# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs H Matthews

**Respondent:** Razors Edge Group Limited (1)

Mr Roberts (Manchester) Limited (2)

**HELD AT:** Manchester (by CVP) **ON:** 21, 22, 23, 24 and 25 November 2022 (chambers on 3 January 2023)

**BEFORE:** Employment Judge Johnson
A Jackson
D Kelly

**REPRESENTATION:**

**Claimant:** Mr A Marshall (counsel)
**Respondent:** Mr A McPhail (counsel)

# JUDGMENT

Upon hearing the parties:

(1) The complaint brought under Part-Workers (Protection from Less Favourable Treatment) Regulations 2000 is not well founded and is unsuccessful.

(2) The complaint of direct sex discrimination contrary to section 13 Equality Act 2010 is not well founded and is unsuccessful.

(3) The complaint of indirect sex discrimination contrary to section 19 Equality Act 2010 is not well founded and is unsuccessful.

(4) The complaint of a failure by the respondents to make reasonable adjustments under sections 20 and 21 Equality Act 2010 is well founded and succeeds.

(5) The claimant was constructively and unfairly dismissed contrary to section 95(1)(c) Employment Rights Act 1996 is well founded and is successful.

(6) The first respondent failed to pay the claimant her notice pay as a result of her termination of employment and her complaint of wrongful dismissal is successful.

(7) The claimant's complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is in principle well founded and is successful, but subject to evidence of loss being proved at remedy.

(8) The complaint of unpaid holiday pay contrary to regulation 13 Working Time Regulations 1998 is in principle well founded and is successful but subject to evidence of loss being proved at remedy.

(9) The successful complaint of constructive unfair dismissal did not arise from a resignation prompted by the imminent transfer from the first respondent to the second respondent on 6 July 2020. Accordingly, liability for the successful complaints rests solely with the first respondent.

(10) The quantification of the successful complaints including the determination of the actual holiday pay and unpaid wages claimed will proceed to a remedy hearing on a date to be confirmed with a hearing length of 1 day.

# REASONS

## Introduction

1. The claimant presented a claim to the Tribunal on 12 August 2020 following a period of early conciliation from 7 August 2020 to 1 July 2020. She brought complaints of unfair dismissal, disability discrimination, sex discrimination, breach of contract, holiday pay, unpaid wages and other payments. The claim was initially brought against the Razors Edge Group Limited (first respondent),

2. The respondents resisted the claim, and a preliminary hearing was listed to determine the question of the claimant's employment status. This was heard by Employment Judge ('EJ') Sharkett on 13 May 2021, and it was determined that the claimant was an employee.

3. A further preliminary hearing took place before Employment Judge Batten on 13 May 2021, and she dealt with matters of case management, including the addition of Mr Roberts (Manchester) Limited (second respondent). A final hearing was listed for 21 to 25 November 2021. It was also decided to list the case for a preliminary hearing to deal with preliminary issues.

4. Employment Judge Johnson sitting alone heard the further preliminary issues on 8 November 2021 and found that the claimant was disabled within the meaning of section 6 Equality Act 2010 and also that her employment terminated with the first respondent before its business was transferred to the second respondent. The question of whether the claimant's resignation was prompted by the transfer from the first to the second respondent and any application of TUPE as a result, was a matter to be determined at the final hearing.

5. Further case management orders were also made in order that the case would be ready for the final hearing.

**The Issues**

6. These were prepared by the respondent in accordance with EJ Johnson's case management order made following PH on 8 November 2021 and they were agreed at beginning of final hearing on day 2. They are as follows, (see below).

