EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Smith	**v**	(1) Wellspring Care Services Limited; (2) Caerus Life Care Limited

Heard at: Cambridge (by CVP) **On**: 19, 20 and 21 October 2021

Chambers Discussion with Members: 4 November 2021

Before: Employment Judge Tynan

Members: Ms S Hughes and Mr Hoey

Appearances
For the Claimant: In person
For the Respondent: Ms Bayliss, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint that she was directly discriminated against on the grounds of sex is not well founded and is dismissed.

2. The Tribunal declares that the Claimant's complaint that the Respondent made unlawful deductions from her wages is well founded and orders the Respondent to pay the sum of £1,330.43 to the Claimant in respect of the sums so deducted.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 1 July 2019, following Acas Early Conciliation between 4 and 6 June 2019, the Claimant pursues various complaints against the Respondents that she was directly discriminated against on the grounds of sex and that she is owed outstanding holiday pay and wages (including expenses). As we shall return to, the Claimant originally pursued a whistle blowing claim; namely that she had been subjected to detriments and dismissed because

she had made protected disclosures. In completing form ET1, the Claimant had indicated at section 8.1 of the form that she had been discriminated against on grounds of marriage or civil partnership, albeit there is nothing in the 42 paragraph addendum to her claim form to indicate such a claim, or the basis for it.

2. The Claimant was initially directed by Employment Judge R Lewis to define which parts of her claim were claims of discrimination. Subsequently on 27 October 2019, the Claimant notified the Tribunal that she believed that she had been treated less favourably because of her sex, specifically because she is the mother of three children, one of whom is under six years old and another of whom has an underlying health condition.

3. The case was listed for a Preliminary Hearing Case Management on 21 February 2020. In completing the Agenda for the Case Management Hearing, the Claimant notified the Tribunal that she wished to withdraw her whistleblowing claims. At the Preliminary Hearing on 21 February 2020, Employment Judge Smail directed that there should be an Open Preliminary Hearing to determine whether or not the Claimant had withdrawn her whistleblowing claim such that it could not be reinstated, and also, to consider whether the Claimant should be permitted to amend her claim to add a claim of sex discrimination.

4. The matter then came before Employment Judge Alliott on 17 July 2020. The Claimant submitted a 32 page statement dated 9 June 2020 in connection with that Hearing. Judge Alliott decided that the Claimant had withdrawn her whistleblowing claim and that it could not be reinstated. However, he granted the Claimant permission to amend her claim to include a claim of sex discrimination. He also dismissed her marriage / civil partnership discrimination claim on the basis that it had been withdrawn.

5. Throughout the Hearing, we were referred to Employment Judge Alliott's Case Management Summary which followed his substantive Judgment on the issues above. The Claimant's sex discrimination complaint was identified as pursued under Section 13 of the Equality Act 2010 ("EqA"); namely that the Claimant had been directly discriminated against because of sex. The complaint is pursued under 24 separate allegations, albeit some of which are connected.

6. On the face of the Case Management Summary and particularly as we began to hear evidence, it seemed to the Tribunal that issues 1, 2, 6, 9, 10, 11 and 18 were potentially complaints of indirect sex discrimination and issues 22 and 23 were potentially complaints of sex harassment. Accordingly, we raised the matter on the second day of the Hearing, stating that we would be inviting the parties' representations the following day, specifically whether the Claimant wished to make an application to further amend her claim to include complaints of indirect sex discrimination and sex harassment. In the event, on the third day of the Hearing, having

explained the position again to the Claimant, she stated that she did not wish to further amend her claim and only wished to pursue a complaint against the Respondent that she had been directly discriminated against on the grounds of her sex.

7. The Claimant gave evidence in support of her claim.

8. For the Respondents we heard evidence from Ms Elaine Thomas, a Director and the Registered Manager of both services. We refer to her in this Judgment as Ms Thomas in order to distinguish her from her daughter, Anelia Thomas.

9. Employment Judge Alliott had Ordered the parties to exchange witness statements by no later than 26 February 2021. The Claimant's witness statement is dated 2 July 2021 and was served by her on the Respondents on or around this date. The Respondents did not serve Ms Thomas' witness statement on the Claimant until 14 or 15 October 2021 in circumstances where the Hearing was scheduled to commence on Monday 18 October 2021 (the start date was delayed due to listing issues). When the Hearing commenced on 19 October 2021, the Claimant was understandably distressed and upset about the late service of Ms Thomas' statement. The Respondents were not at fault in the matter, instead responsibility rested with its representatives; the matter appears to have been overlooked following a change of personnel. Whilst we considered that it would be a disproportionate sanction to exclude Ms Thomas' evidence, particularly as it largely rehearses the Respondents' position as set out in their Grounds of Response, we indicated to the Claimant that we would consider adjourning the Hearing to another date if this would enable her to better prepare her case for Hearing.

10. Having given the Claimant an opportunity to reflect on the situation and discuss it with family / friends, she informed the Tribunal that she wished to proceed. In reaching our findings and coming to a judgment in this case, we have taken into account that the Claimant only received Ms Thomas' statement very late in the day and, further, that she understandably felt somewhat ambushed by its late service. To the extent therefore that the Claimant showed anger, particularly during the first day of the proceedings, this should not count against her in terms of her credibility as a witness.

11. Those preliminary issues and irritations aside, the Claimant and Ms Thomas were truthful witnesses, even if their recollections and perceptions differ and, in relation to at least one matter, might be thought irreconcilable. We return to this.

12. The Hearing Bundle in this case runs to some 468 pages. However, in the course of the Hearing it became apparent that documents had not been included in the Hearing Bundle by the Respondent, notwithstanding the Claimant's request that they should be. She continued to express concerns through to the conclusion of the Hearing that the Respondents

had not complied with their disclosure obligations. At the Tribunal's direction, the Respondents filed a small supplementary bundle of documents in the course of the hearing. This included a more recent version of the Respondents' Employee Handbook, albeit the relevant sections are unchanged from those in the copy provided to the Claimant during her employment.

