right under section 57A(1)(b) to time off to make arrangements for the provision of care for a dependant who is ill or injured is designed to give the employee the time to make 'longer-term' care arrangements for a dependant who is ill or injured, such as making arrangements to employ a temporary carer or taking a sick child to stay with relatives.

110. The online guidance also suggests that the right under section 57A(1)(d) to time off because of the unexpected disruption or termination of arrangements for the care of a dependent covers matters such as a childminder failing to turn up or a nursery closing unexpectedly. In *Nim v Union Grove Community* 2305431/2006, the Employment Tribunal held that the claimant had been automatically unfairly dismissed after leaving work an hour and a half early because the claimant's childminder was unable to collect her son from nursery and take him to a doctor's appointment. The request to take one and a half hours' off was, in the tribunal's view, reasonable.

111. The EAT held in *Cortest Ltd v O'Toole EAT 0470/07* that it would not be permissible for the employee to become the primary carer for a lengthy period of time. The EAT said that the section was intended to give a parent 'the breathing space to enable a replacement carer to be found'.

112. Time off under section 57A must be 'necessary'. The EAT in *Qua v John Ford Morrison 2003 ICR 482* described the circumstances that trigger the right to time off under s.57A as being 'unexpected or sudden'. In *Cortest Ltd v O'Toole*, the EAT held that the purpose of the legislation is to cover emergencies and enable other care arrangements to be put in place.

113. In *Royal Bank of Scotland plc v Harrison 2009 ICR 116* the EAT took a broader approach and rejected the argument that Parliament only intended in section 57A to provide for time off on the ground of

'force majeure'. It held that the disruption in the employee's childcare arrangements did not have to be sudden as well as unexpected.

114. The employer is required to permit the employee to take time off which is 'necessary' for one of the activities set out in section 57A(1). In *Qua v John Ford Morrison* 2003 ICR 482 the EAT considered how Employment Tribunals should approach the question of whether it was necessary for an employee to take time off, and held that the factors to be taken into account include:-

a. The nature of the incident which has occurred;
b. The relationship between the employee and the dependent in question; and
c. The extent to which anybody else can provide assistance.

115. The EAT held that, when deciding whether an employee has been dismissed for taking time off under section 57A, a Tribunal should ask itself the following four questions:

The First Question

a. Did the employee take time off or seek to take time off from work during working hours? If so, on how many occasions and when?

The Second Question

b. If the answer to the first question is yes, then on each of these occasions did the employee:

    i. Tell the employer as soon as reasonably practicable of the reasons for the absence; and
    ii. Tell the employer how long she expected to be absent?

The Third Question

c. If the answers to the first two questions are yes, then the Tribunal must consider:

    i. Whether the employee took or sought to take time off work to take action which was necessary to deal with one or more of the five situations listed in section 57A(1); and
    ii. If so, whether the amount of time off was reasonable in the circumstances. In considering whether the amount of time off was reasonable, the Tribunal should take account of the circumstances of the individual and ignore any disruption or inconvenience to the employer.

The Fourth Question

d. Was the reason or principal reason that the employee was dismissed that she took or sought to take the time off?

116. There is no statutory limit on the amount of time off that an employee is entitled to take off under section 57A, nor is there any limit on the number of occasions that an employee may be off. However, in *Qua v John Ford Morrison*, the EAT held that an employee was not entitled to unlimited amounts of time off, even if on each occasion she complied with the relevant notice requirements and took a reasonable amount of time off. In that case the claimant was dismissed because of her high level of absence from work after she took 17 days off over a 9 month period to to care for her son who had a serious medical condition which caused regular relapses. The EAT found that once it was known that a child was suffering from an underlying medical condition and likely to suffer regular relapses, the situation would no longer fall within section 57A. An employer is entitled, the EAT held, to take into account the number and length of the employee's previous absences when deciding whether the time taken is reasonable and necessary.

117. The EAT also held, in that case, that the legislation was not intended to provide an employee with the right to take a day or more off each week on a regular basis whenever an existing medical condition caused a dependent to become unwell.

Detriment under section 47C of the ERA

118. Under section 47C of the ERA an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer for a prescribed reason. The prescribed reasons are set out in section 47C(2) and include a reason which relates to: "*time off under section 57A*".

Uplift for failure to comply with ACAS Code

119. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") gives Employment Tribunals the power to increase or decrease the amount of an award to a successful claimant in certain circumstances. It states that:

"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

a. The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
b. The employer has failed to comply with that Code in relation to that matter, and
c. That failure was unreasonable,

The Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

120. Section 207A is only relevant to cases to which the ACAS Code of Practice on Discipline and Grievance applies. If the ACAS Code does not apply, then there can be no uplift or reduction in compensation for an unreasonable failure to comply with it.

