EMPLOYMENT TRIBUNALS

Claimant: Miss Carolina Arias Gayon

Respondents: 1) Ms Sharon Kaye & 2) Sun Rose Care Ltd

Heard at: London South Croydon, in public, in person

On: 25-27 October 2022 (26 & 27 in chambers)

Before: Employment Judge Tsamados
Mr J Hutchings
Mr S Khan

Representation:
Claimant: In person
Respondents: Did not attend, were not represented

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The First Respondent indirectly discriminated against the Claimant on grounds of sex;

(2) The First Respondent victimised the Claimant in respect of the following detriments: by reducing her salary; by demoting her; by making insulting personal comments about the Claimant's appearance; by withdrawing permission for the Claimant to work from home and retrieving her working from home equipment without prior warning; and by ridiculing and humiliating the Claimant in front of other employees;

(3) The Second Respondent discriminated against the Claimant by constructively dismissing her;

(4) We make an award of past loss of earnings of £5,174.13 and for injury to feelings of £3,656.70 against the Respondents for which they are jointly and severally liable;

(5) The Second Respondent made the following unauthorised deductions from the Claimant's wages: accrued but untaken annual leave of £519.18 gross; wages of £173.06 gross; and SSP of £63.90 gross.

(6) The Claimant is entitled to damages for breach of contract in respect of the following from the Second Respondent: payment of her mileage allowance

of £114.48 and reimbursement of her DBS fee of £58.

REASONS

Background

1. By a Claim Form presented to the Employment Tribunal on 16 July 2020, the Claimant brought complaints of pregnancy/maternity discrimination, sex discrimination and entitlement to outstanding pay against the First Respondent, Ms Kaye. This followed a period of Early Conciliation between 31 May and 1 June 2020.

2. On 27 August 2020, the Tribunal accepted the Claim and it was served on the First Respondent. The return date for presentation of a Response to the Claim was 24 September 2020. In addition notice of a Preliminary Hearing on Case Management to take place on 31 August 2021 was also sent to the parties.

3. On 7 January 2021, the Tribunal wrote to the Claimant, cc the First Respondent, advising that no Response to the Claim had been received but noted that the First Respondent was an individual who may not have been the Claimant's employer. The letter asked the Claimant if she wished to substitute Sun Rose Care Ltd as Respondent in which case the Claim Form would need to be re-served. The Claimant replied by email on 9 January 2021 stating that her Claim was against the First Respondent who is the owner and Managing Director of Sun Rose Care Ltd. She subsequently emailed the Tribunal on 31 March 2021 confirming that her employer was Sun Rose Care Ltd.

4. On 12 April 2021, the Tribunal ordered that Sun Rose Care Ltd be added as a party to the Claim, sent them a copy of the Claim Form, indicating that the return date for presentation of a Response was by 10 May 2021. The Tribunal also sent the notice of the case management hearing set for 31 August 2021.

5. In an email from the First Respondent dated 25 August 2021, sent from an email address in the name of the Second Respondent, Ms Kaye advised that she had sent a Response to the Claim many months ago and attached a photocopy of the completed Form ET3, the attached grounds of resistance and supporting documents. In addition she asked for a postponement of the hearing due to confidential medical reasons. It is taken as read that the emails from Ms Kaye were on behalf of both Respondents.

6. In any event the Tribunal wrote to the parties by letter dated 25 August 2021, which was sent to the Respondents by post (not then having an email address for them), advising that the case management hearing was postponed due to lack of judicial resources.

7. From this point onwards unless otherwise indicated, all correspondence to the Respondents was sent to the business email address (this being the only one provided by the Respondents).

8. By a letter to the parties dated 7 September 2021, the Tribunal notified that the Response had been accepted on behalf of both Respondents.

9. By letter dated 9 September 2021, a further date for the case management hearing was set for 23 February 2022.

10. By letter dated 12 January 2022, the Tribunal wrote to the parties seeking their confirmation on or before 26 January that they were ready to proceed with the hearing.

11. By email dated 25 January 2022, not copied to the Claimant, the First Respondent wrote to the Tribunal seeking an adjournment of the case management hearing on medical grounds. She also pointed out that the Claimant was accusing her of pregnancy discrimination but the Claimant was not pregnant and at the time had a two year old and so she believed she meant to put forward discrimination against having a daughter.

12. In response that same day, the Tribunal sent an email to the First Respondent suggesting that she either send a representative on her behalf or apply for a postponement. It was also pointed out that under Rule 32 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 where a party sends a communication to the Tribunal it must send a copy to all other parties and state that it has done so.

13. By email dated 26 January 2022, the First Respondent wrote to the Tribunal (again without copying it to the Claimant) requesting a postponement on medical grounds. By letter dated 4 February 2022, the Tribunal granted a request subject to receipt of suitable medical evidence within 21 days of the date of the letter. Suitable medical evidence was subsequently received on 17 February 2022 and at the First Respondent's behest this was not disclosed to the Claimant.

14. By email dated 22 February 2022, the hearing set for 23 February 2022 was postponed and by letter dated 17 March 2022 it was relisted for 5 July 2022.

15. On 13 June 2022, the First Respondent made a further request for a postponement due to her continued ill-health. Her email indicated that one of the main reasons she was unwell was due to stress and being bullied at work and so coming to a hearing to handle aggression towards her would be impossible just now. She also indicated that the Second Respondent was *"no longer open and has gone under"*.

16. By email dated 20 June 2022, the Claimant objected to the postponement request and stated that whatever bullying the Claimant was suffering from it was not from her. She suggested holding the hearing by video.

17. By letter dated 30 June 2022, the request for a postponement was refused on the basis that the hearing was to clarify the issues and it had already been delayed for 2 years. The letter also indicated that the Respondents could send a representative on their behalf and that the hearing would be by way of Cloud Video Platform ("CVP") and there was no requirement to attend in person.

18. The First Respondent sent a further email on 4 July 2022 stating that the Second Respondent limited company had *"closed"* in March, there was no one to attend and she was too weak to attend remotely. The email also made a number of allegations against the Claimant to the effect that she was involved with others in a vendetta against the First Respondent. This email is referred to later on in this Judgment. The Tribunal received an out of office reply from the Respondents' email address stating that "*Sun Rose Care has now closed after 10 years due to ill health."*

19. The Claimant responded to the Tribunal in an email also on 4 July 2022 in which she denied the allegations and included screenshots from the First Respondent's Go Fund Me website page which she relies upon as evidence that the First Respondent was not as ill as she made out to the Tribunal.

20. The preliminary hearing on case management took place by CVP on 5 July 2022. The Claimant attended the hearing but no one from the Respondents took part. At that hearing, Employment Judge Morton identified the complaints and issues, set a series of case management orders and listed the full hearing to take place over 3 days from 25-27 October 2022. In particular, the Claimant was given permission to amend her claim to include a complaint of victimisation in respect of the allegation that the First Respondent had maintained on various social media platforms that the Claimant was the cause of her ill-health. I should point out that the record of that hearing refers to the names of the two Respondents in reverse order and I have corrected them to reflect the order in which they appear in the heading of this Claim.

21. On 19 October 2022, the Tribunal wrote to the parties because it appeared that they had not complied with the case management orders and so it was unclear if the case was fully prepared for the hearing. The letter required a response within 7 days and warned that if the hearing was cancelled it would not be rescheduled until late into 2023. The same out of office reply was received from the Respondents and so the Tribunal also sent the letter by post. The Claimant responded and in fact it was clarified that she had complied with the various case management orders. However, there was no response from the Respondents and they had not complied with any of the case management orders.