Background

13. Although there are two named Respondents, the available evidence in the Hearing Bundle, including offer letter, contract, Employee Handbook and wage slips, confirm that the Claimant was employed by the First Respondent. It is unclear to the Tribunal on what basis claims are pursued against the Second Respondent. For convenience we refer to the 'Respondents' in this Judgment except where necessary to distinguish as between the two named Respondents.

14. The Claimant's documented job title was Care Co-Ordinator. She commenced employment with the First Respondent on 3 January 2019 and her employment with it terminated on 3 April 2019 at the end of her three month probation period.

15. The Claimant's two page Statement of Main Terms of Employment is at pages 197 and 198 of the Hearing Bundle. It begins as follows,

> *"This statement, together with the Employee Handbook, forms part of your contract of employment (except where the contrary is expressly stated) and sets out particulars of the main terms on which… "*

Accordingly, unless stated otherwise, the provisions of the Employee Handbook formed part of the Claimant's contractual terms of employment.

16. The Statement of Main Terms of Employment was prepared on the basis that the Claimant's employment would begin on 4 January 2019. In the event, we find by agreement, her employment commenced earlier on 3 January 2019.

17. In terms of her duties, the Statement of Main Terms of Employment provides,

> *"Your duties may be modified from time to time to suit the needs of the business."*

18. The documented salary was £18,711.42 per annum, though, early in the relationship (we were not told when) the Claimant agreed with Ms Thomas that her salary would increase to £20,400.00 per annum.

19. The Statement of Main Terms of Employment, provide as follows, in relation to holiday:

> *"In the event of termination of employment holiday entitlement will be calculated as one twelfth of the annual entitlement for each completed month of service during that holiday year and any holidays accrued but not taken will be paid for."*

20. The Respondents' holiday year begins on 1 April and ends on 31 March each year. Accordingly, when the Claimant's employment terminated on 2 April 2019, the 2018/19 holiday year had just ended. The Respondents' position is that in so far as the Claimant may have accrued unused holiday to 31 March 2019, this did not carry over into the 2019/20 holiday year with the result that the Claimant was not entitled to be paid in lieu of it on termination of her employment. The Claimant relies in this regard upon the provisions of the Employee Handbook (page 7 of the current version),

> *"A(2) It is our policy to encourage you to take all of your holiday entitlement in the current holiday year. We do not permit holidays to be carried forward and no payment in lieu will be made in respect of untaken holidays other than in the event of termination of your employment."*

21. The Claimant worked at the Respondents' serviced offices at First Central 200 in North West London. The Claimant described it as a six storey building with multiple occupiers and what she described as a maze like layout. The Respondents occupied a single office at First Central 200. The Claimant, Ms Thomas and her daughter Anelia and another employee were based there. In addition, the Claimant's colleague Helius (whom she relies upon as her comparator in relation to a number of her direct discrimination complaints) also worked from the office perhaps two or three days per week.

22. The Claimant's job description is at page 186 of the Hearing Bundle and forms part of an advertisement for the role. It provides:

> *"…on occasion you may be asked to work flexibly in order to support the team or a particular client on an evening or weekend"*

Amongst the stated responsibilities the job description includes,

> *"…ensure all operations are company and CQC and Ofsted compliant;*
>
> *Effectively manage complaints and incidents"*

23. The Statement of Mains Terms of Employment is effectively silent on the issue of home working. It does not state in terms that the Claimant either could, or could not, work from home.

24. In her evidence and submissions, the Claimant maintained that the fact her duties could be modified from time to time to suit the needs of the

Respondents' business and that she would work flexibly, imported some requirement for flexibility on the Respondents' part. That reflects a misunderstanding on her part as to the effect of the clause, which in fact says nothing as to the Respondents' obligations as her employer.

25. The sickness absence and sick pay arrangements contained in the Employee Handbook are at pages 193 of the Employee Handbook.

26. The Respondents' Grievance Procedure is at page 196 of the Hearing Bundle. The Disciplinary Procedure was not included in the Hearing Bundle. The version made available to the Tribunal provides as follows,

> *"F(2) We retain discretion in respect of the disciplinary procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service you may not be in receipt of any warnings before dismissal."*

27. On her first day of employment with the Respondents, the Claimant signed a Deductions From Pay Agreement which provides,

> *"(3) Lateness or absence may result in disciplinary action and / or loss of appropriate payment;*
>
> *(4) You are required to complete and submit time sheets as directed in order to ensure that you receive the correct payment. Incorrectly completed, or late submission of, timesheets, may result in incorrect or delayed payment of salaries or wages. Deliberate falsification of time sheets will be regarded as a disciplinary offence and may lead to a summary dismissal."*

28. In the section of the Handbook dealing with salaries and wages etc., the Handbook provides,

> *"B (lateness / absenteeism)*
>
> *(1) You must attend for work punctually at the specified time(s) and you are required to comply strictly with any time recording procedures relating to your area of work;*
>
> *(2) All absences must be notified in accordance with the sickness recording procedures laid down in this Employee Handbook;*
>
> *(3) …*
>
> *(4) Lateness or absence may result in disciplinary action and / or loss of appropriate payment."*

29. This last provision replicates the provisions of the Deductions From Pay Agreement referred to above. Likewise, there are provisions regarding timely submission of timesheets.

30. The Claimant acknowledged during cross examination that arriving at work on time would support the Respondents' compliance with its regulatory obligations.

Findings of Fact

31. We set out below our findings by reference to the issues which it was identified at the Case Management Hearing on 17 July 2020 fall to be determined by the Tribunal.

<u>ISSUE 1</u>

32. The Claimant complains that Ms Thomas asked her to start work on 3 January 2019, a day earlier than originally envisaged.