*Part-time Workers (Prevention of Less Favourable Treatment Regulations 2000*

7. The ET is referred to:

a) para 20(c) of the Particulars of Claim (p28); and,
b) para 10 the Particulars of Claim (p22)

8. On the basis of those elements of the Particulars of Claim, the first respondent would summarise the alleged less favourable treatment pursued by the claimant as:

a) The claimant alleges that, in June 2018, she was not permitted to attend a course.
b) The claimant alleges that, during the Christmas 2018 period, she was required to attend work for extra days/hours unpaid.
c) The claimant alleges that, for the period from May 2019 onwards (up until lockdown in March 2020), she was required to attend work for an extra day each week unpaid.
d) The claimant alleges that, on 25 October 2019, she was ridiculed by Mr James Roberts.

9. The issues for determination will be:

a) Who is the allegedly comparable full-time worker? The claimant has indicated that she relies on JP and DS.
b) Are those persons comparable full-time workers for the purposes of the Part-time Workers Regulations?
c) In respect of each of the above items of alleged less favourable treatment:

    i) Did the alleged matter occur?
    ii) Did it constitute an act, or deliberate failure, of the first respondent?

iii) Was the claimant thereby subjected to detriment?
iv) Was the claimant thereby treated less favourably than the comparable full-time worker?
v) Was the less favourable treatment done on the grounds that claimant was a part-time worker?
vi) Was the treatment justified on objective grounds?
vii) Was the claim presented in time? If not, should time be extended?

*Direct discrimination (s.13 Equality Act 2010)*

10. The claim is pleaded in the ET1 at para 20(d) of the Particulars of Claim (p28).

11. This claim appears to be pursued based on the same alleged less favourable treatment covered above (in paragraph 8 under the Part-time Workers Regulations claim).

12. As such, the alleged less favourable treatment appears again to be:

a) The claimant alleges that, in June 2018, she was not permitted to attend a course.
b) The claimant alleges that, during the Christmas 2018 period, she was required to attend work for extra days/hours unpaid.
c) The claimant alleges that, for the period from May 2019 onwards (up until lockdown in March 2020), she was required to attend work for an extra day each week unpaid.
d) The claimant alleges that, on 25 October 2019, she was ridiculed by Mr James Roberts.

13. The issues for determination will be:

a) Who is the comparator (actual or hypothetical)? C has indicated that she relies on JP and DS.

b) Is that person an appropriate comparator?
c) In respect of each of the above items of alleged less favourable treatment:

i) Did the alleged matter occur?
ii) Was it done by the first respondent?
iii) Was the claimant thereby subjected to detriment by first respondent?
iv) Was the claimant thereby treated less favourably than her comparator?
v) Was it done because of sex?
vi) Was the claim presented in time? If not, should time be extended?

*Indirect sex discrimination*

14. The claimant has provided further and better particulars on this claim (see p98 of the bundle)

15. The alleged PCP set out by the claimant is:

a) *"The respondent's practice required the claimant to attend the salon for an additional working date every week for a period of 12 months over and above the claimant's previously agreed working hours."*

16. The alleged disadvantage set out by the claimant is:

a) "as a woman she had primary responsibility for the care of her two children (age 10 and six at the relevant time) and consequently have to pay for additional childcare on the extra days that she was required to attend the salon, thereby putting her at a financial disadvantage when compared to her male colleagues"

17. The issues for determination are:

a) Did the first respondent (or the second respondent) have the alleged PCP?
b) What is/are the correct pool/s for comparison?
c) Did the first respondent (or second respondent) apply it, or would the first respondent (or second respondent) apply it, to men in the relevant pool?
d) Did it, or would it, put women in the relevant pool at a particular disadvantage when compared with men in the relevant pool?
e) Did it put claimant at that particular disadvantage?
f) Can Did the first respondent (or second respondent) show it to be a proportionate means of achieving a legitimate aim?
g) Was the claim presented in time? If not, should time be extended?