22. The Claimant sent emails to the Tribunal in September and October 2022 seeking clarification as to whether the forthcoming hearing was in person or by video. In response to her September emails she was erroneously told that the hearing would be a hybrid, meaning some parties will attend by video and some in person. She sought further clarification as to whether she and her witness could attend by video and how was the Respondent going to attend. Unfortunately, these emails went unanswered.

23. On 20 October 2022, the parties were sent notice that the hearing would be in person.

24. At some point after the preliminary hearing, the Claimant sent a revised Claim Form. This contains an additional complaint of disability discrimination although it is not particularised. It does not appear to have been sent to the Respondents.

Full merits hearing - 25th October 2022

25. By 10 am, the Claimant and her witness, Ms Galt, were present in the Employment Tribunal building. However, no one had arrived for or on behalf of the Respondents. I instructed my clerk to telephone the First Respondent and ask her if she is proposing to attend or if she is requesting a postponement and to warn her that we could proceed in her absence.

26. My clerk reported back that the First Respondent was driving and advised that she is undergoing chemotherapy and cannot attend today, that she was unaware of this hearing as emails go to the Second Respondent's email address and the Respondent company has closed down. My clerk also informed me that the First Respondent clearly expressed no interest in attending and her surprise that the case was continuing, given that the company has closed down and has no money, and so the Claimant is not going to get anything. My clerk asked the First Respondent to confirm what she had said in writing. The First Respondent explained given she was driving, this might not be possible for 30 to 40 minutes.

27. By 11.15 am we had received nothing from the First Respondent and we decided that it was best to contact her because she did not appear to appreciate that she has been named personally as a Respondent to the proceedings and so could potentially be found personally liable for any award of compensation that we make.

28. I instructed my clerk to telephone and email the First Respondent as follows:

"The Tribunal have asked me to pass on this message:

We need to stress that the claim is against you personally and not just the company and so it does not matter whether the company is still trading or not or has no assets. We need to know whether you are going to attend the hearing which is not just today but scheduled for the next 2 days. You must contact us by 2 pm to let us know whether you are going to attend or not and if not why not. You should be aware that if you do not contact us by the 2 pm deadline, the case will proceed in your absence. Can you also provide a personal email address and this message will be confirmed in writing."

29. We were subsequently provided with a copy of the earlier email sent by the First Respondent at 10.41 am in response to our clerk's first telephone call. This email was sent from the Second Respondent's email address. This is set out below:

"I just had a phone call saying I was supposed to be in court today. I am having chemo today - I am end of life and having palliative chemo. I thought the case had taken place in August. So I am confused what today is about? Sun Rose Care shut down last year due to my illness and also because Carolina Arias Gayon wrote to all my staff and told them all sorts of untruths so that the day of my first surgery 7 of my staff walked out and then my business collapsed last year. It isn't showing as closed at companies House because I have not had the strength to do the final accounts. Currently Sun Rose Care is £40,000 - £100,000 in debt. There is no office, no clients, no insurance, no workers, the business had gone into liquidation."

30. Having discussed the matter as a panel, I instructed our clerk to respond to the First Respondent by email as follows. This was sent at 1.07 pm:

"The Tribunal as asked me to write to you as follows:

We have belatedly received your email sent at 10.41 today. We are very sorry to learn about your medical situation. Unfortunately, we cannot simply cancel the hearing.

Our clerk has already left a message on your mobile voicemail and this is repeated below.

We need to stress that the claim is against you personally and not just the company and so it does not matter whether the company is still trading or not or has no assets. We need to know whether you are going to attend the hearing which is not just today but scheduled for the next 2 days. You must contact us by 2 pm to let us know whether you are going to attend or not and if not why not. You should be aware that if you do not contact us by the 2 pm deadline, the case will proceed in your absence. Can you also provide a personal email address and this message will be confirmed in writing."

31. The First Respondent sent a further email at 1.19 pm which said the following:

"I am end of life now sure how long I have left. Few months. As we speak I am hooked into chemo and will not be able to attend anything. As am having chemo all day. I was unaware of this case until someone called me today. I have no personal income bar benefits. So not sure how I can attend court when I am not sure how much longer I have to live? How can I be personally taken to court when Sun Rose Care was a limited company? Carolina told a colleague of mine that she was going to get as much money out of me as possible. She does know I am on my very last legs. She is using my inability to be alive to get as much out of me as possible as I don't have the life force to contest her lies. But she only worked for me for a few months and during this time her employer was our registered manager not me. I hardly saw Carolina as she was working for my managers and office workers not me. I have no idea why she is taking me to court as she only worked for me for a couple of months - she was paid very well as we paid way over the living wage.

Please can someone help me? I am sick due to a 2 year vendetta of past staff trying to get whatever they can from me as I am literally dying."

32. She sent a further email at 1:21 pm which said the following:

"PS I am about to go personally bankrupt as well as Sun Rose Care. I have no money, no property, no savings."

33. We commenced the hearing and explained to the Claimant what had happened and as to the emails received from the First Respondent. The Claimant was very upset by elements of those emails directed at her alleged behaviour.

34. We explained that we had decided to proceed for the following reasons. The Claim has been outstanding for over 2 years. A postponement will mean re-listing for dates towards the end of 2023 or even 2024. The Respondents have provided an email address for communication and we are entitled to assume that it is monitored. Indeed, the First Respondent has emailed us from the Second Respondent's email address today even though she states that she has not received our previous emails because the company has closed down. Whilst the First Respondent believes that the Claim was resolved in August 2022, there is no reason why she would believe this to be the case. With no disrespect to the First Respondent, she has provided no evidence in support of the treatment she is receiving or that her medical position is as grave as she says. While she has written her emails in very emotive terms those matters are not relevant to consideration of the Claim or the lack of attendance today. The financial position of the Respondents is not relevant to liability and remedy although they might be practical issues that the Claimant will have to face in enforcing our Judgment if she is successful. If the Respondents have valid reasons for not being present today and evidence in support then they are at liberty to seek a reconsideration of our decision or even appeal if appropriate.

The issues

35. The issues are as identified by EJ Morton at the case management discussion. These are complaints of:

    a. Indirect sex discrimination (sections 19 and 39 of the Equality Act 2010 ("EQA"));
    b. Victimisation (sections 27 and 39 EQA);
    c. Constructive dismissal (sections 39(2) & (7) EQA);
    d. Unlawful deduction from wages (section 13 of the Employment Rights Act 1996 ("ERA")).

36. The Claimant has sought to widen the complaints in her revised Claim Form and within her witness statement on the basis that she believed that EJ Morton had invited her to do so by allowing her to amend her Claim. I explained to her that this was not the case. EJ Morton amended her Claim as indicated above and set out the complaints and the issues arising from them. What she had done in her revised Claim Form and witness statement was to add new complaints of harassment and disability discrimination.

37. I explained that she was at liberty to make an application for leave to amend but we would have to adjourn today to allow her to make a written request setting out the details of the amendments, send a copy to the Respondents and allow them the opportunity to reply. This would mean having to set new dates for the hearing in the future.

38. The Claimant said she was content to deal with the complaints and issues as set out at the last case management hearing.

39. These are set out at pages 2 to 4 of the record of that hearing. I further explained that these are the complaints and issues that will be determined by the Tribunal and we will not depart from them unless there are exceptional circumstances.

Evidence

40. The Claimant provided a witness statement and a series of exhibits identified as CAG1 to 22. Within the exhibits were statements from 2 of her work colleagues, Maria Galt (at CAG6) and Alex Smith (at CAG4). She provided a separate Schedule of Loss.

41. We heard evidence from the Claimant and Ms Galt by way of reference to their written statements and in oral testimony. Ms Smith did not attend the hearing to give evidence and to the extent that its contents were in contention we gave it limited or no weight.