33. It is not in dispute between the parties that the Claimant's first day of employment was brought forward one day to 3 January 2019. As far as we can discern, the Claimant raised no concerns about this at the time or at any other time during her employment, nor did she identify it as a concern in her Grievance following the termination of her employment. She does not identify it as unfavourable or less favourable treatment in her witness statement. She does not suggest that it caused her any difficulties or inconvenience as a woman, or as a working mother. The Claimant herself provides the explanation for the earlier start date at paragraph 3 of the Addendum to her Claim Form (page 49 of the Hearing Bundle), in which she states,

> *"However, registered manager (Elaine Thomas) requested that the Claimant start a day earlier and attend a Caerus Life Care appointment with Carer Charmaine Henry and herself, on the 03rd January 2019 for client SB."*

Thus, described in the Claim Form, it was presented by the Claimant as part of the factual background, rather than indicating a discrete specific complaint of direct discrimination. There is no suggestion in the Addendum, and the Claimant did not suggest in her evidence at Tribunal, that the reason she had been asked to commence employment a day earlier than originally identified was other than that she might usefully attend a client related meeting. We find that was the reason for the earlier start date.

<u>ISSUE 2</u>

34. The Claimant complains that after initially agreeing to the Claimant working flexibly, Ms Thomas subsequently would not allow her to do so.

35. The complaint is expressed in general terms, with little further clarification provided in the Claimant's witness statement. In cross examination, the Claimant said she had agreed with Ms Thomas on either the first or second day of her employment that she could work flexibly. She did not articulate what this agreement meant in practice beyond suggesting that she could start work later and make up the time by taking a shorter lunch break or working later in the evening. We were not referred to any documents in this regard and the Claimant was unable to take us to any diary or other personal notes made by her which might have thrown some further light on any discussions she had with Ms Thomas at this time. We note it was agreed that the Respondents' standard hours of work would be adjusted in the Claimant's case so that instead of finishing at 5pm each day, her finish time was 4pm on Tuesdays, Thursdays and Fridays. These discussions are evidenced at page 186 of the Hearing Bundle; we find they took place during the recruitment process and that the change to core hours was reflected in the Claimant's Statement of Mains Terms of Employment.

36. Given that the Statement of Mains Terms of Employment was adjusted to reflect what had been agreed with the Claimant, it seems to us unlikely that any additional flexible working arrangements would not also have been documented. We are driven to conclude that the only explanation is that whilst the Respondents may have shown a degree of flexibility towards the Claimant, there was no specific agreement in relation to flexible working beyond that evidenced by the adjustment to the Claimant's core hours of work. We further note in this regard that the Claimant did not raise any concerns in relation to flexible working as part of her Grievance following her dismissal, and that the rota documents at pages 335 – 339 of the Hearing Bundle document the Claimant's start time as 9am.

37. In summary, we find that Ms Thomas had a flexible attitude and approach, and that she was understanding of the Claimant's circumstances if ever she was delayed getting to work, whether as a result of childcare responsibilities or otherwise. Otherwise, however, the Claimant has failed to discharge the burden of proof upon her to establish the primary facts upon which her complaint is pursued, namely that she had a specific agreement with Ms Thomas that she could work flexibly and that in disregard of that agreement Ms Thomas subsequently would not permit her to work flexibly.

<u>ISSUE 3</u>

38. The Claimant alleges that on 4 March 2019, Anielia Thomas changed the Claimant's job description and demoted her from Care Co-Ordinator to Residential Support Worker.

39. In support of her complaint, the Claimant relies upon a rota at page 308 of the Hearing Bundle. The rota does not evidence that the Claimant was demoted, rather that on two occasions, namely 12 and 28 March 2019, the

Claimant was documented to be effectively performing the duties of a Support Worker for 5.5 and 4.67 hours respectively on those dates. We understand this to have been a necessary part of the Respondent's record keeping requirements, possibly in order to satisfy the Respondent's regulator (the CQC) or its commissioners that it was fulfilling its obligations as a registered provider.

40. When cross examined, the Claimant accepted that she was paid her normal salary on those dates in accordance with her contract of employment and that she had not been demoted in any real sense. In the circumstances the Claimant has failed to establish the primary facts upon which her complaint is based. Her job description was not changed, and she was not demoted.

ISSUE 4

41. The Claimant alleges that on 21 March 2019, Anielia Thomas changed her job description from Residential Support Worker to Service Manager.

42. We have already found that the Claimant's job description did not change to Residential Support Worker. We find that it did not change to Service Manager either.

43. It became apparent in the course of the hearing that the List of Issues does not perhaps reflect the Claimant's complaint, which is that having allegedly been offered promotion to the role of Service Manager that offer was then withdrawn, allegedly because of safeguarding concerns. Anielia Thomas did not give evidence in the proceedings. As with other aspects of her evidence, the Claimant was imprecise in terms of what she said had been agreed and when, making it difficult for the Tribunal to make specific and detailed findings as to what discussions may have taken place between them.

44. When cross examined, the Claimant acknowledged that had she been appointed Service Manager this would have represented a promotion for which training and an induction would have been required, as well as an open and transparent recruitment process. She also accepted that any promotion would have been documented in a revised job description and updated Statement of Mains Terms of Employment.

45. We accept Ms Thomas' evidence that, whatever conversations may have taken place between Anielia Thomas and the Claimant, there was no Service Manager vacancy, and in any event that there were other employees within the organisation who would be potential candidates for any such vacancy should it arise. We think it particularly relevant that the Claimant was in her probation period and, by her own account, that her relationship with Anielia Thomas was under strain (she claimed that Anielia Thomas was monitoring her emails). Whatever discussions they may have had regarding the Claimant's career aspirations, we find that no offer of appointment as a Service Manager was made to the Claimant and,

accordingly, that the offer was not withdrawn and that no threat was made to withdraw the offer.

46. The Claimant has failed to establish the primary facts upon which her complaint is based. Furthermore, and in any event, on her own case (paragraph 21 of form ET1 – page 22 of the Hearing Bundle) the offer was withdrawn because of safeguarding concerns, rather than on grounds of her sex.

ISSUE 5

47. The Claimant alleges that Ms Thomas was dismissive of the Claimant's concerns in relation to Issues 3 and 4. It is unclear when Ms Thomas is alleged to have been dismissive of the Claimant's concerns.

