EMPLOYMENT TRIBUNALS

Claimant: **Ms N Bailey**

Respondent: **Latus Health Limited**

Heard at: **Leeds by CVP** **On: 24-26 January 2022**

Before: **Employment Judge Maidment**
Members: **Ms J Rathbone**
Mr R Webb

Representation
Claimant: **In person**
Respondent: **Mr F Jaffier, Consultant**

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant brings a complaint of direct sex discrimination alleging that she was treated less favourably than a male comparator, Greg, by her being paid a lower discretionary bonus in December 2020. The respondent maintains that such claim was not brought within the requisite time limits. The claimant says that it would be just and equitable to extend time in circumstances where she only discovered that she had been paid less than her male comparator in July 2021. Her tribunal claim was submitted on 15 July 2021 and a period of ACAS early conciliation from 12 June to 13 July.

2. She next brings a complaint of direct age discrimination. The claimant was at the time of the alleged discriminatory acts in her late 40s and her claim is based upon her being in an age group of between 45 – 50 years. Her treatment is compared to that of employees in the 20 – 25 years age group.

She alleges that she requested but was refused additional shifts whereas younger employees were given additional shifts on their request. The claimant says that she had to take on bank work to enhance her hours and therefore her pay. The claimant maintains this was a continuing state of affairs until the end of her employment.

3. It is accepted that the claimant was at all material times a disabled person by reason of her suffering from PTSD and complex grief as well as, separately, carpal tunnel syndrome. The respondent however denies that it had the requisite knowledge of such disabilities or how they disadvantaged the claimant. She maintains that she was subjected to disability-related harassment (with particular reference to her mental health impairments) during the course of a welfare telephone call during her sickness absence commencing in March 2021. In particular, she complains that she was asked if she was on drugs and laughed at regarding the reason for her absence. Separately (and reliant upon the impairment of carpal tunnel syndrome), the claimant maintains that the respondent failed to comply of its duty to make reasonable adjustments by not providing the auxiliary aids of a wrist support and an appropriate carrying bag for her equipment.

4. The claimant resigned from her employment with effect from 30 June 2021. She maintains that she did so in circumstances where the respondent was in breach of the implied duty of mutual trust and confidence. In this respect she relies upon the aforementioned disrespectful way in which she was spoken to during the welfare telephone call, the respondent breaching her confidence during the period of her sickness from March to May 2021, her being passed over for shifts as already referred to and in the respondent's failure to comply with the aforementioned alleged duty to make reasonable adjustments. The claimant maintains that such dismissal was unfair and also, given the matters relied upon, an act of unlawful discrimination.

5. The claimant also has a claim for holiday pay on termination and a balance of 2 months' notice pay.

Evidence

6. The tribunal, having clarified the above issues with the parties (which reflected those identified at a previous preliminary hearing), spent some time privately reading into the witness statements exchanged between the parties and relevant documentation.

7. The documents were contained in an agreed bundle numbering some 116 pages together with some additional documentation provided by the respondent without any objection from claimant.

8. The claimant gave her own evidence first. The tribunal then heard, on her behalf, from Mr Aaron Eastwood, whose evidence was set out in an email

from himself to the claimant dated 27 October 2021. Ms Karen Scott also then gave evidence on the claimant's behalf with reference to the information she had provided by email of 21 May 2021. Both Mr Eastwood and Ms Scott were former employees of the respondent. The tribunal then, on behalf of the respondent, heard from Mr Jack Latus, director and Mr James Reger, operations manager.

9. Having considered all relevant evidence, the tribunal made the factual findings set out below.

Facts

10. The claimant was employed by the respondent as an occupational health technician from 19 June 2019. She was initially employed to work 3 days each week, but increased that to 4 days in September 2019. She did not work Fridays.

11. Under the claimant's contract of employment, her normal place of work was at the respondent's client, Young's, in Grimsby. However, she could be required to work from any other location. Throughout the claimant's employment thereafter she was paid a fixed salary calculated on the basis of her working 4 days each week, including where there was no work available. This principle held good despite the need at various times and to various degrees for the respondent to take advantage of the coronavirus job retention scheme from March 2020.

12. Young's required the services of an occupational health technician on 3 days each week. The claimant was typically assigned to the client on 2 of those days, with other employees also assigned to Young's so that the client was familiar with a number of the respondent's employees, who could provide cover for each other whenever necessary due to holidays or sickness.