Failure to provide a written statement of employment particulars

121. Section 1 of the ERA places an obligation on an employer to provide employees and workers with a written statement of employment particulars.

122. Since 6 April 2020 the employer has had to provide the written statement no later than the date upon which employment commences. In November 2019 however, when the claimant's employment commenced, the obligation was to provide the written statement "*not later than two months after the beginning of the employment*".

Submissions

Respondent

123. Mr Moon submitted on behalf of the respondent that the core facts in this case are not in dispute. The claimant's employment ended after an extended probationary period, part of which was on reduced working hours at the claimant's request.

124. The claimant had an absence level of 45% in his submission, which was exacerbated by frequent lateness, both in terms of attendance and notification of absence. There were, he argues, three clear trends in the claimant's absence:

a. She was often off on Fridays;
b. She frequently failed to call in; and
c. She was regularly late.

125. The respondent argued that dismissal was a reasonable and proportionate response given the frequency of the claimant's absences, the needs of the respondent's business, its contractual obligations to its client and its obligations to other members of staff. The respondent had, Mr Moon said, given the claimant every opportunity including extending her probationary period and changing her working hours.

126. Mr Moon accepted that the respondent had applied a PCP of requiring a reasonable / satisfactory level of attendance. The respondent does not accept however that there was group disadvantage as a result of the PCP, as the majority of the respondent's workforce are women. Mr Moon did, however, accept that the PCP put the claimant at a disadvantage.

127. Mr Moon argued that the respondent had a legitimate aim in imposing the PCP and adopted a proportionate way of trying to

achieve that aim. It tried to accommodate the claimant and took her personal circumstances into account.

128. He accepted that there was no evidence before the Tribunal of the impact of the claimant's absences from work on the respondent's ability to fulfill its contractual obligations towards its client. He submitted however that the respondent had to rejig other staff when the claimant was off, and that this put a strain on them, affected their morale and made it difficult for the respondent to ensure a fair distribution of work.

129. Mr Moon acknowledged that some of the claimant's absences fell within section 57A of the ERA but argued that the claimant had failed to discharge the notice requirements on many occasions. The claimant had, he submitted, failed to put in place proper arrangements for the care of her children which led to persistent absences and stretches section 57A too far. It was difficult to see the repeated failures in childcare as being unexpected. The claimant had simply failed to put in place adequate, or indeed any suitable arrangements.

130. It was, Mr Moon argued, not the purpose of section 57A to support predicted absences. For these reasons, he said, section 57A does not apply and the claims sunder section 47C and section 99 of the ERA fail.

Claimant

131. The claimant submitted that she had tried to be proactive by asking to reduce her hours. She pointed out that she was not paid for the days that she was off.

132. She stated that she had never expected special or preferential treatment and was aware that there are a lot of single parents. She had always been transparent with the respondent and tried to help out.

133. The claimant said that there was another female employee of the respondent who was given more time off and flexibility because she had a disabled child.

134. In relation to group disadvantage she argued that it was harder for women to have good attendance at work because women have more caring responsibilities. She was not asking for a free ride and had been willing to make up missed shifts.

Conclusions

Indirect sex discrimination

135. We have no hesitation in finding, on the basis of the admission of the respondent and the evidence before us, that the respondent applied a PCP of requiring a reasonable level of attendance from its employees. The concept of a PCP is to be widely construed and can cover a range of conduct, including formal or informal policies, rules,

practices, arrangements, criteria, conditions and provisions. A requirement that employees have a satisfactory level of attendance is capable of amounting to a PCP and does so in this case. That PCP was clearly applied to the claimant during the course of her employment with the respondent, particularly in March 2020 when she was dismissed.

136. When deciding the question of group disadvantage, we consider that the appropriate pool for comparison is the employees of the respondent. They are the ones who are affected by the PCP.

137. Section 19(2)(b) of the Equality Act makes it clear that a claimant does not have to identify people in a particular group on whom the PCP has a disproportionate impact. It is sufficient for the claimant to establish that the PCP would put persons of a particular group at a particular disadvantage.

138. Similarly, there is no absolute requirement for a claimant to adduce statistical evidence of disparate impact, and the Tribunal can take judicial notice of matters which are generally considered to be common knowledge. The Equality and Human Rights Commission Employment Code recognises that some PCPs are intrinsically liable to disadvantage a group with a protected characteristic, and that in some cases the link between the protected characteristic and the disadvantage might be obvious.