Findings of Fact

42. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

43. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

44. There were a number of gaps in the evidence where the written and oral evidence did not tally with each other or with the contemporaneous documents. The Respondents were not here to assist. We have done our best where possible to resolve these gaps.

45. The Claimant was employed by the First Respondent initially as a Care Co-ordinator and Supervisor and latterly as a Care Co-ordinator from 3 February to 24 July 2020.

46. The Second Respondent provides care for elderly adults in social need in their own homes. At the time, the Second Respondent had approximately 10 service users. The First Respondent is the Managing Director but at the time of the events in question the day to day manager was Maria Galt who was the then Registered Manager.

47. At that time, the Second Respondent employed between 7 to 10 staff who were all female apart from one male. This included the First Respondent's two daughters, Arla as Office Administrator and Support, and Fearn, although we were not told what position she held. The office staff were part-time and most of the care staff full-time. In addition, the Second Respondent employed two consultants, Debbie Silvester as HR consultant, and Nicki Whitehead, as independent care support.

48. The Claimant applied for employment with the Second Respondent and we were referred to the advertisement at CAG1.

49. The Claimant attended for interview with the First Respondent and Ms Galt on 10 January 2020 at which it was agreed that she would work 3 days per week, Monday, Wednesday and Friday, although it was subsequently agreed that she would work Monday, Thursday and Friday.

50. The Claimant made it clear that she had to pick up her daughter (who was then aged 2) from nursery in Haywards Heath and would have to leave work (in Lewes) by 5.30 pm to get there by latest 6 pm. There is some disagreement as to the actual hours of work but nothing turns on it beyond the agreement to leave work no later than 5.30 pm.

51. Ms Galt told us that it was early days for the Second Respondent company, it did not have many employees and so she and the First Respondent left the nature of the job vague at interview because the Second Respondent did not then know whether it required a Care Co-ordinator or a Supervisor. For this reason there was also no job description. Both Ms Galt and the First Respondent thought they would see how the Claimant settled in before formulating the exact nature of the role.

52. The advert contains what is described as a *"Full Job Description"* although it is somewhat brief (at CAG 1):

"We are looking for a Care Co ordinator / Supervisor to join our growing team here in our offices in Lewes. We are a compassionate care service / agency. Pay is on a permanent contract and a salary as above - depending on experience, training and how long you are with us. This is an exciting role for the right candidate, as there is a lot of variety, in that the role is both office based and in the field. You will need to have some computer literacy.

The job description will be partly working in the community and the rest of the time will be office based. The role will be working alongside our Registered Manager carrying out reviews, spot checks, shadows, meeting new clients and doing risk assessments. Writing and updating support plans. Mentoring new staff, supervising the team. Setting up a weekly rotas for the team. Full training given. We are an independent care service, open for 8 years, known for our compassion and personal touch. We just received all Goods in our CQC report so all applicants must strive to keep our quality and reputation flourishing.

We offer a pension plan, holiday pay, free training and a mileage allowance. Travel time is paid. We will support you in your career progression.

You must be willing to work on a mixed rota with a mix of shifts, mornings, evenings and some week ends. This post can be part-time or full time.

You do need a background in care and to be experienced in working in the care arena. It is desirable that you have a minimum training level of NVQ 2 in Health and Social Care. We are happy for you to be working towards this and to have the Care Certificate in the interim. You must be a car driver."

53. We note in particular the second paragraph which states that the job involved partly working in the community and the rest of the time office based.

54. The Claimant was successful in her application and was offered the position of Care Co-ordinator/Supervisor. We were referred to the offer letter dated 14 January 2020 at CAG2 as well as emails relating to the revision of work days at CAG3. The Claimant was initially paid £22,500 pa gross pro rata for 3 days at the rate of £13,499. Salaries were due to be paid on 29th of each month, although the Claimant said they were always paid late.

55. In addition, the Claimant as with other staff received reimbursement for car mileage for journeys for undertaking care calls at the rate of 35p per mile.

56. However, there were ongoing disputes with staff as to mileage payments. Ms Galt told us that it happened every month and she dreaded pay day because all of the staff had complaints about what they had been paid which did not reflect the actual amount of mileage they incurred. They were unclear how the First Respondent calculated her figures but she always came up with a lower amount of miles than staff had actually driven.

57. The Claimant's case is that she was underpaid her mileage and then not paid it at all. She received payment for 86 miles but had actually done a total of 413 miles. She provided us with copies of her mobile phone's Google Maps'

timeline in support of this (at CAG19). In the absence of any evidence from the Respondents as to how mileage was actually calculated we accept the Claimant's evidence that she should have been reimbursed for the balance of 413 less 86 miles = 327 miles @ 35p per mile.

58. The Claimant was told that she would be reimbursed the cost of her Disclosure & Barring Service ("DBS") check after completion of her 3 month probationary period (the length of probation is in dispute later on in her employment). Ms Galt corroborated this evidence and added that others were reimbursed immediately and in one case an employee left after one shift and the First Respondent never got the money back. The Claimant's receipt for payment of £58 is at CAG8.

59. We understand that the Claimant was later issued with a Contract of Employment and Job Description for the position of Care Co-ordinator but we were not provided with copies. This is apparent from a note of the meeting between Ms Galt and the Claimant dated 6 March 2020 and signed by both of them. The Claimant's evidence was that she signed this note under duress although we had understood the meeting was with the First Respondent and not with Ms Galt.

60. The Care Co-ordinator role was office based and involved drawing up rotas of staff available to work. This had to be done by Thursday to be issued on Friday for the week commencing the following Monday and hence the revision to the Claimant's days of work. The Supervisor role involved working in the field, going out shadowing staff, spot checks and mentoring. The role would also involve undertaking care calls, that is, visits to service users in their homes.

61. It was agreed that the Claimant would not have to undertake care calls outside of her normal work hours unless all the other staff were sick and she had sufficient notice to make alternative care arrangements.

62. Initially, the staff were all based in a large open plan office and latterly the Claimant and Ms Galt relocated to a small room in Lewes whilst the First Respondent and her two daughters were based in an office in Newhaven. The First Respondent was rarely in the office apart from one week in March 2020 whilst Ms Galt was on annual leave. However, the First Respondent was in constant contact with the office by telephone, text and email.

63. Ms Galt said that the First Respondent was not well liked in the office. She described her as a micro manager, a very difficult person to get along with and unable to communicate with others. The First Respondent did most of her communication by email. Ms Galt said that on occasions she received 100 emails a day. Ms Whitehead had to intervene as a mediator with staff and drew up a communication policy.

64. The Claimant commenced employment on Monday 3 February 2020. The First Respondent was in the office that day. The Claimant discovered that she had been put on the rota to undertake a number of care calls after 5.30 pm. It appears that she believed that this included a care call for that Thursday, when in fact it was for the following week (CAG10 first email). The Claimant was naturally distressed by what she believed the rota said. She

reminded the First Respondent of their discussion at her interview in which they had agreed that she was unable to undertake care calls after 5.30 pm without prior notice and agreement because she had to pick up her daughter.

65. This conversation took place in the open plan office in front of other staff including Ms Galt. Ms Galt's evidence was that the First Respondent was her usual difficult self.

66. The First Respondent's response to the Claimant was not to clarify the misunderstanding as to when the Claimant was rota'ed to work but to react emotionally saying that the Claimant was not telling the truth about the arrangement, that not everything could be captured in a job description and the First Respondent took documents that were written by her and waved them around whilst walking up and down the office.