*Alleged failure to make reasonable adjustments*

18. The claimant has provided further and better particulars on this claim (see p99 of the bundle).

19. The alleged PCP, as set out in the FBPs, is:

a) "the respondents practise required the claimant to comply with their instructions that she attend the salon on four days per week following the lifting of the first lockdown restrictions"

20. The alleged substantial disadvantage is:

a) "this was contrary to the claimants doctors advice that the claimant was unfit to do so and should return only return to work on two days per week"

21. The alleged reasonable step relied on by the claimant is:

a) "to allow her to return to work on two days per wee

22. The issues for determination by the ET are:

a) Did the first respondent (or second respondent) have knowledge, or ought the relevant respondent to have had knowledge, of the claimant's disability at the relevant time?

b) Did first respondent (or second respondent) have the alleged PCP at all?
c) Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The alleged substantial disadvantage on which the claimant relies is set out above.
d) Did first respondent (or the second respondent) have knowledge of that substantial disadvantage?
e) Did the first respondent (or the second respondent) take such steps as it is reasonable to have to take to avoid the disadvantage?
f) Was the claim presented time? If not, should time be extended?

*Unfair dismissal*

23. The claim is pleaded in the Particulars of Claim at para 20(b) (p28 of the bundle).

24. The alleged conduct on which the claimant relies is

*a) "the continual bad treatment received by her over a 24 month period".*

*b) "her manager….. acting completely unreasonably in rejecting the recommendations from the claimant's doctor for a controlled and safe return to her work after being treated for contracting COVID-19 during the furlough period and suffering medical and psychological after effects that needed careful monitoring".*

25. The issues for determination are:

a) Did the first respondent (or second respondent) act as alleged above?
b) Did that constitute a repudiatory breach of contract by the first respondent?
c) Did the claimant resign in response to any of the alleged conduct by the first respondent found to have been a repudiatory breach by the first respondent?
d) Did the claimant affirm the contract and/or waive the breach before resigning?
e) Was the dismissal fair?

*Notice pay/wrongful dismissal*

26. The issues mirror those in the unfair dismissal claim, other than that referring to fairness.

27. An additional significant issue (arguably as to liability) is whether the claimant has in fact suffered any damages, bearing in mind her new role.

*Accrued holiday pay on termination*

28. The claimant has presented some calculations in respect of this claim (at p15 of the bundle), in the Particulars of Claim.

29. The first respondent asked the claimant to explain the basis of this claim in more detail, including the basis of the calculations thereby set out. No further information has been forthcoming, however.

*"Arrears of pay"*

30. The claimant has ticked this box (in section 8.1) on p9 of the ET1.

31. The first respondent asked the claimant to spell out what the claim is for, if it is not covered above.

32. No information has been forthcoming. The first respondent assumes there is no further claim being pursued.

*"Other payments"*

33. The claimant has ticked this box on p9 of the ET1.

34. The first respondent asked the claimant to spell out what the claim is for, if it is not covered above.

35. No information has been forthcoming. The first respondent assumes there is no further claim being pursued.

*Transfer of any liability (in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006)*

36. If any claims are upheld against the first respondent, an issue arises as to whether that liability passed to the second respondent.

37. The issues for determination are as follows:

a) Was there a constructive dismissal? *[This point is addressed in any event in respect of the unfair dismissal claim above]*

b) If there was a constructive dismissal, what was the conduct in repudiatory breach? *[The ET will be considering this point in any event in respect of the unfair dismissal claim]*
c) Was the reason for that conduct the transfer itself or a reason connected with the transfer that was not an ETO reason entailing changes in the workforce?
d) If so, any liability arising in respect of any of the claimant's claims passed as a matter of law from first respondent to the second respondent (by virtue of regulations 4(1)-(3) TUPE 2006).