48. The only reference the Tribunal can find to the matter in the Claimant's witness statement is at the bottom of page 6 where she states,

> *"Did Ms Charmaine Smith question the change of job description (i.e. order, collection and delivery of toiletries) as Care Co-Ordinator after talks of a promotion to Service Manager of Wellspring Care Services Limited due to safeguarding concerns were mentioned to Ms Elaine Thomas. As a result, did Ms Charmaine Smith incur less favourable treatment by Ms Elaine Thomas and Ms Anielia Thomas?"*

49. The Claimant then cross references a notebook entry dated 18 March 2019 and an email to Ms Thomas dated 25 March 2019. However, neither document relates to the alleged concerns in question or evidences that Ms Thomas was dismissive of the Claimant's concerns as she alleges.

50. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 6

51. The Claimant alleges that Ms Thomas and her daughter changed the Claimant's working hours from fixed hours to a shift pattern. The complaint is related to Issue 3.

52. Again, the Claimant relies upon the rota at page 308 of the Hearing Bundle. Her complaint is unfounded. The Claimant was not put onto a shift working pattern. The Statement of Mains Terms of Employment, the available rota sheets and the Claimant's wage slips all evidence that throughout her employment with the Respondent the Claimant worked the core hours identified in paragraph 35 above.

53. It is not in dispute between the parties that the Claimant worked overtime, albeit there is an issue as to whether the Claimant was paid for all of the overtime hours that she worked. However, the fact that she worked

overtime does not in any way evidence that she began working a shift pattern. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 7

54. The Claimant alleges that when she was put on the Rota Cloud (the Respondent's online rota system) as a Residential Support Worker, the Respondent altered her pay so that she was not paid her contractual rate of pay, but instead paid the hourly rate of pay for a Residential Support Worker.

55. The Claimant's evidence on this issue was confusing. In any event, under cross examination she acknowledged that insofar as she had been identified as performing the duties of a Residential Support Worker on 12 and 28 March 2019, this *"was not at reduced pay"*. She contradicted herself a few moments later and asserted that it was at a reduced hourly rate of pay though did not take us to any payslips or other evidence in the Hearing Bundle to substantiate her complaint. We note that in an email to the Respondents' payroll providers, Tax Spot Group, on 29 March 2019, the Claimant herself identified that she was in receipt of a fixed salary of £1,700 per month. Notwithstanding this was the day after she claims to have been incorrectly paid the hourly rate of a Residential Support Worker, she does not identify in that email (page 229 of the Hearing Bundle) that there was a different, lower rate of pay for certain aspects of her duties.

56. We accept Ms Thomas' evidence at Tribunal that the apparent description of the Claimant as a Residential Support Worker in the Respondents' records at page 308 of the Hearing Bundle is a reflection of the duties the Claimant effectively performed on the dates and times in question, but that this has nothing to do with her rate of pay which remained as set out in the Statement of Mains Terms of Employment.

57. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 8

58. The Claimant complains that her job description was altered to include duties to collect and deliver cleaning products to the Respondents' residential units.

59. There was no such amendment to the Claimant's job description as she accepted during cross examination. Instead, there was a one-off request to take some cleaning products to the Respondent's Girton Road Project. The request was made of the Claimant because it was known that she was working at the Girton Road Project on 28 March 2019.

60. The Claimant's complaint is that this was not within the ambit of her job description yet conceded during cross examination that the occasional

request to take cleaning products to a residential unit would be reasonable.

61. She went on to clarify that her complaint was about the way the request had been made, namely it had been conveyed through one of the residential support workers, Ms Henry, who apparently found the matter amusing. The Respondent was not privy to any discussion between the Claimant and Ms Henry and was not therefore in a position to challenge the Claimant's account of their discussion.

62. Ms Thomas deals with the matter at paragraph 28 of her witness statement, where she explains that there were occasions when the organisations would run out of supplies at a unit and, if these were urgently required, a member of staff (this could include someone in a management role) might be asked to drop off supplies to the unit. Ms Thomas described it as a relatively rare occurrence and that anyone might be asked to help out. We accept her evidence.

<u>ISSUE 9</u>

63. The Claimant complains that on 17 March 2019 she was requested by Ms Thomas to draft and send a document to Hillingdon Council outside her contracted working hours.

64. 17 March 2019 was a Sunday. The available evidence supports that a challenging situation arose in relation to one of the young residents in the unit over the course of the weekend.

65. The Respondents' primary position is that the Claimant was not asked to draft or send a document to Hillingdon Council on 17 March 2019. Ms Thomas' evidence was that there was no evidence of any such work on its IT systems. Further, that the Respondent did not have any Hillingdon Borough resident in its care at this time. The Respondent additionally relies upon the fact that there was no overtime claim by the Claimant in respect of any work undertaken by her on 17 March 2019. Of course, that doesn't of itself mean that the Claimant did not work, particularly as it is common ground that the Claimant failed to submit overtime claims for overtime worked by her.

66. Insofar as the Claimant worked on 17 March 2019, the Respondent relies upon the Claimant's contractual obligation to work flexibly and that this explicitly refers to potential weekend working. We accept Ms Thomas' evidence that she would always endeavour to deal with such a situation by agreement and that if a member of staff is unable to help because of existing commitments, the Respondent will ordinarily look to another member of staff to assist.

67. The Claimant has produced handwritten notes (pages 350 – 355 of the Hearing Bundle) in support of other aspects of her claim. These do not evidence that she worked overtime on 17 March 2019, though they do

identify other dates on which she claims to have worked overtime. Even if we proceed on the basis that the Claimant did take some work on 17 March 2019, there is no evidence available to the Tribunal that there was any request or instruction by Ms Thomas that she do so over the weekend.

68. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 10

69. The Claimant alleges that Ms Thomas instructed her on 19 March 2019 to attend a training event at 6pm on 21 March 2019, outside the Claimant's contracted hours.

70. At the heart of this complaint are tensions between the Claimant and Ms Thomas when the Claimant was asked by Ms Thomas to account for her whereabouts on 21 March 2019 after she failed to attend her normal place of work, First Central 200.