67. This was clearly an emotional discussion on both sides.

68. The First Respondent's actions made the Claimant cry and she had to leave the office. Ms Galt went after the Claimant and they sat in her car where she comforted her and persuaded her to come back to work. Ms Galt added that with the benefit of hindsight, given what later happened, she wished she had just let the Claimant leave.

69. The First Respondent later called the Claimant and apologised blaming her back pain for the outburst in the office.

70. The Respondents' position in its Response is that the Claimant misunderstood her rota and started to say that she could not work weekends. The First Respondent asserts that she then explained that the care industry requires weekend work and that the Claimant had agreed to this during interview and all staff share weekends.

71. This does not accord with the evidence we heard from the Claimant and Ms Galt. The issue was not about working weekends but working beyond 5.30 pm during the week without adequate notice. The Claimant said that if she had adequate notice then she could ask her partner to pick up her daughter.

72. The Claimant's position is that after this incident the First Respondent's attitude and behaviour towards her changed dramatically. This is evidenced by her testimony, that of Ms Galt, the email at CAG5 from Ms Paige and the statement from Ms Smith at CAG4. The Claimant describes this as bullying and harassment on a regular basis and in a number of ways: being constantly put down in front of the rest of the team and being accused of everything that went wrong in the office. Her witness statement goes into some detail about these matters but we focus on those matters relevant to her complaints.

73. Incident on 6 March 2020. The First Respondent was unhappy for the Claimant to continue with the Care Supervisor role. The Claimant met with Ms Galt and effectively agreed a way forward which was to undertake the Care Co-ordinator role at a lesser salary with a promise of progression to the Care Supervisor role at an unspecified time in the future following training. The Claimant signed this document, at CAG11 but said in evidence she signed this under duress believing that she would lose her job if she did not.

Her pay slip for April 2020 at CAG7 shows her basic monthly salary as £1124.92 and £13,499 pa gross. Her final pay slip for July 2020 at CAG18 shows basic pay as £591.18 gross. It is not clear when this reduction started.

74. Incident on 16 March 2020. Ms Galt was on holiday for one week and the First Respondent came to manage the office. The Claimant states in her written evidence that her time there then became hell. The First Respondent spoke to her negatively in front of other staff and mocked her whilst talking to her colleagues. On Ms Galt's return to work, the Claimant was advised of a letter that Ms Paige had sent to Ms Galt asking for the Claimant to be taken off the office rota when the First Respondent was there because of the way the First Respondent treated her. This is at CAG5 and is an email letter dated 10 April 2020. This supports the Claimant's evidence that the First Respondent had made insulting remarks towards her.

75. Towards the end of March or early April 2020, the Claimant and a number of other staff had to self-isolate having been in contact with a service user who had COVID-19. The Claimant had a work laptop and was able to work from home. However, the First Respondent was not happy with this and came to her home unannounced and retrieved the laptop and subsequently deducted two days pay from her as "unpaid sickness" in her April 2020 salary (at CAG7). This forms part of the Claimant's unauthorised deduction from wages complaint. Ms Paige and Ms Smith were self-isolating as well but got paid. Ms Galt was able to work from home and was paid. Ms Galt's testimony supports the Claimant's allegations in respect of her self-isolation.

76. The Claimant returned to work after her self-isolation having drafted a grievance against the First Respondent which she intended to submit. On return, she was called into a meeting by the First Respondent without notice. She initially presumed that this meeting related to her grievance. We are not sure how this could be if she had yet to submit the grievance. However, the meeting was about a complaint that had been made by one of the care homes that the Claimant visited, which alleged that she had been rude and unkind in her dealings with them on the telephone. Documents relating to this complaint were attached to the Respondents' Response. One is a copy of an email dated 31 March 2020 timed at 11.03 am from the Manager of a care home. The other is an email that same day timed at 11.35 am from the Duty Manager of the same care home making a formal complaint against the Claimant. In their meeting, the Claimant alleges that she was not given the opportunity to put her side across and was not treated fairly. She became tearful.

77. Ms Galt's testimony supports the Claimant's allegations as to the way in which the First Respondent called the Claimant into a meeting without initially carrying out an investigation meeting and advising the Claimant of the nature of the complaint against her, although she was not present in the meeting beyond delivering a letter of apology from the Claimant for what she described as a misunderstanding.

78. The Claimant then asked Ms Whitehead to deal with her grievance against the First Respondent.

79. It would appear that at this point the Claimant provided the Respondents with a copy of her grievance. This is at CAG8. The foot of the letter states that it was given to Ms Galt on 3 April 2020. However, in its Response, the First Respondent states that she received the grievance on 3 April 2020.

80. On 23 April 2020, Debbie Silvester met with the Claimant to discuss her grievance. The First Respondent states in the Response that she set the meeting up, that Ms Galt attended the meeting and that the Claimant declined the First Respondent being there. Whilst we heard no evidence on these matters from the Claimant, we do note that Ms Silvester's subsequent email dated 27 April 2020 is not copied to Ms Galt (at CAG10) which more probably than not would indicate Ms Galt was not present.

81. In summary, her email said as follows. The Claimant confirmed that the grievance would be discussed informally and no formal action was to be taken. She did not want the matter discussed with the First Respondent because the meeting would be awkward (although Ms Silvester later in the email reserved her position whether this was an appropriate way to leave matters). The Care Co-ordinator role would be used to discuss her progress at her forthcoming probation meeting after employment for 6 months. Once she has passed her probation period, Ms Galt will then have a plan for the Claimant to move to a more senior role. The relationship between the Claimant and the First Respondent was "upset" for want of a better expression by the misunderstanding of the rota in the first week. Had this not happened the Claimant said that she believed "we would not be where we are now". It was agreed that at her interview the Claimant did confirm that she would be able to work evenings if required.

82. On 29 April 2020, the Claimant replied to this email at CAG10. In her response she corrected a number of matters set out in Ms Silvester's email. In summary these are as follows: the probationary period was 3 months; in interview she agreed to work weekends and evenings if no other person was able to do it and in the event of an emergency; Ms Galt was aware of this; she agreed that the grievance should be discussed with the First Respondent; could Ms Silvester or Ms Whitehead arrange a meeting to discuss; she is owed an apology from the First Respondent; the First Respondent needs to work on how to learn to treat her fairly as she treats her very differently to the rest of the staff and that is something that the Claimant cannot cope with.

83. The grievance was not progressed further. Ms Galt said in her written evidence that the Claimant was encouraged to let the grievance go as it was suggested that the working relationship could not be repaired if she carried on with the formal process and she believed that the Claimant felt if she continued she would not have a job (as she states in the second page of her statement at CAG6). The Claimant said in evidence that following the grievance Ms Whitehead told her that the First Respondent could not fire her because she had been advised by Ms Silvester that she would be in a lot of trouble and to see if she wanted to be demoted.

84. In her witness statement, the Claimant states that from this point onwards her life became hell whilst working with the First Respondent. She states that after the meeting with Ms Silvester, the First Respondent made her sign a

letter advising that she was going to cut her pay and her job title, in effect demoting her. She further states that she felt pressurised to sign it as she was told that she could be fired after her probation. For financial reasons she could not afford to lose her job. She believes that this was in part retaliation for the raising of a grievance against the First Respondent. From then onwards her pay was reduced by £500. She subsequently sat down with Ms Galt to discuss her revised role and put a plan into place for her progression to supervisor role. The Claimant's witness statement then refers to the document at CAG11.

85. We could not reconcile this evidence with the surrounding chronology of events and we did wonder if the Claimant was simply confusing when this happened. The grievance was handed to at least Ms Galt on 3 April 2020, the Claimant had the meeting with Ms Silvester on 23 April, their email correspondence was between 27 and 29 April. However, the discussion with Ms Galt around the Claimant's revised job role and the signed document agreeing to this took place on 6 March 2020. There was no other document provided to us setting out agreements to a pay cut and a reduced role.