13. The claimant's evidence was that she wanted to work additional shifts and was frequently in contact with the respondent asking for additional work. The claimant's desire was to increase her earnings to alleviate her money worries. From around October 2020 the respondent operated a separate "bank" of casual workers used to man Covid testing facilities. At times, the claimant was able to obtain additional work from this source and indeed at times technicians were assigned to Covid testing as part of their normal shifts. The claimant raised with the tribunal that sometimes she had worked 7 shifts in a week. However, her position was that the respondent had taken insufficient regard for her health and welfare in giving her additional work. At other times she had been treated unfairly by being provided with less than 4 shifts of work although always paid for her contractual minimum. She raised that other more recently recruited technicians were given their full number of shifts at times when she wanted extra work or was not provided

with 4 shifts of work in a week. All of these newly recruited technicians were engaged on the basis that they were working 5 days each week.

14. The tribunal has been provided with schedules showing the shifts worked by all occupational health staff in the period from January 2020 until May 2021. The claimant has pointed to errors in the schedule, for instance, a couple of days where she appeared to have been assigned to work for a client, Karro, with whom she in fact refused to work due to an instance where she had been subjected to aggressive and unpleasant behaviour from some of their staff. However, the tribunal does not believe such document to have been fabricated and accepts that it is a predominantly accurate reflection of work undertaken.

15. The claimant has complained of the work she was allocated in May 2021 shortly before her resignation and a period immediately after a return to work from a significant period of sickness due to a mental health illness. In the first working week of May there was a bank holiday Monday and the claimant then worked 3 shifts at Young's. In the next week she worked 2 shifts at Young's, but was on holiday then for one of the days and sick on another. In the third week of May she worked at Young's on 2 days, was sick on a single day and was not allocated work, but was paid, on the fourth day. During the final complete week of May she worked 3 shifts at Young's and did not work, but was paid, for a single further shift. She compared herself to an employee, Charlie, who largely worked during this period at Karro and who worked typically his full 5 shifts each of these weeks save for 2 days of holiday. An employee, Ali, performed a mixture of work including some days at Covid testing sites, shadowing others and completing management referrals. A recently recruited employee, Lucy, worked typically on each weekday but in this period had some holiday, periods of office work, training, work at Covid testing sites and worked Thursdays and Fridays at a client known as Frank Roberts based in Northwich, which required significant travel from East Yorkshire and an overnight stay. Again, the claimant did not work on Fridays and the evidence is that she did not work on jobs which required overnight stays, although the claimant maintains that she was not asked to.

16. Looking back over the preceding months there are clearly weeks when the respondent had less work than others and where other technicians had days where no clients were allocated. These included Charlie and Ali. The claimant not being able to be allocated to Karro inevitably had some effect on her opportunities for work.

17. The claimant's case is that Charlie and Ali were recruited because they were friends of others in the business and Lucy as she was known to the respondent from working on its bank staff. The respondent, on the evidence, clearly did recruit some staff on the basis of existing employee

referrals. The claimant also maintained that these employees were cheaper due to them having less experience than the claimant, albeit the tribunal has not seen any evidence confirming that to be the case. She brings a complaint of age discrimination based on them being in an age group of 20-25 years, whereas the claimant was in an age group of 45-50. The respondent's records indicate 3 occupational health professionals in the 20 – 25 age group and 2 more in the 25 – 30 age group. 3 occupational health professionals were in their 30s, 3, including the claimant, in their 40s, 1 in their 50s and 3 in their 60s. Of the people newly recruited into the clinical team from October 2020, 2 were in the 20 – 25 age group, 2 in the 25 – 30 age group, 1 aged 44 and 1 aged 54. They were equally divided by sex.

18. The claimant was absent from work due to a shoulder injury, incurred as a result of a fall, from 14 September to 18 October 2020. Sicknotes submitted recorded "arm pain" and "pain in upper limb" as the reasons for her lack of fitness. It appears that the effects of the shoulder injury were short lived on the claimant's own evidence.