139. In *Price v Civil Service Commission and another [1978] ICR 27*, judicial notice was taken of the fact that women aged between their mid 20s and mid 30s were more likely to be responsible for childcare than men, and in *Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 IRLR 729,* the EAT held that the Tribunal had erred in failing to take judicial notice of the 'childcare disparity', namely the fact that women bear the greater burden of childcare than men and that this can limit their ability to work certain hours.

140. In this case, we do take judicial notice of the fact that women are more likely to be single parents than men, and that they are more likely to have primary responsibility for childcare than men. As a result they are more likely to need time off work at short notice for childcare related reasons.

141. In light of this, we find that the PCP applied by the respondent of having a satisfactory attendance record had a disparate impact on female employees of the respondent, when compared to male employees.

142. We also find that the PCP applied by the respondent placed the claimant at a particular disadvantage. She could not comply with the PCP and as a result she was dismissed. Dismissal is clearly a disadvantage.

143. The claimant has therefore established a prima facie case of indirect discrimination and we have gone onto consider whether the respondent has proved that the PCP was applied with a view to

achieving a legitimate aim, and that its actions were a proportionate means of achieving that aim.

144. The legitimate aims relied upon by the respondent were an ability to service its contract to provide catering services to the hospital, and staff morale. By the respondent's own admission, there was no evidence before us of the claimant's absences having any impact on the respondent's ability to service its contract. There was very limited evidence of any impact on staff morale.

145. A mere assertion of a legitimate aim is not, in our view, sufficient. There must be at least some evidence to support that assertion. The respondent has not, therefore, discharged its obligation to establish a legitimate aim or aims.

146. Even if we are wrong on that, we find that the respondent has not established that the actions it took were a proportionate means of achieving that aim. We have considered the principles set out in *Hampson v Department of Education and Science [1989] ICR 179* and balanced the reasonable needs of the respondent against the discriminatory effect of the PCP on the claimant.

147. In this case the discriminatory effect of the PCP on the claimant was substantial as it caused her to lose her job.

148. There was very little evidence before us of the impact of the claimant's absences on the respondent. Whilst we accept that any employee's absence is capable of having an impact on an employer, there was quite simply little evidence of that impact before us. The claimant's evidence was that she was not paid when she did not attend work, and there was no evidence as to how dismissing the claimant was a proportionate way of achieving the respondent's aims.

149. There was no evidence of the respondent considering other options which would not have resulted in the claimant's dismissal, such as giving her unpaid leave to sort her childcare out, putting in place more flexible working arrangements or discussing the use of parental leave. There were, in our view, less discriminatory steps that the respondent could have taken.

150. For these reasons the claim for indirect sex discrimination succeeds. The respondent discriminated against the claimant by imposing a requirement that she have a satisfactory attendance record and dismissing her for not meeting that requirement.

Automatic Unfair dismissal

151. In determining this element of the claimant's claim we have considered the principles and applied the four questions set out in *Qua v John Ford Morrison 2003 ICR 482*.

First Question

152. We find that the claimant did take time off work repeatedly – on the dates set out above in our findings of fact. During the fifteen weeks of her employment she was absent on no less than fourteen occasions. She very rarely worked a full week and was off on most Fridays. Some of her absences lasted for several days.

153. She gave a number of different reasons for her absence. We conclude that five of her fourteen periods of absence were for reasons that do not fall within section 57A of the ERA, for example, not having enough money to pay for the bus fare to work and her kitchen ceiling falling through. She could not recall the reasons for some of her absences.

Second Question

154. Nine out of fourteen of the claimant's absences were for reasons which potentially fell within section 57A of the ERA. The claimant complied with the reporting requirements in section 57A(2) on five of those occasions. She did not comply with the reporting requirements in respect of her absences on 23rd December, 9th January, 6th&7th February, or 14th February. Those absences therefore fall outside section 57A and are to be treated as unauthorised.

Third Question

155. In relation to the remaining five absences (four days commencing 16th December, the 27th December , the 30th December to the 3rd January, the 24th January and the 28th February we have then gone on to consider whether the time off taken by the claimant was for her to take action with was necessary to deal with one of the situations set out in section 57A(1) and, if so, whether the amount of time taken off was reasonable.

156. We find that the absence that began on 16th December, and which resulted in 4 days off work falls within section 57A(1)(a) as the time off work was necessary for the claimant to provide care for her child, who was unwell. We also find, on balance, that the amount of time off was reasonable.