86. However, we accept the Claimant's evidence that from the point that she wished to proceed with the grievance, the First Respondent's behaviour towards her worsened.

87. The Claimant's case is that after this the First Respondent: stopped listening to her in the office; ignored her when she talked to her and asked her to send emails instead of speaking to her; gave her more care work without payment at the agreed rates; initially asked her to interview a prospective carer and subsequently told her that she was not capable of doing this and gave her administrative tasks to do in preparation for the interview instead; and allowed other employees to work from home, including her daughter Fearn, Ms Paige and Ms Galt, but she was not allowed to work from home. She relies on the email from Ms Paige to Ms Galt dated 10 April 2020 at CAG5 in support of this. However, this predates this part of the Claimant's case and relates to the period of time that the First Respondent was in the office for a week whilst Ms Galt was on annual leave. But on a general level, it is supportive of the Claimant's allegations and in addition Ms Galt's testimony supports the Claimant's assertions as to the First Respondent's behaviour towards her.

88. On 13 July 2020, the Claimant sent an email to the First Respondent and Ms Whitehead raising a problem that she and Ms Galt were having with Ms Paige (at CAG12). The reply from the First Respondent is on the next page and then a further email from the Claimant to the First Respondent. We were not convinced that this matter was relevant to the issues that we needed to decide beyond the following extract from the Claimant's initial email:

> *"I have felt unsupported by (Ms Paige) when last-minute shift needed to be covered. She is never available any more, she keeps throwing work at us advising of illness or simply don't want to work in certain client's houses. This cannot continue as I was employed as a part time Supervisor/Coordinator to start with for 24 hours a week and some weeks I do 30, 34 and 36 hours of care week. (Ms Galt) had worked 7 days a week many weeks and this is not sustainable. We are going to get ill! I am not prepared to work every weekend I am afraid as I have 2 years old to take care off (sic) and this is generating me so much stress."*

89. The Claimant was absent from work with stress/anxiety for two weeks from 14 July to 28 July 2020. Whilst the Claimant was off sick, the First Respondent came to her house unexpectedly to collect her work equipment. The Claimant asked her partner to greet her because she could not face her in her state of mind. As she said in her witness statement at paragraph 16:

"I felt very scared and weak. I could not understand why someone would drive to my house while I was sick when she knew full well she was the issue of my illness. (The First Respondent) drove from Newhaven to Haywards Heath."

90. The Claimant also gave evidence as to the First Respondent being able to ascertain the whereabouts of employees because there was a door alert and cameras within the communal areas of the premises. She refers to this at paragraph 16 of her witness statement and has also provided supporting evidence at CAG14 although this was dated prior to the period that the Claimant was employed. We were not convinced that this evidence was relevant although we could see that it added to the Claimant's feelings of an oppressive environment and of harassment.

91. The Claimant explained that she went home from work feeling very unwell and under a lot of pressure from work because of the First Respondent's treatment towards her and the complaint that she raised against her. She describes having a panic attack and states that her partner took her to the doctor who diagnosed her as suffering with stress/anxiety.

92. The Claimant sent a fitness for work certificate to the Respondents. This is at CAG13. It is for the period 14 to 29 July 2020 and states that the Claimant is not fit for work because of stress and anxiety.

93. On or about 24 July 2020, the Claimant sent an email to the First Respondent cc'ed to Ms Galt stating "I can't do this any more, I have to resign, because of my health". The Claimant had texted Ms Galt beforehand telling her she was resigning. She has not retained the email or the text.

94. The Claimant described the cause of her resignation as the First Respondent's behaviour towards her throughout her employment: not listening to her; mocking her; complaining to colleagues about her; blaming her for anything wrong in the office; sending her numerous emails out of hours raising accusations against her; giving her lots of out of hours work and at weekends; continually messing up her pay; not paying her on time and not getting paid for her mileage or for care calls.

95. The Claimant did not receive full payment of her final wages. Her position is that her basic monthly pay was £1124.92 and additional carer hours were paid at £12 per hour. In addition she was only paid for 6 hours of annual leave entitlement and in fact her accrued holiday entitlement was 12 hours. She did not receive reimbursement of £58 in respect of her DBS check. Her mileage payments were inaccurate. She was not paid for all of the care calls that she had done and for which she asserts she was entitled to time off in lieu. These are set out at CAG15.

96. After leaving the Second Respondent's employment, the Claimant was unemployed for 3 months and then obtained full time employment with West Sussex County Council on 2 November 2020.

97. It is fair to say that the First Respondent denies the allegations against her and the Second Respondent and believes that the Claimant instigated a vendetta against her.

98. Part of the Claimant's case is that the First Respondent has made various comments about her online or in emails. This formed the amendment to her Claim which was allowed by EJ Morton at the preliminary hearing. The Claimant's evidence relating to this is set out at paragraph 22 of her witness statement and she also relies on an extract from the First Respondent's Go Fund Me page at CAG21.

99. In essence, the Claimant complains that during the course of the Tribunal proceedings, the First Respondent made various comments about her online and in emails to the Tribunal.

100. The only document relating to social media or online comments is the one at CAG 21. This is an extract from the First Respondent's Go Fund Me page in which her daughters seek funding for their mother in respect of medical treatment. There is a general reference to the First Respondent's company becoming unstable late last year (although the extract is not dated) when "a manager and supervisor left without working notice, taking a number of other staff members with them whilst (the First Respondent) was in hospital undergoing surgery". The extract goes on to state the financial impact that the unsustainability of the company has had on the First respondent.

101. The Claimant also relies on a comment within an update dated 25 March 2022 written by the First Respondent which states "I am doing well and am feeling the healthiest I have felt in many years thanks to the programme I am on". She asserts that this was at odds with what the First Respondent was telling the Tribunal at that time when she was seeking a postponement on grounds of her health.

102. This document does not identify the Claimant and we have not been provided with any supporting evidence from any other social media or online platforms.

103. The Claimant also relies on an email that the First Respondent sent to the Employment Tribunal on 4 July 2022 at CAG22. The email denies the allegations made by the Claimant and states as follows:

> *"I have been a victim of a vendetta created by the claimant and others. I did none of the things that the claimant's letter is claiming stop I have emails and texts which was sent to my new manager, after the claimant left, telling her to leave. My manager did leave - she told me she couldn't risk this happening to her, what was happening to me. That is I have been a victim of Internet trolling, social media attack. She did give me the texts she received before she left.*
>
> *Many fake reviews were put up naming my name and my daughters names. I have other emails and text sent office staff telling them to leave from others in the vendetta. Giving them false stories. Again I have these. These office staff or left at once taking carers with them – Sun Rose lost a total of 7 staff that day. I had to step in and do the jobs, again huge stress leading to my illness."*

104. Whilst we accept that these are unpleasant allegations, they are bland assertions of a vendetta and matters being placed online. The Respondents have not produced any evidence in support and the Claimant has no evidence of the matters referred to. On this basis we are unable to make a finding pertinent to the issues that we are required to determine in the context of the complaint of victimisation. For the avoidance of doubt we record that the First Respondent's general allegations are not made out or accepted.

105. We do note that the First Respondent has repeated assertions of this nature in her emails to the Employment Tribunal on the day of hearing (25 October 2022 sent at 10.41 am and 1.19 pm (as set out above). However, these emails do not form part of the Claim and whilst the Claimant understandably finds the contents distressing and unpleasant, in any event we do not accept the veracity of what is said.