71. It is not in dispute that the Claimant was not at First Central 200 on 21 March 2019. It is also common ground that 21 March 2019 was a significant date for the Claimant and her family for reasons it is not necessary to go into in this Judgment.

72. Page 380 of the Hearing Bundle evidences an entry in the Claimant's diary that supports she was due to meet with someone called Vanessa at 6pm on 21 March 2019 but that the meeting was to be rescheduled. It is not described in the Claimant's diary as a training session. It is also referred to by the Claimant in an email to Ms Thomas on 22 March 2019, in which she wrote,

> *"On Wednesday when we spoke, I did say I could not meet with Vanessa yesterday (Thursday) evening to do the Case Work Induction for Wellspring…"*

73. We have reviewed Ms Thomas' communications with the Claimant in the Hearing Bundle and also take into account the measured terms in which she gave evidence at Tribunal. Further, we remind ourselves that Ms Thomas agreed to adjust the Claimant's hours of work to enable her to leave work at 4pm three evenings per week, including on a Thursday. Insofar as the Claimant was scheduled to attend a Case Work Induction session on the evening of 21 March 2019, we find that this was by discussion and agreement rather than, as is alleged, Ms Thomas *"telling"* the Claimant to attend. We find no evidence to support that Ms Thomas directed, instructed or pressured the Claimant to attend an out of hours Case Work Induction session.

74. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 11

75. It is alleged that on 19 or 20 March 2019, Ms Thomas withdrew an offer to the Claimant for her to become Manager of the First Respondent with a corresponding increase in her pay to £3,000 per month.

76. The offer referred to is the alleged offer of the role of Service Manager referred to under Issue 4 above. No such offer having been made, it follows that the offer was not withdrawn.

77. The Claimant has failed to establish the primary facts upon which her complaint is based. Furthermore, as noted already, on her own case the offer was withdrawn because of safeguarding concerns, rather than on grounds of her sex.

ISSUE 12

78. The Claimant alleges that on 25 March 2019, Ms Thomas threw a Wellspring out of hours company telephone on the table in front of the Claimant and told her that she would take back the Caerus mobile.

79. On 4 April 2019, the Claimant raised a formal Grievance with Ms Thomas. We have noted already that the Grievance does not include other matters raised in these proceedings. However, one of the issues raised in the Grievance was the Claimant's Caerus mobile phone (page 247 of the Hearing Bundle). The Grievance makes no mention of Ms Thomas having allegedly thrown the telephone on the table or to any other allegedly aggressive conduct on her part. There is no reference to any such incident in the Claimant's diary records in the Hearing Bundle, albeit we recognise that her diary tends to record meetings and appointments rather than provide a narrative record of events.

80. The first documented record of such alleged conduct is at paragraph 22 of the Addendum to the Claimant's form ET1 (page 23 of the Hearing Bundle). Ms Thomas denies the allegation and states that it would be completely out of character for her to behave in that way. We agree. We were able to observe Ms Thomas in a pressured situation over three days, during which she gave evidence and was cross examined. We observed no anger or loss of control on her part that might support, or indicate, an inability on her part to maintain her temper. It is a serious allegation and one that we would have expected the Claimant to have raised at the time. We conclude that Ms Thomas did not throw a phone onto the table or otherwise behave aggressively. The Claimant has failed to discharge the burden upon her of establishing the primary facts upon which her complaint is based.

ISSUE 13

81. The Claimant complains that Ms Thomas asked her to work out of hours. As framed, it is not a separate complaint, rather the alleged incidents that support the complaint arise under Issues 1, 9, 10 and 17 of the List of Issues.

ISSUE 14

82. The Claimant complaints that on 22 March 2019, Ms Thomas claimed that she had not worked her contracted hours when in fact she had done. As noted already in relation to Issue 10, the substantive issue is whether the Claimant worked on 21 and 22 March 2019.

83. The Claimant's evidence is that she largely worked from home on 21 March 2019, though attended a meeting at the Respondent's Westmoreland Road Project that day involving a young person. Ms Thomas' evidence is that she called the Claimant repeatedly on 21 March 2019, but that the Claimant failed to return her calls, something the Claimant disputes. Ms Thomas alleges that when her daughter, Anielia Thomas spoke to the Claimant on 22 March 2019 (regarding her alleged absence on both days) the Claimant suggested the Respondent deduct two days' wages from her pay. Anielia Thomas did not give evidence, or provide a written statement in these proceedings, a surprising omission given her previous involvement in the business and that she is Ms Thomas' daughter.

84. We accept the Claimant's evidence that she did not agree with Anelia Thomas to two days' wages being deducted from her pay. None of her conduct supports any such agreement. For example, on 4 April 2019 she raised a Grievance specifically about the fact that deductions had been made from her wages. At paragraph 55 of her witness statement, Ms Thomas addresses the matter in slightly different terms, namely that the Claimant had not asked about working from home and that in circumstances where she had not been given permission to work from home she should have taken holiday or unpaid leave. Ms Thomas does not state in terms that the Claimant was not working. The fact the Claimant may have been working from home without prior agreement does not alter the fact, as we find, that the Claimant did work on 21 March 2019.

85. We do not criticise Ms Thomas for emailing the Claimant on 22 March 2019 (page 227 of the Hearing Bundle) expressing concern that she had been unable to contact the Claimant the previous day. It is also understandable why tensions arose, including why the Claimant was potentially defensive in circumstances where she was dealing with a difficult family event.

86. There is ample evidence at pages 391 – 393 of the Hearing Bundle that the Claimant was working on both 21 and 22 March 2019. As regards 22 March 2019, we find that the Claimant was at her normal place of work that day, albeit she was not in the office for a period of time when Ms Thomas was also in the building. The building security records (page 420 of the Hearing Bundle) confirm that the Claimant was in the building from 09:30 to 16:51. The Claimant's email at page 226 of the Hearing Bundle, further confirms this.