157. The absences on 27th December and from 30th December to 3rd January were to enable the claimant to provide childcare for her children during the school holidays. This was not sudden or unexpected, as school holidays are a regular and planned event. Whilst we accept that on 30th December the claimant's childcare provider cancelled, the amount of time off taken by the claimant over this period was not reasonable in the circumstances. The purpose of section 57A is to give an employee time off work to make arrangements for alternative care, rather than to provide that care herself. These absences therefore fall outside section 57A.

158. The absence on 24th January lasted just one day and in our view fell within section 57A(1)(a). The claimant took just one day off work, and the amount of time off was reasonable.

159. Similarly, the claimant's absence on 28th February, which was to care for her daughter who had become unwell, falls in our view within section 57A(1)(a) and the amount of time taken, one day, was reasonable.

160. We therefore find, that of the fourteen periods of absence that the claimant had during her second period of employment with the respondent, three of those periods of absence fall within section 57A of the Employment Rights Act. The vast majority of the claimant's absences do not fall within that provision.

161. It was, in our view, necessary for the claimant to take time off on those three occasions, given the nature of the incidents which all involved the unexpected illness of a child of the claimant. We accept that, whilst the claimant did have some childcare options, it was difficult for her to arrange childcare at short notice when the childcare involves looking after a sick child.

Fourth Question

162. We have then gone on to consider whether the reason or principal reason for the claimant's dismissal was related to the time off that the claimant took under section 57A of the ERA. We find on balance that it did not.

163. It is clear from the evidence before us that the respondent had a lot of sympathy for the position that the claimant found herself in as a single parent and took a number of steps to support her. Mr Clark was aware that the claimant may need time off when he recruited her in October 2019, and it did not put him off. He was, we find, keen to support and encourage her.

164. Mr Clark personally gave the claimant money to enable her to get the bus to work, agreed to reduce her working hours and even suggested a change to her start time with a view to enabling her to get into work on time. These are not the actions of someone who was unsympathetic to the position that the claimant found herself in.

165. If the claimant had only had three periods of absence she would not have been dismissed. She was dismissed because she had fourteen periods of absence over a fifteen-week period, some of which were unreported and therefore unauthorised, and was repeatedly late for work. The steps that the respondent took to try and support the claimant to improve her attendance and her timekeeping appeared to have no effect, as neither her timekeeping nor her attendance improved after they were put in place.

166. The reason for the claimant's dismissal was, therefore, not related to the leave she took under section 57A but rather to her overall

attendance and timekeeping, which was extremely poor, and her failure to report her absence on occasion either in a timely manner or at all.

167. The claim for automatic unfair dismissal therefore fails and is dismissed.

Detriment claim

168. The claimant's allegation that Mr Clark subjected her to a detriment because she took time off under section 57A is not supported by the evidence. We accept Mr Clark's version of events and find that the treatment that the claimant complains about was part of the normal course of her duties. She was not asked to carry out the specific tasks for any other reason than they were necessary tasks and someone had to carry them out. Others also carried out these tasks and there was no evidence that the claimant was singled out for differential treatment.

169. We therefore find that the alleged detriments set out in paragraph 13 above do not amount to detriments, because they were tasks that fell within the normal range of duties expected of the claimant. We also find that the claimant was not asked to carry out those duties for reasons related to her exercising her rights under section 57A of the ERA

170. The claim under section 47C of the ERA therefore fails and is dismissed.

Uplift under section 207A of TULRCA

171. The ACAS Code on Discipline and Grievance does not apply in this case. This is not a claim involving either a disciplinary or a grievance process. As a result, section 207A of TULRCA is not engaged and there can be no uplift or reduction in compensation.

172. In any event, we find that the respondent did not unreasonably fail to hear the claimant's appeal against the decision to dismiss her. We accept the claimant's evidence that she did appeal the decision, but we also accept the respondent's evidence that it did not receive the appeal. In circumstances where an employer does not receive an appeal it cannot be said that it is unreasonable of the employer not to deal with that appeal.

Provision of a written statement of employment particulars

173. The respondent provided the claimant with her contract on or shortly after 8th January 2020. This was within two months of the commencement of her employment on 25th November 2019. At that time the obligation under section 1 of the ERA was to provide a written statement of employment particulars within two months of the commencement of employment. The respondent has therefore

complied with its obligation under section 1 of the Employment Rights Act 1996.

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Employment Judge Ayre

30th November 2021

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JUDGMENT SENT TO THE PARTIES ON

3 December 2021

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FOR THE TRIBUNAL OFFICE