Relevant Law

106. Section 19 EQA:

"Indirect discrimination

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

107. Section 27 EQA:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

108. Section 39 EQA:

"…(2)An employer (A) must not discriminate against an employee of A's (B)—
(a)as to B's terms of employment;
(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c)by dismissing B;
(d)by subjecting B to any other detriment.
…(4)An employer (A) must not victimise an employee of A's (B)—
(a)as to B's terms of employment;
(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c)by dismissing B;
(d)by subjecting B to any other detriment.
…(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

109. Section 13 ERA:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

EQA Burden of Proof

110. We have followed the guidance given as to the burden of proof by the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258.

111. The Employment Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

112. Madarassy also found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

113. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

Conclusions

Indirect discrimination

114. Indirect discrimination is defined in section 19 of the Equality Act 2010. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

115. At paragraph 1 of the issues set out by EJ Morton (the references to the Respondents are adjusted to reflect their correct order in the title of this claim), we are asked, did the First Respondent apply the provision criterion or practice ("PCP") of requiring a part time employee to work outside the hours and responsibilities of her role?

116. We formed the view that the agreement reached between the Claimant and the First Respondent (on behalf of the Second Respondent) at interview was that the Claimant was prepared to work beyond her agreed hours at weekends and evenings if no other staff were available and also in the event of an emergency and with sufficient notice in which to rearrange her care responsibilities. The Claimant made clear her reasons for this agreement.

117. The Respondents' position is that this restriction was not what was agreed and the Claimant was required to work weekends and evenings when needed.

118. In fact, the Claimant did go on to work outside her hours from the two pay slips we have before us. These are at CAG7 & 18. Care calls are shown as Basic Rate 2.

119. Paragraph 2 of the issues asks us to decide, did that PCP place women at a particular disadvantage compared to men because of their caring responsibilities and did it place this Claimant at a disadvantage?

120. It is accepted that a Tribunal can take judicial notice of the "childcare disparity" – i.e. the fact that women bear the greater burden of childcare than men and that this can limit their ability to work certain hours.

121. We think more properly the correct PCP is requiring employees to work outside their contractual hours.

122. From this it must follow that if a woman has to leave work by a particular time to collect a child from nursery, then to be required to work outside of those hours will put her at a particular disadvantage compared with a man given the childcare disparity.

123. Paragraph 3 of the issues states, can the Respondent show that the PCP is a proportionate means of achieving a legitimate aim?

124. The major difficulty for us of course is that the Respondents are not here to further explain the position set out in their Response.

125. We accept that it is likely there is a legitimate aim (although only expressed

in the Response as "the care industry does need to work weekends and (the Claimant) agreed to do this during interview (all staff work weekends)". However, this does not address the general need to work outside contractual hours and we have no evidence of proportionality, that the Respondents went through the balancing exercise at the time. In addition, the Respondents have not addressed the obvious issue that the rota was issued for the following week not that first week.

126. We therefore conclude that the indirect sex discrimination complaint is well-founded.

Victimisation

127. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010.

128. Paragraph 4 of the issues asks us to decide, did the Claimant do a protected act by querying the First Respondent's decision to give her responsibilities outside her role? We find that the Claimant did so on 3 February 2020. This falls within section 27(2)(c) EQA.

129. Paragraph 5 asks, did the First Respondent do the following because the Claimant had done a protected act? The detriments are set out in the sub-paragraphs.

130. It is of course difficult to determine motivation without the Respondents presence. We can only go on the evidence before us of course and bear in mind the burden of proof that applies.

131. Paragraph 5.1 - reduced the Claimant's salary by £500 per year.

132. This is indirectly evidenced by the agreement to undertake a reduced role as Co-ordinator dated 6 March 2020 (at CAG11).

133. The reduction was £500 of the full time equivalent gross salary and not £500 of the Claimant's part time salary.

134. The Claimant's salary was reduced because she was demoted to Care Co-ordinator only. The Claimant's evidence is that the rationale given was that she was part-time and could not do the supervisory role. The letter she signed at CAG11 indicates capability issues as does the Response with the last page of the attached grounds of resistance within the first paragraph.

135. We conclude that this detriment is made out.

136. However, the Claimant does not claim any loss flowing from this detriment.

137. Paragraph 5.2 - demote the Claimant.

138. The Claimant could not recall the date but we think it more probable that this had to have occurred on 6 March 2020.

139. We rely on the same matters as set out in paragraph 134 above and reach the same conclusion.

140. Paragraph 5.3 - withhold payment for additional hours worked.

141. This appears to relate to the additional care call hours worked which could be claimed in lieu rather than paid for as set out at CAG15. That document indicates that they have been approved by a manager, although we did not know whose signature it is.

142. The First Respondent asserts in the Response that the Claimant was confused and kept asking for in lieu hours and she kept explaining that her contract said she was paid overtime, not in lieu.

143. We reached the conclusion that this allegation was not clearly made out. We were not even clear that the Claimant was entitled to payment as she said and the Respondents' reason for not paying is that she is not entitled to it as far as we can work it out. If that is the case it is not connected to the protected act.

144. We take into account that the First Respondent was by all accounts difficult to deal with, lacked communication skills and that there were general disputes with staff as to pay. Although in this particular instance it does seem that the First Respondent simply did not pay the amounts due because she did not believe that the Claimant was entitled to it.

145. We therefore find that this detriment is not made out and this element of the victimisation complaint is not well founded.

146. Paragraph 5.4 - withhold the Claimant's last salary payment.

147. The Claimant's last pay day was 29 July 2020. Her bank statement at CAG17 indicates that she was paid on 3 August 2020. However, the First Respondent paid everyone late. Moreover, it is not a question so much of withholding pay but paying it late and not paying all of it.

148. We concluded that the evidence indicated that this was a general issue for all staff and so this element of the complaint is not well founded.

149. Paragraph 5.5 - withhold mileage payments;

150. This arose from the start of the Claimant's employment onwards. The First Respondent paid some mileage but not all that which the Claimant claimed. Again, this was a general issue with all staff and not just with the Claimant. There is no indication that the protected act had anything to do with it

151. As a result we concluded that this element of the complaint was not well founded.

152. Paragraph 5.6 - make insulting personal comments about the Claimant's appearance.

153. The Claimant alleges that the First Respondent referred to her as being overweight and "yellow" in front of other members of staff. This is set out in the attachment to her Claim Form and her grievance at CAG8. In oral evidence she stated that this was said during the week of 16 March 2020 when Ms Galt was on holiday. She further stated that the reference to "yellow" was made because the Claimant used to be a smoker and the First Respondent hated staff leaving the building to smoke and she said generally that she did not like staff to smoke. However, she did not make such a pointed remark to others as only one other carer and Ms Paige smoked and Ms Paige was not in the office much.

154. We also take into account Ms Paige's email written on 10 April 2020 in which she states:

> "I get the impression, Sharon (the First Respondent) doesn't like Caroline (the Claimant).
>
> I don't know what is going on or is going on there but it made me feel really uneasy.
>
> Sharon was very critical of Carolyn and I felt quite uncomfortable with the way Sharon was talking to Carolyn especially when she was talking to me in a completely different way"

155. In conclusion we find that there is sufficient indication that the turning point is the protected act and we accept the Claimant's evidence as supported by Ms Paige's email.

156. We therefore find this element of the complaint well founded.

157. Paragraph 5.7 - withdraw the Claimant's permission to work from home and retrieve the Claimant's working from home equipment without prior warning.

158. Doing the best we can this is when the Claimant was at home self-isolating, and her pay slip shows a deduction for "unpaid sickness" of £173.06 from her April 2020 salary.

159. There did not seem to be any credible reason to do this and so in view of the generality of matters we concluded that it was because of the protected act.