*Remedy*

38. To be confirmed, (if relevant)

**Evidence Used**

39. The claimant gave witness evidence during days 2 and 3 of the hearing.

40. The first respondent called the following witnesses who gave evidence on days 4 and 5:

a) Amy Cross (assistant manager in the first respondent's salon until her transfer to the second respondent on 6 July 2020);
b) Tony Heffernan (former owner of the first respondent's business and from 25 December 2010 a general manager until 24 May 2022);
c) Stewart Black (owner/director of the first respondent)

41. The second respondent did not attend with representation and no witnesses were called. Mr James Roberts was conspicuous by his absence and his failure to attend to give witness evidence was surprising as he had managed the claimant while working for the first respondent and was the owner of the second respondent business. Whatever his reasons for non-attendance, there were occasions where his absence effectively meant that the claimant's evidence was unchallenged by the first respondent's witnesses. As the Tribunal found the claimant to be largely credible in how she gave her witness evidence (and willing to concede where her memory was not reliable on a matter), there were occasions where her evidence could be accepted in the absence of any rebuttal evidence from witnesses or within the documents that the Tribunal was taken to.

42. The hearing bundle was produced in pdf form and consisted of some 407 pages. This included the claim form and response, further particulars and earlier preliminary judgments and case management orders. It also enclosed contractual information relating to the claimant, email/SMS/WhatsApp correspondence for a variety of dates, GP letters, rotas and the transfer agreement between the first and second respondents.

43. During the hearing, it became clear that there had been diary sheets showing the dates when employees were working and how each working day was occupied. They had been available at the preliminary hearing before EJ Sharkett and added to the hearing bundle on day 3, so they could be used in the cross examination of all of the witnesses. Unfortunately, the reproductive quality of these documents was poor, and it was difficult to magnify them while retaining their clarity. It was possible to work out the contents of most pages with a bit of discussion as each witness was taken to relevant pages. However, while we found them to be of some use during the hearing, it was difficult to revisit them clearly during our discussions in chambers. Nonetheless, we felt that they did not play an integral role in our deliberation, although the answers given by witnesses in relation to these documents was recorded and used where appropriate from the Tribunal panel's notes. Accordingly, it was possible to reach a decision without returning to the parties for further assistance.

44. The hearing took place remotely using the Tribunal's Cloud Video Platform ('CVP') and as the hearing of witness evidence was not concluded until late on day 5, the Tribunal was willing to sit slightly later than usual to enable both parties to give appropriate oral submissions and thereby avoiding a need for written submissions to be provided at a later date.

## Findings of Fact

Introduction

45. The first respondent company ('Razors Edge') is owned by Stewart Black and he is a director of the company. It previously owned 4 hair salons in Manchester City Centre and 3 of these traded as Razors Edge and one traded as James Roberts Limited. The 3 Razors Edge salons were franchised from 2006 with each salon being run by a separate owner and Mr Black retaining the ownership of James Roberts.

46. Two of the three franchised salons were then brought back into Mr Black's ownership in 2010 and the remaining franchised business left the group and then operated independently from the franchise. Tony Heffernan had owned the franchise of the Royal Exchange branch and resigned as a director when the business was insourced back to the first respondent in 2010. He then became the general manager of Razors Edge until his resignation on 24 May 2022.

47. It is understood that the claimant (Mrs Matthews), started working for Razors Edge Royal Exchange from 7 August 2007 as a hair stylist. She transferred to the first respondent as an employee in accordance with the provisions of TUPE in 2010. She subsequently moved to the James Roberts salon which appeared to take place during July 2017. This salon continued to be owned by the first respondent until its transfer of ownership to the second respondent on 6 July 2020. Once Mrs Matthews started working at this new salon, her line manager became James Roberts who at this stage was an employee of the first respondent.

48. Mrs Matthews appeared to have an uneventful working relationship with the first respondent until 2018, when issues arose relating to her employment status and then from March 2020 when the Covid pandemic reached the UK and lockdown began.

49. It is no longer necessary to consider Mrs Matthews' employment status as the decision of Employment Judge Sharkett following the preliminary hearing on 10 May 2021 found that she remained an employee and was not self-employed. However, the factual basis behind the allegations made in relation to each of the complaints referred to in the Issues section above need discussing further and each one is now dealt with in turn.