87. In the circumstances, the Claimant has established the primary facts upon which her complaint is based, namely that it was claimed or asserted that she had not worked her contracted hours in circumstances where she had in fact done so. However, in circumstances where the Claimant had not attended her place of work on 21 March 2019 and Ms Thomas had been unable to reach her by telephone, and in further circumstances where Ms Thomas had not seen the Claimant at the office on 22 March 2019, we are satisfied that Ms Thomas had genuine and reasonable grounds to be concerned whether the Claimant had failed to perform her duties.

ISSUE 15

88. Linked to Issue 14 above, the Claimant complains that on 22 March 2019 Anielia Thomas amended her timesheet to reduce her hours and pay.

89. It is not in dispute that the Claimant was not paid for 21 and 22 March 2019. It seems to the Tribunal that the mechanics by which this was actioned are irrelevant. An instruction must have given by some means to the Respondent's external payroll provider not to pay the Claimant for those days.

ISSUE 16

90. The Claimant alleges that on 29 March 2019 the Respondents moved office without telling the Claimant.

91. The complaint was finessed in evidence insofar as the Claimant said that whilst she knew of a plan to move office to a different flexible working space, she was annoyed to have learned the precise details from Ms Henry on the day before the move. There are parallels here with Issue 8; as with the delivery of cleaning products to the Girton Road Project, we find that the Claimant regarded it as outside the ambit of her job description and duties to be involved in packing up the office, or indeed even her desk, in readiness for the move to new premises.

92. The email dated 29 March 2019, at page 228 of the Hearing Bundle, evidences that the Claimant knew the Respondent was exploring an office move to Harrow. We find that the Claimant is simply looking to find fault and that it is fanciful for her to suggest that the Respondent was seeking to move office without telling her.

93. In the circumstances, the Claimant has not established the primary facts upon which her complaint is based.

ISSUE 17

94. The Claimant complains that she was not paid her salary on 29 March 2019 and that she was required to sort out her tax issues out of hours.

95. The complaints are not well founded. We accept Ms Thomas' evidence that an issue had arisen in relation to the Claimant's tax code and that she had been asked to provide certain information to Tax Spot Group. In a text message to Claimant sent at 2:32pm on 29 March 2019 (page 416 of the Hearing Bundle), Ms Thomas chased the Claimant in respect of the provision of this information. The Claimant provided the relevant information to Tax Spot Group at 3:26pm, in other words, within her normal working hours. The Claimant accepted under cross examination that she had received her normal pay on 29 March 2019, albeit with a deduction in respect of 21 and 22 March 2019, the two days it was alleged she had not worked.

ISSUE 18

96. The Claimant alleges that on 1 April 2019, Ms Thomas refused her request to work from home due to her children's sickness.

97. The allegation is denied by Ms Thomas in the barest of terms in her witness statement. In paragraph 38 of the Respondents' Amended Grounds of Response, the Respondent focuses upon home working as being an exception. Any home working request would ordinarily have been dealt with by Anielia Thomas as a HR matter.

98. In an email to Ms Thomas at 10:56am on 1 April 2019, the Claimant wrote,

> *"…if I had not called today to notify you that my daughter wasn't well and I would not be in. I would not have been made aware if this meeting."*

99. She was referring to a meeting to discuss her continued employment. Her comments evidence that she had sought to notify Ms Thomas that she would not be working, not that she would be working from home. This was further confirmed during the Claimant's cross examination when, regardless of whether or not she had in mind to work from home that day, she confirmed that she had in fact been unable to work as her children needed her support.

100. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 19

101. The Claimant complains that she was dismissed on 2 April 2019.

102. The Respondent does not dispute that the Claimant was dismissed. By a letter dated 30 March 2019, Ms Thomas invited the Claimant to attend a Probationary Review Meeting on 2 April 2019 to discuss the following issues,

> *"1. Failure to work your contracted hours;*
> *2. Failure to follow the absence reporting procedure; and*
> *3. Concerns surrounding conduct"*

103. The Claimant was warned that if she did not attend the meeting without good reason, a decision might be made in her absence without her input. She was further warned that any failure to attend might be regarded as breaching a reasonable management instruction (page 233 of the Hearing Bundle).

104. In her email of 1 April 2019, already referred to above, the Claimant wrote,

> *"I will consult my Union Representative and notify whether we will be in attendance".*

105. In the event, neither she nor her Union Representative attended the meeting on 2 April 2019. There was no further explanation at the time, or indeed in these proceedings, as to why she did not attend, for example whether this was linked to her family situation.

106. By letter dated 2 April 2019, Anielia Thomas wrote to the Claimant informing her that her employment had been terminated. The letter referred to the fact the Claimant had been invited to attend a Probation Review Meeting and that the company had received no communication from her, or any explanation for her absence. She wrote,

> *"Therefore, we have no alternative other than to conclude that you no longer wish to work for Wellspring and that you have terminated your employment by your own volition."*

107. On that basis, the Respondent initially failed to pay the Claimant her notice pay. It subsequently recognised that the Claimant had not resigned her employment even if she had failed to attend the Probation Review Meeting.

ISSUE 20

108. The Claimant complains that she was not permitted to take holiday by Anielia Thomas, following a request made on 4 March 2019.

109. This was a further issue in respect of which the Claimant gave limited evidence. She refers, at the bottom of page 8 of her witness statement, to her request *"being ignored"*. There was no evidence in the Hearing

Bundle, or in the Claimant's witness statement regarding a specific holiday request made on 4 March 2019, or indeed on any other date. Instead, we find that on or around 4 March 2019, the Claimant sought to access the Respondent's online holiday system on the back of difficulties encountered by one of her reports. We conclude that the Claimant was concerned to ensure that she had the relevant access to the system to be able to book holiday when the time came to do so.

110. Whilst we do not uphold the Claimant's specific complaint that she was not allowed to take holiday following a specific request made on 4 March 2019, we do accept that the Claimant had not been set up on the Respondent's system to be able to submit holiday requests online. The document at page 371 of the Hearing Bundle confirms that, for reasons which are not clear, the Claimant was only set up on the system on or around 2 April 2019, by which time, of course, her employment had terminated.

ISSUE 21

111. The Claimant complains that Anielia Thomas did not register her on the HR online system between 3 January 2019 and 1 April 2019.