19. She then, however, described to the tribunal undergoing an MRI scan after which she was diagnosed as suffering from carpal tunnel syndrome around October 2020. She says that she raised with the respondent and, in particular, one of its directors, Sam Latus, and the operations manager, Jim Reger, on numerous occasions thereafter that she was seeking a referral to occupational health – her evidence was not that she said that she had carpal tunnel syndrome. She says that Mr Sam Latus asked her if she was content with one of the respondent's own physicians, Frank, seeing her to which she agreed. However, she was never in fact seen by Frank or anyone else. She said that her calls and emails in this respect were ignored. The tribunal has not seen any evidence of these communications and it is denied by the respondent that there was any awareness on its part of a carpal tunnel syndrome diagnosis. The tenor of the claimant's evidence is that she kept asking for a referral to occupational health, but without providing any further information or detail of the reasons behind that request.

20. The claimant told the tribunal that she carried on with her duties unaided, but in pain. She did not raise a grievance, she said, as this was a family business and she felt that her relationship with the respondent was such that she should not need to. The claimant's case is that she ought to have been provided with a wrist support and an appropriate carrier for her equipment. When suggested to the claimant that, on her own case, she knew from October 2020 what she needed, she agreed. When then put to her that she never told her employer, she did not disagree, replying that she needed advice as to which equipment was best for her.

21. The claimant's evidence is that she telephoned her line manager, Jim Reger, on 22 March in a state of some distress as she had had a form of

mental breakdown and she had attempted to take her own life. Jack Latus called her back himself shortly afterwards. She told both of them what had happened and described both as being very sympathetic. The claimant's evidence is that she had not been in the right frame of mind for some time, having suffered the death of her husband prior to joining the respondent and, whilst in its employment, having to deal with further bereavements of close relatives and of her dogs.

22. As regards her conversation with Jack Latus, the claimant said that he asked her if she had been taking any drugs as this could affect her mental health. She said that he said that he was just checking, as recreational drugs could cause mental health issues. The claimant told the tribunal that she was very offended, including in circumstances where her husband died through drug use and she felt that there was therefore no reason why she would have been taking drugs.

23. Mr Latus' own account is not dissimilar from that of the claimant. He said that he first learned of her attempt to take her life when he called her, having been told by Mr Reger that the claimant was off due to depression. He said that he told the claimant that he was calling her as a friend rather than her boss to see if she was okay. She had said that she was not and had explained her attempted suicide. He said he was very sorry. He said that he did not ever want to go to her funeral and that she should call him if she ever needed any help. He said that the claimant had explained that she had gone off the rails and had been going out drinking again. He did ask her if she had been using any drugs but, he said, seeking to be supportive as from his limited knowledge he understood if someone used drugs it could make depression worse. She said that she had not - having lost a husband to drugs she would never use or condone their use. Mr Latus' account was not materially challenged by the claimant and is accepted as accurate. He said that he had always thought that the call had been very supportive, not at all disrespectful and that at the end of the call he had thought he had done the right thing. He was very sorry if the claimant felt that was not the case.

24. The claimant subsequently on 22 March saw her doctor and she was certified then as unfit to attend work due to depression until 2 May 2021.

25. On 30 April the claimant texted Jack Latus saying that she had not been paid enough money to cover her bills that month and wondered if he could help her get to work and get through the month. She was asking effectively for a loan which could be repaid out of subsequent wages. Mr Latus thanked her for coming to him with this and asked what she might need. She said that she thought £500 and he responded that that was no problem and he would get that sorted for her that day. The claimant agreed in evidence that in doing so the respondent was very helpful to her.

26. The claimant agreed that her messages did not indicate any problems in her employment at that point, but said that she had nearly died and was looking forward to getting back to some form of normality. She had not wanted to say that Jack Latus' comments about drugs had been hurtful as she had not been in the right frame of mind to do so. When put to her that it might have been a good time to seek some clarity regarding any steps which could be taken in respect of her carpal tunnel syndrome, she said that she was not off work with that condition then and she had bigger issues (a reference to her mental health impairment) to deal with. Mr Jack Latus, as she accepted, had just been good to her and she said that she had already asked Sam Latus for help.

27. It was put to the claimant that, after she returned to work, she did not request any adjustment to her duties. She said that she requested an occupational health appointment to discuss her situation relating to carpal tunnel syndrome. She referred to it being raised in a supervision meeting with Sam Latus. There is no corroborative evidence of that.