Treatment as a part time worker

50. Mrs Matthews alleges that she was not permitted to attend a course by the first respondent prior to lockdown in 2020. It was noted from the agreed list of issues above, suggested this took place in June 2018. However, during the hearing it became clear that there was some uncertainty on the part of Mrs Matthews as to what this allegation related to and upon reflection, she conceded that it involved a matter which arose on a slightly earlier date.

51. On balance, having considered the witness evidence of Mrs Matthews (and in the absence of Mr Roberts or indeed other respondent witnesses being able to give contrary evidence), we find that her concession that it related to a course taking place in the summer of 2017 and that the subject matter was bleach/colour course. We also accept that her request of the first respondent for her to attend this course was refused, but insufficient evidence was given as to the reason for this refusal. It appeared to be accepted by Mr Black and Mr Heffernan however, that the first respondent did have a training budget and that suppliers of hair products such as L'Oreal (and which is considered in more detail below), provided training of a value based upon the custom hair salons gave them. In any event, Mrs Matthews accepted that she did not raise any grievance or complaint and the first time this matter was raised, was within the claim form presented in these proceedings, some 3 years later.

52. Mrs Matthews said that during the Christmas 2018 period she was required to work extra days and hours on an unpaid basis. She accepted that on 3 December 2018, the first respondent's attendance sheet (p276 of the bundle) correctly recorded her standard working pattern of 3 days on Tuesday, Friday and Saturday. These work rotas included in the bundle (pp276 to 280) were not the subject of any challenge by Mrs Matthews and on the whole, accurately reflected the staff working patterns during December 2018.

53. The Christmas period was inevitably a busy time for hairdressers and there was typically an increased demand from customers. During the weeks commencing 10 and 17 December 2018, Mrs Matthews worked an additional day on Thursdays, albeit with an earlier finish time than her colleagues of 6pm rather than 8pm. During the week commencing 24 December 2018 (p.279), the salon was closed for Christmas from Monday 24 December to Thursday 27 December 2018. Mrs Matthews worked on Friday 28 December as usual but was absent through sickness on Saturday 29 December 2018.

54. Mrs Matthews argued that she didn't need to come into work during this period because she did not have many (or any) customers from whom she would earn money and as her mother had taken ill, she was struggling with childcare. We accept her evidence that this was the case and that it is also consistent with EJ Sharkett's decision at paragraph 66 of her judgment on the preliminary issue of employment status, that she was effectively being expected to work as an employee with management deciding when she should be available to work. It was certainly not the case that she could decide when she felt she should come into work.

55. Mrs Matthew's underlying issues concerning the expectation that she works between Christmas and New Year gave rise to an argument between her and Mr Roberts on 28 December 2018. Although it was not clear as to precisely when this took place, (we only heard evidence from Mrs Matthews and Mr Roberts did not of course give evidence), we accept that a heated discussion took place between them and he stormed out of the room where the meeting was taking place, slamming the door as he left. She was then ill on the next day, (29 December 2018) and did not attend work. It was at this point she called her former manager Mr Heffernan who agreed to act as a mediator between Roberts and her with this meeting taking place on 4 January 2019.

56. In terms of whether Mrs Matthews was asked to work for extra days unpaid during Christmas 2018, we find that she was expected by the first respondent to work her normal hours as normal. The issue here was she did not have any clients booked in on those days and her domestic situation meant that she really needed to be at home because her mother was ill, and childcare was problematic. Because there was a mutual belief at the time that she was self-employed, she did not get paid for simply coming into work but had to have customers in the diary or the likely prospect of walk-in customers to make it worth her while coming into work.

57. While both parties believed she was self-employed, the first respondent expected to control her hours of work and require her to attend the salon. It was not the case that she was expected to work extra days or hours on an unpaid basis, but a consequence of being expected to work her normal hours when her customer base was reduced and thereby diminishing her earning capacity. But ultimately, this was not a case of Mrs Matthews being instructed to come into work on one of her usual non-working days, but not being allowed to take a day off on a usual working day.