112. We have dealt with this complaint under Issue 20 above. As to whether responsibility rested with the Respondent or its external provider, on the balance of probabilities we find the most likely explanation is that Anielia Thomas overlooked the matter and failed to take the necessary action to notify its external provider that the Claimant needed to be set up with an account.

ISSUE 22

113. The Claimant alleges that on several occasions, Ms Thomas told the Claimant that she would only be recruiting "people without children in the future".

114. We do not uphold this allegation. It is a serious allegation and, if the comments were to have been made, would potentially support an inference of discriminatory motives and bias on the part of Ms Thomas. Yet the Claimant made no mention of this in her Grievance. The alleged comments are not consistent with an organisation which at that time was owned and managed by two women. Ms Thomas is herself a parent, even if her daughters are now adults. It also begs the question, why Ms Thomas employed the Claimant at all if she had an adverse view of working mothers or working parents. The alleged comments are also at odds with an organisation which we accept employs a significant proportion of working parents and is dependent upon them to deliver its services.

115. The Claimant has failed to establish the primary facts upon which her complaint is based.

ISSUE 23

116. The Claimant complains that when her P45 was first issued it was completed on the basis that she was *"male"*.

117. The P45 in question is at page 455 of the Hearing Bundle and was prepared by the Respondent's external payroll providers. It contains a limited amount of information yet it is littered with errors. The PAYE reference is incorrect, the identity of the employer is incorrect, the leaving date is incorrect, the National Insurance number has been incorrectly recorded and the Total Pay to Date figure is incorrect. We find that these errors reflect a basic lack of care and diligence on the part of the person who prepared the P45.

ISSUE 24

118. The Claimant complains that she was not paid all monies due to her on the termination of her employment.

119. We have identified already that the Claimant was not paid for 21 and 22 March 2019. She did not work on 1 and 2 April 2019 (and was not precluded by her own ill-health from doing so) and accordingly, she was not paid for these days. As far as we can discern, the Claimant makes no claim in respect of those days even though at Issue 18 she makes complaint about being not permitted to work from home on 1 April 2019.

120. The Respondent accepts that there are sums owing to the Claimant in respect of overtime and expenses, albeit it justifies its failure to pay these sums by reference to the Claimant's failure to notify the overtime and expenses to it. As noted already, the Claimant was initially not paid in lieu of notice, though this was subsequently rectified. For reasons we return to below, the Claimant was also not paid in lieu of accrued holiday. We calculate that the Respondent failed to make payment to the Claimant of £1,330.43 due to her on the termination of her employment.

The Law and Conclusions

121. For the reasons set out in our detailed findings above, the complaints identified under Issues 2 – 8, 10 – 13, 16 – 18 and 22 are not well founded and are dismissed. We address the remaining complaints below, namely Issues 1, 9, 14, 19 – 21, 23 and 24.

Discrimination Claims

122. During the hearing we encouraged the Claimant to address the 'reasons why' the Respondents may have acted as the Claimant alleges they did.

123. Other than in cases of obvious discrimination the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877. In order to succeed in any claim a Claimant must do more than simply establish that they have a protected characteristic and have been treated unfavourably.

124. Section 13 EqA provides,

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

125. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference may properly be drawn.

126. This may be done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not been a member of the protected class: Shamoon v RUC [2003] ICR337. Comparators provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of any comparator will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the Claimant. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.

127. It is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator or by reference to a hypothetical comparator. In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. There were no such comments in this case.

128. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. However, we found Ms Thomas to be convincing and consistent in her explanations for why the Respondents acted as they did.

129. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. We return to this particularly in relation to the Respondent's failure to pay the Claimant all sums due to her on the termination of her employment.

130. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of

unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

131. In our discussions we have held in mind that we are ultimately concerned with the reasons why the Respondents (and each of the alleged perpetrators) acted as they did in relation to the Claimant. In our Judgment, whilst the Claimant has not proved facts from which we could properly conclude that any of them committed any unlawful acts of discrimination, in any event, for the reasons below, we are satisfied that their reasons for acting as they did had nothing whatever to do with her sex.

ISSUE 1

132. In pursuing her complaint, the Claimant relies upon a hypothetical comparator. In circumstances where it had been identified by the Respondents that the Claimant might usefully attend a meeting in relation to an operational issue, whether that was in order to provide her input or simply in order to be introduced to the matter, we consider that a man, or a man with childcare responsibilities, would have been treated in exactly the same way as the Claimant, namely they would have been asked to commence their employment a day earlier than originally anticipated in order to facilitate their attendance at that meeting. The reason why the Claimant was asked to attend the meeting was nothing whatsoever to do with her sex. It was for purely operational reasons in circumstances where the Claimant's attendance was felt to be useful and ultimately in the best interests of the young person the subject of the meeting.

ISSUE 8

133. As above, the Claimant relies upon a hypothetical comparator. In our judgment, a man or a man with childcare responsibilities in the Claimant's position, namely at her level in the organisation, would have been treated in the same way by being asked if they could deliver cleaning products to the residential unit if it was known they were going to the unit. The Claimant was not singled out for treatment or required to put aside her regular duties, on the contrary she was going to the premises in question for a meeting. It was purely a matter of convenience and it is entirely understandable why she, and anyone else in her situation, might have been asked to deliver the products to the unit.

134. The Claimant did not put her case on the basis that she was being stereotyped as a woman or working mother or that assumptions were made as to her willingness to undertake tasks of a domestic nature, whereas there would be no expectation of a man. In any event there is no evidence to support that the Respondents engaged in such stereotyping. This one-off request had nothing whatever to do with the Claimant's sex.

ISSUE 14 / 15

135. Again, the Claimant relies upon a hypothetical comparator. We have set out in our findings above why we consider that Ms Thomas' concerns were well founded even if, in fact, the Claimant was working. In our judgement, Ms Thomas would have been equally frustrated if calls to a man, or a man with childcare responsibilities, had gone unanswered and if they were apparently not in the office.