28. The claimant's evidence is that she then telephoned Mr Reger on 20 May to ask for more shifts. She could not believe, looking at some schedules for future periods, that she had been given 2 shifts in a week whereas another person, Gail, had more shifts and with a client she was used to working with. She said that the conversation became heated with her saying that he had kept telling her that further work was coming but she had bills to pay. She said that she told him that she couldn't carry on like this and was going to have to leave. Working with the respondent, she told him, was making her poorly and her mental health bad. She said that he laughed at her in response which disgusted her and made her feel upset.

29. Mr Reger's recollection is that the call was in fact on 17 May. The tribunal is unable to make a positive finding as to the exact date, save that it was on or shortly prior to 20 May. Before the tribunal, Mr Reger said he did not laugh, but rather may have been guilty of a nervous chuckle of sheer disbelief when the claimant said that she felt she had never been supported and accused him of purposively not giving her shifts. His response was nothing to do with or any reaction to any mention of the claimant's mental ill-health. He told the tribunal that the claimant had been supported throughout her recent sickness and he reacted in similar astonishment to her contention to the contrary. He said that he had genuinely cared about the claimant. His account was convincing. The evidence is of him being sympathetic to her condition.

30. The claimant described that she had become aware that she had been called names behind her back and that the respondent's managers were ignoring her phone calls. She told the tribunal that she understood that Sam Latus and Mr Reger had referred to her as a pain and a troublemaker which,

she told the tribunal, related to her asking for more shifts and raising issues relating to data protection. She said that she felt pushed out and, in particular, excluded as an after-work get-together had been organised which she believed she had not been invited to. The tribunal has been shown a text she sent to Mr Jack Latus on 21 May where the claimant was complaining about how technicians rather than office staff were treated saying that she always seemed like the moaner but it was frustrating. She continued: "I honestly don't think Jim meant to do it but how does he expect a decent relationship with his techs when they're excluded with everything?"

31. The claimant's evidence is that she spoke to Jack Latus over the telephone on 21 May about her decision to leave the respondent, whereas he believes a conversation took place on 20 May. She said that he asked her to put in a grievance and indeed a grievance from the claimant dated 13 May was submitted by email on 20 May. The exact date of the conversation between the claimant and Mr Latus is not material.

32. In the grievance document, the claimant complained about two male technicians receiving respectively a £500 and £1000 bonus the previous Christmas in contrast to her award of £250. She complained that new technicians were getting work for 5 days and the respondent was looking to recruit further technicians, yet she had been given only 2 ordinary shifts and had been told that more was coming. She complained that there had been no return to work interview and that she had been put straight back into her normal work. The claimant explained this was a reference to the recent return to work after her breakdown. She then said: "I also have not received my occupational health referral for my carpal tunnel syndrome which Sam was to arrange when I had diagnosis."

33. She complained of a breach of confidentiality stating that a colleague, Libby Greenwood, had messaged her asking if she wanted to talk in circumstances where she should not have known anything about the claimant's illness. The claimant's evidence is that on 24 March she had received a text from Ms Greenwood saying that she was sorry to hear that the claimant was not good and what was going on. She was there for the claimant if she wished to talk. The claimant's position was that Ms Greenwood would not have sent that message if she did not know about the reason for the claimant's absence.

34. She complained that various people had told her that she had been called names in front of other staff in the office. She raised holidays from 2020 which she believed ought to have been carried forward. She then said that during a conversation with Mr Reger that evening she was upset and frustrated and "he laughed at me". She referred to this as: "not very professional considering we advertise as mental health advocates." She stated that she could not see any resolution to these problems as it had

been continuing for 9 months and even continued after discussing "some of these issues at supervision with Sam Latus." She said that she was extremely upset and hurt, feeling underappreciated and did not see any way that these issues could be resolved due to the anxiety and insecurity which she had been made to feel.

35. Jack Latus provided a response to the grievance on 27 May. He maintains that before doing so he had met with the claimant. The claimant said that there was no such meeting. The tribunal cannot on balance conclude that there was in the absence of any notes of or referring to a meeting or any evidence of an invitation to it. Mr Latus said that he had a clear recollection of it taking place in the kitchen area of the office, but the claimant was adamant that she had not been there at any point after she had indicated an intention to resign.

36. In the outcome, Mr Latus said that bonuses were at the discretion of senior management and based on a number of variables which did not include gender. As regards hours of work he said he had seen evidence regarding not putting the claimant back onto working 4 days per week to support her in her return from sickness. It was the operations manager who decided the most appropriate clinician for each client each day depending on numerous factors. He said he was confident that decisions on deployments were made with sound reasoning and where the claimant was posted did not affect her pay.