58. It should also be noted that although the rota for the week commencing 24 December 2018 suggested that Mrs Matthews may have been expected to work Sunday 30 December 2018. Mrs Matthews did not suggest during her evidence she was compelled to work on that day, and we did not hear any other evidence which persuaded the Tribunal that this entry was anything other than an error as it fell outside her normal working pattern.

59. Mrs Matthews alleged that from May 2019 until lockdown in March 2020, she was required to attend work for an extra day each week unpaid. The additional working day arose from an agreement with Mr Roberts on behalf of Razors Edge that Mrs Matthews could undertake a L'Oreal colour course which began on 28 January 2019 and which continued every Monday (usually) until a date in or around April 2019. Although Mrs Matthews appeared to have been given the impression that this course was a cost to first respondent, Mr Heffernan's gave credible evidence that the course was provided by L'Oreal who allocated a training budget to its salon customers based upon the value of the products they ordered from L'Oreal. Mr Black accepted the course came out of a budget and did not dispute that this was provided by L'Oreal. He argued however, that by offering this course to Mrs Matthews, she would be able to increase her earning potential by becoming more skilled in the use of hair colouring and thereby provide more expensive colouring treatments. The Tribunal found that this course was not a cost as such to Razors Edge and accepted that potentially Mrs Matthews could increase her earnings by offering these additional skills.

60. The issue behind this matter, however, was that Mrs Matthews felt that the offer of the L'Oreal course was contingent upon her committing to working 4 rather than 3 days once she had completed it in April 2019. The reasons behind this were not clearly expressed during the hearing, but we accept that from 3 June 2019, the rota (p295) demonstrated that Mrs Matthews worked Tuesday, Thursday, Friday and Saturday and that continued working pattern

until 16 March 2020 which was the final rota in the bundle before lockdown began as a result of Covid, (p.322).

61. There were some weeks where she was away on holiday or days when she was ill, but a working pattern of 4 days began in June 2019 and continued until March 2020. On balance, we accept that there was an expectation that she would increase her work from 3 to 4 days and that this reflected this commitment would be for a year as asserted by Mrs Matthews and was in return for being allowed to do the L'Oreal course. Again, the situation was confused to some extent by the belief she was self-employed, and she would be able to increase her earning capacity, but Razors Edge clearly believed they could require her to work these additional hours/day and Mrs Matthews felt she had no alternative to accept them. Had she been treated as employed at this time she would of course been paid an additional day's pay. However, the time sheets revealed that while some weeks she would have additional customers, her argument was correct that she would typically be left to spread her existing customer base over 4 days instead of 3 days as was previously the case. There was an absence of convincing evidence from the available respondent witnesses that this was a voluntary arrangement or that it resulted in significant increased earnings for Mrs Matthews.

62. Mrs Matthews says that she was ridiculed on 25 October 2018 by Mr Roberts in a meeting with her colleagues JP and Daniel when they were informed that the salon was entering a L'Oreal *Colour Specialist* competition. It was understood that the salon would nominate a team of stylists, one doing colour, one doing cutting and one doing styling (which we understood to be styling the models in terms of fashion and accessories as opposed to their hair). Mrs Matthews' two full time male colleagues (JP and Daniel) were nominated as the stylists who would be responsible for the colour and cutting of the model's hair and she nominated as the *fashion* stylist. Mrs Matthews felt that this amounted to a demotion and expressed her unhappiness with Mr Roberts.

63. Mr Roberts was manager in charge and the Tribunal accepted that he was responsible for selecting those stylists whom he felt were best for the relevant tasks. Mrs Mathews said that he told her that in relation to JP and Daniel, *'they are stronger'* but did not suggest that he made any reference specifically to their sex or that they worked full time. The Tribunal understood that all 3 stylists were trained by L'Oreal to provide the specialist colour treatment and that JP and Daniel were also described as being engaged on a self-employed basis.