160. We therefore find this element of the complaint well founded.

161. Paragraph 5.8 - send a message to the Claimant's line manager ridiculing the Claimant's suggestion that she was thinking of resigning.

162. In oral evidence the Claimant stated that the message said *"If she quits, she quits, ha"*.

163. In her written evidence the Claimant states that the text was sent when the Claimant was off sick and said *"if she quits, she quits, I don't care"*.

164. We have not seen the text and do not have the accurate wording. The Claimant was not sure when it was sent. It was not a text sent to her but to Ms Galt. Ms Galt did not give evidence as to the text and did not provide a copy of it.

165. In any event we did feel that it put it too high on what we know to state that it

ridicules the Claimant's suggestion that she was thinking of resigning.

166. We therefore conclude that is not a detriment and this element of the complaint is not well founded.

167. Paragraph 5.9 - ridicule and humiliate the Claimant in front of other employees.

168. This is part of what happened during the week of 16 March 2020 when Ms Galt was on annual leave. It is referred to in the rider to the Claim Form, the grievance and is supported by Ms Galt's evidence and the email from Ms Paige at CAG5.

169. We refer to our conclusions in respect of paragraph 5.6 above. We therefore conclude that this element of the complaint is well-founded.

170. Paragraph 5.10 - send the Claimant text messages at all hours of the day and night criticising her performance and making demands.

171. The Claimant did not produce the text messages. The Claimant said that this started the week of 10 February 2020 when the First Respondent started to email all of the staff, although Ms Galt more than her. She did not provide any details of the text messages, the criticism of her performance and the demands that were made. In any event the treatment appears to apply to others and not just to the Claimant.

172. However, on the basis of what was before us we were unable to reach a finding and so we conclude that this element of the complaint is not well founded.

173. Paragraph 5.11 - by maintaining on various social media platforms after the end of the Claimant's employment that the Claimant was the cause of her ill health.

174. As we indicated in our findings the Go Fund Me page does not identify the Claimant and we did not see evidence of any entries on any other social media platforms.

175. We therefore find that the detriment is not made out and this element of the complaint is not well founded.

176. The Claimant also relies on the First Respondent's email to the Employment Tribunal dated 4 July 2020. This is not part of the list of issues and in any event contains bland allegations with no evidence to support them and the Claimant does not have evidence of what was referred to.

<u>Constructive dismissal</u>

177. Under section 39(2)(c) EQA, an employer must not discriminate against a worker by dismissing that worker. Section 39(7)(b) defines a dismissal as an act by the worker (including the giving of notice) in circumstances such that the worker is entitled, because of the employer's conduct, to terminate the employment without notice. This is colloquially and widely known as a

"constructive dismissal".

178. The leading case is *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA. As Lord Denning indicated an employee is entitled to treat himself or herself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

179. Thus in order for an employee to be able to claim constructive dismissal, four conditions must be met:

    a. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

    b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his/her leaving.

    c. S/he must leave in response to the breach and not for some other, unconnected reason. S/he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

180. If an employee leaves in circumstances where these conditions are not met, s/he will simply have resigned and there will be no dismissal within the meaning of ERA 1996 and so there can be no claim of unfair dismissal.

181. Paragraph 6 of the issues asks us to determine, did the Claimant resign because of the First Respondent's unlawful conduct towards her?

182. For the purposes of sections 39(2)(c) and 39(7) EQA the constructive dismissal has to give rise to a complaint of unlawful discrimination. The unlawful discrimination is either the indirect discrimination and/or the victimisation which we have found.

183. Having considered those elements of the complaints that we have upheld and looking at the treatment afforded to the Claimant by the First Respondent and the reasons that she gave for her resignation, we find that the Claimant was constructively dismissed and that this complaint is well-founded. She resigned because of the course of conduct towards her by the First Respondent acting on behalf of the Second Respondent, her employer, which included those matters which we have found to be discriminatory and acts of victimisation. These are matters which go to the root of the contract of employment between the parties and breach the implied term of mutual trust and confidence. There were a series of acts and the last straw was the visit to the Claimant's home when she was off sick from work a few days

before she decided to resign.

Unlawful deduction from wages

184. Unauthorised deductions from wages are governed by Part II of the Employment Rights Act 1996 ("ERA"). Section 13 ERA prevents an employer from making any deduction from the wages of workers unless it is:

    a. authorised by statute. This enables the employer to deduct from wages the PAYE tax and National Insurance payments as required by law or payments following a court order;
    b. authorised by a "relevant provision in the contract". There is no requirement that the term of the contract should be in writing, and the term in question can be an implied rather than express term. However, it is necessary for the employer to have notified the worker in writing of the existence of the term before making the deduction; or
    c. previously agreed in writing by the worker that the deduction may be made.

185. Where the total amount of any wages that are paid by an employer to a worker is less than the total amount of the wages that are properly payable to the worker on that occasion, the amount of the deficiency will be treated as a deduction made by the employer from the worker's wages.

186. Paragraph 7 of the issues asks, did the Second Respondent fail to pay the wages that were due to the Claimant under her contract of employment? When were these deductions made and how much is owed to the Claimant?

Holiday pay

187. The Claimant was entitled to 12 days per financial year and at the end of her employment was only paid for 6 days.

188. The Claimant's rate of pay was £10.81 per hour gross and so the daily figure of pay is £86.53. This means that she is owed 6 days at £86.53 per day which totals £519.18. We award this amount to her as compensation.

Wages

189. The Claimant is seeking two days wages deducted from her April 2020 salary.

190. The Claimant was told to go sick and was not sick. She was willing to work from home as others did but the Respondents prevented her from doing so. She was therefore entitled to be paid for those days.

191. We award her compensation in the sum of £173.06 gross.

192. The Claimant also claims that she is owed the balance of her basic salary of £605.24 having only been paid £519.18 in her final payment of wages. Her basic monthly salary was £1124.92.

193. The Claimant was off sick from 14 to 29 July 2020 and resigned 24 July 2020.

194. £519.18 represents 48 hours at £10.81 per hour which equates to 2 weeks' pay.

195. From the Claimant's evidence there was no entitlement to contractual sick pay until after the probationary period (of 3 months but we do not know what the entitlement would then have been other than Statutory Sick Pay ("SSP")).

196. The payment she received appears on balance of probability to be a payment to reflect hours worked that month.

197. However, it is likely that the Claimant would have been entitled to SSP. This is not payable for the first 4 days of sickness so it would have been payable for 3 days. Using the Gov.UK SSP calculator this is an entitlement to £63.90.

Care days in lieu

198. We conclude from the evidence that we heard that the Claimant believed that her entitlement was for days off in lieu and not for payment in respect of those days and the First Respondent's position was that the Claimant was confused and that she kept explaining to her that she was paid overtime not in lieu. The position was therefore unclear and the Claimant has not satisfied us that she was entitled to receive payment for those days.

Mileage

199. The Claimant is claiming the shortfall in her entitlement to mileage allowance.

200. For the purposes of Part II ERA, "wages" are given a wide definition. This definition is contained within section 27 ERA. However, certain payments are expressly excluded from this definition. This includes a car mileage allowance (Southwark LBC v O'Brien [1996] IRLR 420, EAT).

201. However, we will treat this complaint as if it were one seeking damages for breach of contract arising or outstanding on termination of employment pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

202. We do not know how the Respondents calculated those payments made in respect of mileage allowance. The Claimant has provided absolute mileage figures of the journeys by reference to records from her Google Maps' timeline which indicates periods of movement of her mobile phone whilst en route to journeys incurred on behalf of the Second Respondent between 6 February and 12 July 2020. Her position is that she was paid a total of £30.10 in respect of 86 miles. However, Google Maps shows a total of 413.1 miles for the period of her employment. Mileage was payable at 35p per mile and so the Claimant calculates that she was entitled to a total of £144.58 less £30.10 received leaving a balance of £114.48 owing.