37. He apologised if the claimant was not happy with the return to work process and took on board her feedback. He recorded that HR processes were currently being reviewed and this was an area that they could be stronger in, referring to the respondent being in the classic 'small business becoming a large business' position. He said that he knew that management did discuss with her what she didn't feel comfortable coming back to and there was an offer that she need not work every day on her return to work. He referred to his own offer that she might come back working in the dispatch team if she wanted to work in a busy or social environment. However, this was no longer an option as the dispatch team had been stood down.

38. As regards an appointment with occupational health regarding her carpal tunnel syndrome, he said that he was unaware of this but was happy to instruct the operations team to ensure it was booked if she still felt it to be beneficial. He accepted her point that information regarding her sick leave should not have been divulged to other members of staff. Whilst they did have to be able to tell colleagues that an individual was off sick to be able to arrange cover, no details should be shared. He referred to interviewing the operations team who confirmed that they did not share information of her case with anyone, but that he was going to remind staff of the importance of confidentiality and sensitivity. He confirmed that name-calling

of staff members would not tolerated, but he required some details of specific instances from her to be able to investigate this further.

39. He referred to having interviewed Mr Reger who had admitted that he laughed during the telephone conversation. His explanation was that this was not a lack of sensitivity towards the situation, but more of a "feeling of disbelief and awkwardness". Mr Latus said that he had explained that this cannot happen and he must learn from it. He said that Mr Reger would like the opportunity to apologise to her. The tribunal notes that Mr Latus' evidence was that he had interviewed 2 or 3 members of staff in the open plan office who told him of Mr Reger's disbelief at the end of his phone call with the claimant. Mr Reger's evidence to the tribunal was that he had not in fact been in the office but had been working from home when the call was made so that there would have been no witnesses. His recollection however was that this call had taken place on 17 May. The claimant believes that the call took place on 20 May and referred to that as being the relevant date in her grievance (which Mr Latus investigated). The tribunal considers it likely that there was confusion as to the timing of the relevant call which was the subject of the claimant's complaint

40. Mr Latus noted that the claimant had said that she did not believe the situation was recoverable and that she provided a verbal resignation on 20 May 2021. He recorded that this was disappointing, but he understood her position and asked for an email to confirm her resignation.

41. Having received the outcome, the claimant emailed Mr Latus on the evening of 27 May asking him to accept this email as her resignation and asking when he wanted her to leave.

42. The claimant and Mr Latus had a further telephone conversation on 28 May where it was discussed that the claimant may have acted in haste through frustration in resigning and Mr Latus considered that everyone deserved a second chance. She emailed him on 2 June referring to that discussion. She said that she was still awaiting an apology from Mr Reger "laughing at me when indicating that all this was making me poorly with my current mental health…" She said that if he was taking her verbal resignation from 20 May, then her finish date would be 20 August and that there was no reason why she could not fulfil her contract. She referred however to Mr Latus stating that he would terminate her employment at the end of June and would not wish her to provide her services anymore. She asked for clarification.

43. Mr Latus responded by email of 4 June stating that they had decided that the best route forward was for the respondent to accept her resignation. He referred to her email mentioning a requirement that she provided three months' notice, but that the respondent was able to facilitate her immediate resignation so would not be asking her to work any notice period. However,

she would be paid up to the end of June. He said that he was sorry that her grievance was not considered resolvable.

44. As regards holiday entitlement, the claimant said that her annual entitlement was probably about 18 days pro rata. She did not know what holiday she had taken in either 2019 or 2020, the respondent operating a holiday year which matched the calendar year. In respect of 2021 she had 5 days of leave outstanding for which she had been paid, probably in June 2021.

45. Looking at the work schedules in 2020 she had taken a day's leave on 16 January, 3 and 6 August, 1 September, 4 days from 5 – 8 October (although the claimant was off sick during this period, she was paid for this leave) and leave on 10, 14, 21, 22, 23, 24, 25, 28, 29, 30 and 31 December. The claimant did not dispute those days. This gives a total of 19 days of paid leave.