64. Mrs Matthews said she felt humiliated and singled out for criticism but did not take any further action following this decision.

Covid and claimant's return to work

The claimant's health in 2020

65. As was discussed in the judgment on the preliminary issue by EJ Johnson dated 8 November 2021 Mrs Matthews developed Covid related symptoms

from late March 2020 and these symptoms increased in their severity from mid-April 2020. This resulted in her being admitted to hospital on two occasions because of breathing difficulties. She was diagnosed as suffering from Covid when she tested positive.

66. It was accepted by EJ Johnson dated 9 March 2022 that Mrs Matthews was disabled within the meaning of section 6 EQA at the relevant times in these proceedings relating to the complaints of disability discrimination which have been alleged.

The claimant's termination of employment

67. Following the relaxation of the government's initial Covid restrictions in the summer of 2020, the first respondent planned to reopen its business from 7 July 2020. Because the first respondent had believed Mrs Matthews to be self-employed, they assumed that she would sort out her own furlough payments.

68. Mrs Matthews messaged Mr Roberts on 22 June 2020, (p.207). She explained that she had contacted her GP who advised her that she was only fit to return to work on a part time basis, working 2 days per week for the initial 4 weeks of reopening of the business. Mr Roberts did not reply immediately and instead confirmed on 23 June 2020, that he would telephone her the next day. The call did not appear to go well because subsequent discussions suggested that while the first respondent might agree to 3 days per week, Mrs Matthews maintained that her GP advised her to only work 2 days per week as part of what was effectively a phased return to work.

69. As a consequence, Mrs Matthews send the following email to Mr Roberts on 26 June 2020:

*'Hi james I'm writing this email because you asked me to get a fit to work note from my doctor I did this it stated I will be well enough to come back to your salon on 2 days a week for the next 4 weeks to keep an eye on my recovery from covid 19 and pneumonia, you have said on the phone and messages that 2 days a week isn't suitable for your company. You have suggested financially, 3 days a week is too much at the moment as I can't commit and I wouldn't want to let people down. In a text message you have told me I could come back week 1 do 1 day week 3 do 3 days week 4 do 4 days, this is impossible for me to do with my recovery so their for I have no choice to tell you I will not be coming back, please could you give one of the girls my hair dryer. Thanks Hayley' [sic].*

70. A series of messages then following concerning Mrs Matthews' hairdryer and her decision not to return to work. Mr Roberts sent a further message to Mrs Matthews on 30 June 2020 which confirmed to her that she could have her hairdryer back. It does not provide the reader with any indication that he was seeking to persuade Mrs Matthews to return to work and suggested a degree of acquiescence on his part concerning her notice to terminate her employment. However, at no stage during the period following 22 June 2020

did Mr Roberts confirm that Mrs Matthews had resigned, nor did he expressly ask her to reconsider the decision to resign.

71. Mrs Matthews sent a further email to Mr Roberts on 2 July 2020 expressing her concern about the way in which she believed Mr Roberts had treated her during her ill health. She reminded him that her doctor had recommended that she should initially only work 2 days a week and why she believed Mr Roberts suggested alternative options would not be practicable for her. She also said:

*'As you didn't even have courtesy to respond to my email of last week, I feel that I have had no alternative other than to resign with immediate effect and pursue appropriately paid work to look after my future in line with my doctor's orders. I am therefore recording my leave date as yesterday 1st July 2020'.*

*72.* The claimant stated in her claim form that she resigned on 1 July 2021 when she sent an email on that date. Whereas her evidence she said that she actually resigned on 26 June 2021 when she sent an earlier email to Mr Roberts. While EJ Johnson found in his judgment on the preliminary issues that Mrs Matthews evidence was *'somewhat confused',* he was persuaded that *'she did give sufficiently convincing evidence that on one of those days, she had no choice to continue working with first respondent and that she wished to resign. She did not receive a response to either of these emails and it is really not necessary to identify the precise date of termination by way of resignation for the purposes of the preliminary issues and the dates which appear to be in issue.'*