203. In the absence of more evidence we accept that the Claimant is entitled to the mileage she claims and award compensation in the sum of £114.48.

DBS

204. The Claimant claims the sum of £58 in respect of entitlement to reimbursement of fees incurred to obtain a DBS check. This was to be reimbursed at the end of her probation period which she says was unilaterally changed from 3 to 6 months; she queried this but we do not have any response from the Respondents.

205. Again this is an expense and it falls outside of the definition of wages under Part II ERA. However, we will treat the complaint as one of damages arising from the contract or outstanding on termination of employment and so we award claimant the sum of £58.

Compensation for discrimination and victimisation

206. Paragraph 8 of the issues asks us to determine what remedy is the Claimant entitled to? She seeks compensation for unpaid wages and for injury to feelings.

207. We have found that the Claimant was constructively dismissed because of matters forming part of her successful complaints of indirect sex discrimination and elements of her victimisation claim.

208. Under section 124 read with section 119(4) EQA we are entitled to consider making an award of compensation in respect of all loss directly caused by the act(s) of discrimination including past and future loss of earnings, loss of opportunity and injury to feelings.

Loss of earnings

209. The Claimant was unemployed from 25 July to 15 November 2020. This is a period of 16 weeks. We accept that she mitigated her loss during this period and had no other income.

210. We had some difficulties understanding the basis on which the Claimant had calculated her weekly net earnings with her Schedule of Loss and so we decided it best to write to her seeking clarification. I instructed my clerk to send an email to the Claimant cc the Respondents. This was sent to the Claimant on 28 October 2022 and she responded that same day also attaching copies of her pay slips for February to July 2020 as requested.

211. From this we calculated her average net weekly income over a period of 3 months of complete earnings prior to the date on which she resigned. This was for the months April to June 2020, July not representing a complete month's pay. The amounts she received are set out below:

Date	Net pay
30 April 2020	1135.84
31 May 2020	1370.30
30 June 2020	1285.72
Total	3,791.86

212. £3,791.86 divided by 3 multiplied by 12 and divided by 52 equals £291.68 net

weekly pay. £291.68 multiplied by 16 equals £4,666.88.

213. We therefore award compensation for loss of earnings in the sum of £4,666.88.

Injury to feelings

214. An Employment Tribunal may make an award for injury to feelings where it finds unlawful discrimination. Injury to feelings are awarded to reflect the degree of hurt felt by the particular claimant as a result of the discrimination. This can include upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression, affront, bitterness, shock and so on. It can also cover loss of a chosen career which gave job satisfaction. It is not necessary that the claimant realised at the time that the discriminatory action which upset him/her, eg the failed promotion or dismissal, was due to discrimination. However, it is probable that a worker's feelings will be even more hurt if she did realise this. Injury to feelings need to be proved, although usually this is not difficult.

215. The size of the award is largely in the Employment Tribunal's discretion. After many years of uncertainty, the Court of Appeal laid down guidelines in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102. The Court of Appeal identified three broad bands for injury to feelings, as distinct from compensation for injury to health:

    a. A top band, normally between £15,000 and £25,000, for the most serious cases, eg a lengthy campaign of harassment. Only in the most exceptional case should an award for injury to feelings exceed £25,000;
    b. A middle band between £5,000 and £15,000 for serious cases which do not merit the top band;
    c. A lower band of £500–£5,000 for less serious cases, eg where the act of discrimination is an isolated or one-off occurrence. Awards of less than £500 should generally be avoided altogether.

216. The date on which the discrimination occurred covers a number of dates falling between February and July 2020.

217. At that time, the Vento guidelines had been increased to: lower band £800-£8,800; middle band £8,800-26,300; and top band of £26,300-£44,000.

218. The Claimant asked for the sum of £990 in her Schedule of Loss which is the current bottom end of the lower band of Vento.

219. In calculating the size of the award we considered the following: the discrimination took place over a period from 3 February to 24 July 2020; the effect that this had on the Claimant in the workplace; the nature of the incident on the 3 February 2020 in front of work colleagues and in denial of the agreement as to her hours of work; the general treatment received in front of colleagues particularly during the week of 16 March 2020; the various detriments that we found in respect of her; that she was sick with stress/anxiety for at least a period of 2 weeks; and that she experienced a panic attack which caused go off work with ill-health.

220. Doing the best we can we feel that an award in the lower band of Vento is appropriate and that an award at the bottom of that band is too low to reflect the degree of injury to feelings caused. We believe it appropriate to make an award of £3000.

221. We also award interest under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 on the awards for financial loss and for injury to feelings.

222. The interest rate is that fixed from time to time by Judgments Act 1838 s17 (in England and Wales). Since July 2013, this has been 8%. The daily rate is calculated by dividing the amount of award by 365 and multiplying by the interest rate of 8%.

223. To calculate interest on financial loss we have multiplied the daily rate by half the number of days between the discrimination and the hearing:

    £4,666.88 divided by 365 x 8% = £1.02
    3 February 2020 and 25 October 2022 = 995 days divided by 2 = 497.5
    £1.02 x 497.5 = £507.45

224. The total award for loss for financial loss is therefore £4,666.68 + £507.45 = £5,174.13.

225. To calculate interest on injury to feelings, we have multiplied the daily rate by the number of days between the discrimination and our final hearing:

    £3,000 divided by 365 x 8% = £0.66p
    3 February 2020 and 25 October 2022 = 995 days
    66p x 995 = £656.70

226. The total award for loss for injury to feelings is therefore £3,000 + £656.70 = £3,656.70.

227. Additional interest on unpaid awards runs from the day after the date of the award unless full payment is made within 14 days of the relevant decision day.

Joint and several liability

228. Under section 109(4) EQA, employers are liable for the discriminatory acts of their workers, which are carried out in the course of their employment, regardless of whether they knew or approved those acts, unless they took all reasonable preventative steps. This has not been addressed by the Respondents in their Response and, of course, they have not attended the hearing.

229. In terms of our conclusions, we have found that the First Respondent indirectly discriminated against and victimised the Claimant and the Second Respondent as vicariously liable for the First Respondent's actions, as its Managing Director, which caused the Claimant to resign by way of constructive dismissal in breach of section 39 EQA.

230. We therefore find that both Respondents are jointly and severally liable for the award in respect of loss of earnings and injury to feeling.

Overview

231. The First Respondent indirectly discriminated against the Claimant on grounds of sex.

232. The First Respondent victimised the Claimant in respect of the following detriments: by reducing her salary; by demoting her; by making insulting personal comments about the Claimant's appearance; by withdrawing permission for the Claimant to work from home and retrieving her working from home equipment without prior warning; by ridiculing and humiliating the Claimant in front of other employees.

233. The Second Respondent discriminated against the Claimant by constructively dismissing her.

234. We make an award of past loss of earnings of £5,174.13 and for injury to feelings of £3,656.70 against the Respondents for which they are jointly and severally liable.

235. The Second Respondent made the following unauthorised deductions from the Claimant's wages: accrued but untaken annual leave of £519.18 gross; wages of £173.06 gross; and SSP of £63.90 gross.

236. The Claimant is entitled to damages for breach of contract in respect of the following from the Second Respondent: payment of her mileage allowance of £114.48; and reimbursement of her DBS fee of £58.

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Employment Judge Tsamados
Date: 8 December 2022

Sent to the parties on
Date: 5 January 2023