46. The claimant is also complaining about Christmas bonuses given in December 2020 in place of the usual Christmas party. She accepted that any bonus was at the respondent's discretion. A breakdown which the tribunal accepts as accurate shows that 3 levels of bonus were awarded to technicians: £100, £250 and £500. Mr Reger was paid the sum of £1000 but his position as operations manager was quite different to that of an occupational health technician. He was their manager and took responsibility for servicing the clients and allocating work. Mr Latus said that the 3 technicians who were given £500 were all regarded as having gone the extra mile travelling significant distances to service clients and often at short notice. He pointed out that all of these individuals worked full-time. The claimant was paid the sum of £250. Mr Latus said that that was the appropriate level for her regardless in fact of her part-time working. All of the 3 individuals receiving the maximum bonus of £500 were male. 7 male employees were paid a lower figure than the claimant whose bonus was the same as the other two female technicians and 3 other male ones. The claimant has, in particular, before the tribunal sought to compare herself to a technician called Greg who was paid the higher level of bonus. The evidence was that he regularly, every other week, travelled to Banbury to work and the respondent wished to show their appreciation for that by a higher bonus award in his case.

Applicable law

47. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the Claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate without notice by reason of the employer's conduct. The burden is on the claimant to show that she was dismissed.

48. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

49. Here no breach of an express term is relied upon. The claimant asserts there to have been a breach of the implied duty of trust and confidence.

50. In terms of the duty of implied trust and confidence the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". The effect of the employer's conduct must be looked at objectively.

51. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by her employer. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

52. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so, then it is for the tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.

53. The claimant complains of direct discrimination based on sex and age. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which 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."* In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".*

54. The Act deals with the burden of proof at Section 136(2) as follows:-

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

55. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

56. It is permissible for the Tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

57. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

58. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> *(5) The third requirement is a requirement where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."*

59. The Tribunal must identify the provision, criterion or practice applied/physical feature/auxiliary aid, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

60. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

61. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the

employer's size and resources, will include the extent to which taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

62. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

63. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP/physical feature/lack of auxiliary aid creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

64. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

65. The tribunal considers firstly the claimant's complaint of age discrimination. This is that she requested but was refused extra shifts, whereas younger employees were given more work. The claimant was contracted to work 4 shifts each week. If there were ever not 4 shifts available for her, she was still paid her full salary. She compares herself with younger employees, but all of those to whom reference has been made in evidence were contracted to work 5 shifts each week. Those employees were not always provided with work covering each shift but they, like the claimant, were paid their full salary. The claimant has not pointed to another employee, whether younger

than her or not, who worked part-time hours but was provided with additional work.

66. There were occasions where the claimant would have been available to work and missed out on a shift in circumstances where the younger employee worked and did not have his or her shift removed. Of course, in such circumstances the claimant did not have to work to get paid her normal contractual salary, whereas the younger employee did. The claimant has referred to the younger employees being cheaper to employ than her, albeit without any evidence of that. However, in terms of providing employees with their contracted shifts, the respondent's employment costs were fixed. There was no saving in asking other employees to cover shifts if the claimant was guaranteed her allegedly higher wage in any event for sitting at home.

67. Even accepting that not being able to perform work on a shift could be viewed as detrimental treatment, there is no evidence from which the tribunal could reasonably conclude that any difference in treatment was because of the claimant's age. Indeed, the respondent has explained the fluidity and complexity of scheduling shifts which might be cancelled at short notice and where employees might be required to move around to cover the absence of others. The tribunal is satisfied that where the claimant was not allocated shifts at Young's, her regular client, this was in circumstances where the respondent wished to ensure that a number of employees were known and acceptable to Young's so that continuity of service could be provided to that client, for instance, on occasions where the claimant was not at work. Looking at the 15 month period where details of scheduled shifts have been provided to the tribunal, there is no basis for the tribunal concluding that the claimant was treated differently to others, let alone because of age.

68. The tribunal struggled to understand the claimant's position. When focusing on the month of May 2021 the claimant maintained that she was not provided with extra work at a time when she had just returned from a significant illness and was also asking to be eased back into the workplace. The claimant points to other occasions in earlier periods where she worked 7 shifts each week – a situation not indicative of her being starved of work.

69. The claimant's complaint of age discrimination fails and is dismissed.

70. Turning now to the claimant's complaint of disability discrimination in a failure to make reasonable adjustments, the disability relied upon is the claimant suffering from carpal tunnel syndrome. The respondent has admitted as an earlier preliminary hearing that the claimant was at all material times a disabled person by reason of this condition.