136. In our judgement, the deductions would equally have been made from a hypothetical comparator's wages in the same circumstances. The reason why the Claimant was not paid was that Ms Thomas genuinely, though incorrectly, believed she had not worked on 21 and 22 March 2019. That has nothing whatever to do with the Claimant's sex.

ISSUES 20 and 21

137. The failure to set the Claimant up on the Respondents' HR online system reflects administrative oversight or inefficiency. Insofar as the matter was flagged to Anielia Thomas on 4 March 2019, it took a further four weeks for her to arrange the necessary log in to be generated. The Claimant contrasts her treatment with that of her colleague Helios, though she did not lead any evidence as to how long it had taken Helios to be given access to the HR online system. Helios has worked for the organisation for approximately two years.

138. There is no evidence before the Tribunal to enable any proper comparison to be made as to how they were respectively treated. The fact that the Claimant's female colleague experienced difficulties does not, in our judgement, support any inference that there was sex discrimination. Rather, it simply reinforces that there was administrative inefficiency and that employees, regardless of gender, were not set up on the HR online system on a timely basis.

ISSUE 23

139. Responsibility in relation to the preparation of the Claimant's P45 rests with the Respondents' external providers. Putting aside whether this was treatment of the Claimant by the Respondents, the errors on the Claimant's P45 including the error which incorrectly identified her as *"male"*, had nothing whatever to do with the Claimant's sex and as noted already, everything to do with a lack of care on the part of the person who prepared the P45.

ISSUE 24

140. For the reasons as set out above in relation to Issues 14 and 15, the complaint in respect of the non-payment of the Claimant's wages on 21 and 22 March 2019 does not succeed as a complaint of direct discrimination. The reason why the Claimant was not paid her wages for

those two days was because the Respondent believed she had not worked them and was nothing to do with her sex.

141. Her overtime and expenses were not paid because she had not submitted any claim in respect of these. Again, that is unrelated to her sex.

142. The Respondent failed to pay the Claimant her holiday pay because it believed she was not entitled to holiday pay pursuant to the Statement of Main Terms of Employment. For the reasons below, we conclude that the Respondent was wrong about this, but its mistaken belief has nothing whatever to do with her sex.

143. Likewise, the Respondent's initial failure to pay the Claimant her notice pay was because it incorrectly believed that she had resigned her employment. It had nothing whatever to do with her sex.

ISSUE 19

144. In terms of her dismissal, the Claimant seeks to contrast her treatment with that of Helios who received a disciplinary warning in respect of an unauthorised absence from the business when he travelled to be with a sick relative without following the normal absence reporting procedure.

145. The Respondents rely upon the fact that Helios was apologetic and insightful in terms of the impact which his absence had on the organisation. In any event, we do not consider Helios to be an appropriate 'actual' comparator. Critically, he was not within his probation period. In our judgement nor does Helios provide assistance to the Tribunal in terms of identifying how a hypothetical comparator in the Claimant's position would have been treated.

146. In our judgement, the Respondents would equally have terminated the employment of a man, or a man with childcare responsibilities, had concerns arisen during their probationary period that they were failing to attend work, could not be contacted, had reacted defensively when an explanation was sought from them and had failed to notify their absence in accordance with documented procedures, and then failed to attend a meeting to discuss the Respondents' concerns in this regard.

147. In conclusion, and for all the reasons set out above, the Claimant's complaints that she was unlawfully discriminated against on grounds of sex are not well founded and are dismissed.

Unlawful Deductions from Wages

148. As regards the Claimant's complaint that the Respondents made unlawful deductions from her wages, given our findings above, the Claimant is entitled to be paid by the First Respondent (as her employer) in respect of Thursday 21 and Friday 22 March 2019. She was contracted to work 6.5 hours on Thursdays and Fridays. Her salary at termination was £20,400

per annum, equating to £292.31 per week. On the basis she worked 34.5 hours per week, her effective hourly rate of pay was £11.37, meaning that the Claimant should have been paid £147.83 (gross) in respect of the 13 hours she worked on 21 and 22 March 2019.

149. The Respondents do not dispute that the Claimant is entitled to expenses of £259.58 and overtime of £373.80.

150. As regards the Claimant's claim to holiday pay, the holiday provisions of the Employee Handbook referred to above (and which formed part of her contractual terms of employment), provide as follows,

> *"A(2) It is our policy to encourage you to take all of your holiday entitlement in the current holiday year. We do not permit holidays to be carried forward and no payment in lieu will be made in respect of untaken holidays other than in the event of termination of your employment".*

The wording is ambiguous in terms of whether the exception denoted by the words *"other than"* relates to both the carry forward of holiday and to payment in lieu. In our judgement, that ambiguity is to be resolved in favour of the Claimant, so that in the event of termination of employment she was entitled to payment in lieu of untaken holidays in the current and previous holiday years. In any event, there is no evidence before the Tribunal that the First Respondent took any steps to ensure that the Claimant took her accrued holiday before the end of the 2018/19 holiday year or even encouraged or permitted her to do so. It had a responsibility to its workers in this regard. In circumstances where the Claimant was not set up on the First Respondent's HR online system until after she left its employment, it is difficult for the Tribunal to identify how it discharged its responsibilities in this regard or how the Claimant can be said to have been able to take holiday. The First Respondent had the benefit of the Claimant's labour and in our judgement she should not be deprived of her accrued holiday in circumstances where there is no evidence that she was able to take it.

151. The Claimant's annual holiday entitlement was 28 days. There is no evidence that she took any paid leave during her employment with the First Respondent and, accordingly, we calculate that her accrued pro-rata entitlement was to 7 days' holiday. On the basis that the Claimant's annual salary was £20,400 we calculate that the average daily rate of pay was £78.46 (gross) and accordingly that the First Respondent made an unlawful deduction from her wages in the sum of £549.22 in respect of holiday.

152. In summary, therefore, we shall make a declaration that the First Respondent made an unlawful deduction from the Claimant's wages and

shall award her the total sum of **£1,330.43** (gross) in respect of those deductions.

17 November 2021

____

Employment Judge Tynan

Sent to the parties on: 13/12/2021

For the Tribunal Office