71. For the duty to make reasonable adjustments to arise, the employer must know or the circumstances must be such that it ought reasonably to have known that the claimant was a disabled person. In addition, there must be knowledge of the disadvantage to which the employee was placed when compared to a non-disabled comparator.

72. The tribunal has to conclude that the respondent in this case did not have such knowledge. On the balance of evidence, the tribunal has to conclude that the claimant did not tell the respondent that she had carpal tunnel syndrome until 20 May 2021 when she raised her grievance having notified the respondent of an intention to leave its employment.

73. The tribunal cannot avoid concluding that the claimant is completely confused regarding the timeline of events. She appears not to have had that confusion at the earlier preliminary hearing when it was clearly identified and set out that the complaint was of a failure to make reasonable adjustments from May 2021. Before this tribunal, the claimant has argued that from October 2020 she constantly raised the issue of her requiring an occupational health referral. There is no evidence that she in fact did.

74. The claimant's own witness statement presents a narrative in which she returned from work after an unconnected shoulder injury in October 2020 and worked extremely hard for the respondent. There is no indication that she did so while suffering pain, let alone that this was brought to the attention of the respondent. She then refers to going off sick on 22 March 2021 and in the subsequent paragraph states that whilst she was off sick she was diagnosed with carpal tunnel syndrome along with PTSD and complex grief, the other disabling impairment relied upon in these proceedings. Her own evidence is inconsistent with a diagnosis of carpal tunnel syndrome at an earlier stage. Obviously, she could have been suffering from pain due to, not yet diagnosed, carpal tunnel syndrome, but there is no evidence that she was or that the respondent could have been aware.

75. The tribunal accepts the evidence of Mr Latus and Mr Berger that they knew nothing of any diagnosis of carpal tunnel syndrome. There is no indication, from what the claimant accepts as an otherwise accurate note of a telephone conversation between the claimant and Mr Reger on 17 or 20 May, of an issue even potentially relating to carpal tunnel syndrome being raised. The tribunal does not accept that Mr Reger missed this out from what was clearly a full and unembellished account of a difficult conversation.

76. In any event, the claimant's own evidence is that whilst she was raising the issue continuously, she was simply raising in fact with the respondent a request for an occupational health referral. Her evidence was not that she

was explaining in any detail or even in general terms why she might need this.

77. Had the claimant been able to show that the respondent had the requisite knowledge of her disability, there is then no evidence whatsoever of how such condition disadvantaged her. The claimant has said that she thought she needed an armrest and some assistance in carrying her equipment but there is no explanation given to the tribunal of her condition and how it affected her in her work.

78. The respondent did not fail to comply with any duty to make reasonable adjustments.

79. The alleged failure to make reasonable adjustments has been pleaded as one of the aspects of mistreatment by the respondent of the claimant which led her to resign in circumstances where the claimant maintains she was constructively dismissed. Clearly, on the tribunal's findings, this issue can add nothing to a claim of breach of trust and confidence. Similarly, the claimant has alleged that she was passed over for shifts in circumstances again where the tribunal's findings are not of any treatment of the claimant by the respondent without reasonable and proper cause which was, viewed objectively, likely to destroy or seriously damage trust and confidence.

80. In terms of the claimant's pleaded case, she is then left firstly with an alleged breach of confidence by management regarding her sickness absence. This claim is based on the text message sent by Ms Greenwood in which she expressed that she was sorry to learn that the claimant was not good and if she needed anything she was there for the claimant. That clearly is suggestive of Ms Greenwood knowing that the claimant was absent due to sickness. It is also to be reasonably construed as suggestive of her having some knowledge of the reason for the claimant's absence. The mere fact of the claimant being on sick leave was not a matter of confidentiality or which could reasonably be kept confidential in circumstances where alternative arrangements would have to be made to cover the claimant shifts. The tribunal cannot, however, conclude that personally sensitive information about the claimant was widely disclosed. It is difficult for the tribunal to conclude any more than that Ms Greenwood was aware that the claimant was generally unwell, but certainly it cannot conclude that, for instance, Ms Greenwood had been told anything like the detailed information which the claimant had shared with Mr Reger and Mr Latus. The text in isolation cannot be viewed as indicative of anything which amounted effectively to a fundamental breach of the claimant's contract of employment.

81. The only other matter then relied upon by the claimant is her being asked by Mr Latus if she was on drugs on 22 March and then on or around 20 May being laughed at by Mr Reger at the (mental ill health) reason for her

absence. These are also separately brought as complaints of disability-related harassment.

82. The tribunal's findings are of Mr Latus engaging in a very sympathetic and objectively clearly well-meaning conversation with the claimant where there was a relevant context for him asking about the use of drugs given the claimant's disclosure, not least about her being off the rails and drinking. Mr Latus was not being judgemental or seeking to diminish the seriousness of the claimant's condition. This was not, in context, a remark which had the purpose of causing offence. In fact, the evidence is that it did not have even that effect given the claimant's subsequent interactions and correspondence with Mr Latus and her lack of complaint at any stage including in her ultimate grievance about the matter.

83. The tribunal cannot indeed even conclude that the question raised by Mr Latus was, in context, related to any disability. His knowledge at the time he raised the question was simply that he had just been told that the claimant had had a form of breakdown and had attempted to take her own life. The claimant had not yet seen a doctor and did not herself understand that she was suffering from any defined mental health impairment. Indeed, subsequently, the claimant was signed off as suffering from depression, but there is no evidence of the pleaded and accepted disability of post traumatic stress disorder and complex grief until a fitness note presented to the tribunal dated in December 2021, a significant period after the claimant's employment ended.

84. Such knowledge issue is part of the relevant context again of Mr Reger's conversation with the claimant. However, in any event, on the evidence the context of that conversation is not that he laughed at her as a reaction to or related in any sense whatsoever to her mental health impairment. The tribunal accepts that he was reacting in disbelief to the claimant's assertion that she had not been supported by him in circumstances where he, with some justification, believed that he had shown significant care for the claimant's welfare and had been trying to facilitate a successful return to work. The tribunal can accept that the claimant genuinely was upset and took his "awkward chuckle" a different way.

85. However, there was no disability related harassment and no conduct which could amount to a breach of trust and confidence.

86. It is noted at this stage that the claimant within her evidence has raised other matters including being called names behind her back, something which was communicated to her she says by her colleagues. The tribunal cannot on the evidence come to any firm conclusion as to what may or may not have been said about the claimant but in any event, these were not matters which have been relied upon as acts which caused her to resign. Similarly,

complaints of her being excluded including from social activities are neither made out, nor were they reasons the claimant had identified as leading to her resignation. The tribunal would note that the claimant herself in evidence has spoken of her resigning in haste, in some temper and frustration and appreciating, in her words, an element of paranoia regarding how she was being treated.

87. The claimant was not constructively dismissed and therefore her claim of unfair dismissal on that basis must fail.

88. The claimant brings completely separate complaints of sex discrimination relating to bonus payments. The tribunal refers to its factual findings in this regard. It is satisfied that the reasons for the higher bonus paid to a number of male employees, in particular Greg, were in no sense whatsoever related to sex. They related to perceptions of performance and the inconvenience caused to such individuals of having to go to distant workplaces at short notice and/or on a regular basis. In any event, the claimant has done no more than pointed to a male employee who has been treated more favourably than her but has provided no evidential basis from which the tribunal could conclude that the reason for the unfavourable treatment was that individual's sex. The statistical breakdown shows that only male employees achieved the highest level of bonus, but also that a significant number of male employees received a lower bonus than the claimant and other female colleagues. This is not material from which any adverse inference could be drawn but in any event the respondent has provided a non-discriminatory explanation satisfactory to the tribunal.

89. The claimant next complaints respect of her not being paid in full for accrued but untaken holiday entitlement carried over from 2020. She has not, however, been able to evidence any untaken element of her holiday entitlement. On the evidence, she took her full entitlement for that year.

90. The claimant's final complaint is one seeking damages for breach of contract in respect of the balance of a three month notice period required contractually to be given by her to resign from her employment and which she had expressed a willingness to honour. The respondent has conceded liability during these proceedings in respect of a 2 month shortfall in notice pay. It is ordered to pay to the claimant the gross sum of £3,333.34.

Employment Judge Maidment
Date 4 March 2022

REASONS SENT TO THE PARTIES ON
Date: 7 March 2022

Note

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