73. EJ Johnson's conclusion in paragraph 31 of that judgment was that:

*'On balance and having considered the evidence, it appeared to me that from 26 June 2021, the claimant had reached a point where she felt an impasse had been reached between Mr Roberts and her concerning the manner of her return to work. She did communicate at this point her intention to resign but recognised that this might be considered as an 'ultimatum', which could reinvigorate their discussions. Mr Roberts failure to reply suggested that he was not sure of what to do regarding that email and the claimant expected a reply before she would consider her resignation to take effect. This resulted in the email being sent on 1 July 2020 which was unequivocal in her intention to resign and gave the impression that she felt her earlier email had not resulted in her resignation on 22 June 2020.*

74. He went on to say that:

'*It is telling that she chose to present her claim relying upon the termination date on 1 July 2020 and while upon reflection as the case progressed, she has readdressed this belief, I am satisfied that the date of termination for the purposes of considering the preliminary issues before me was 1 July 2020.'*

*75.* The Tribunal at the final hearing saw no reason based upon the evidence that it heard to contradict these findings and would agree that on balance this was the way in which Mrs Matthews expressed her decision to resign and reflected

her frustration at the failure of Mr Roberts to effectively engage with her finding a solution to this ongoing problem of how she could return to work while recovering from what was a particularly nasty attack of Covid and which had placed her in a position that she faced a lengthy recovery from its after effects and the ongoing impairments that it caused her.

The transfer from the first respondent to the second respondent

*76.* It was clear from the pre-resignation correspondence and the return-to-work correspondence sent by Mr Roberts and/or the first respondent to Mrs Matthews that no mention was made of a proposed or imminent transfer to the second respondent. Mrs Matthews gave evidence that for a number of years, Mr Roberts had talked to her about buying the business. However, while this was an example of Mrs Matthews giving credible and reliable evidence during the hearing, the Tribunal does not conclude that this was enough to demonstrate notice of transfer of the business to him. This was simply Mr Roberts sharing with a colleague detail of an aspiration that he had for the future and while it was a quite reasonable one to hold, it could not be construed as any clear notice being given and as Mrs Matthews was seeking to return to work in the summer of 2020, an imminent transfer was not a matter that was within her knowledge.

*77.* Ms Cross mentioned that a staff meeting took place on 22 June 2020 to discuss the issue of the proposed transfer from the first respondent to the second respondent, but we accept based upon the evidence before us, that Mrs Matthews was not present and nor were we persuaded that she was made aware of what was discussed through other forms of communication.

78. The Tribunal noted that the first respondent's management saw Mrs Matthews in 2020 as being self-employed. The transfer agreement (from p226), although dated 17 August 2020 provided an effective date of transfer (described as *'effective* time') at close of business on 6 July 2020. This date was after Mrs Matthews' date of resignation. Schedule 3 of the transfer agreement (p247) does not record Mrs Matthews as being a relevant employee transferring rom the first hearing bundle included a copy of the Business Sale Agreement between the first respondent to the second respondent.

79. While we acknowledge that the respondents would have considered Mrs Matthews to be a self employed person, there is insufficient evidence available to persuade us that she was considered as being subject to the transfer, but more importantly, that she was aware of the transfer when she resigned and that this decision was in any way motivated by the prospect of such a transfer.

**The Law**

Constructive Unfair Dismissal

80. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

81. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach);

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract;

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

82. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

83. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

Breach of contract

84. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

Part-time Workers (Protection of less favourable treatment) Regulations 2000

85. The 2000 regulations under regulation 5 state that a part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker as regards the terms of their contract or being subject to any detriments by an act or deliberate failure to act by their employer.

86. Regulation 5(2) qualifies this right by making clear that the treatment complained of will only contravene these regulations if the treatment is on the

ground that the worker was a part-time worker, and it is not justified on objective grounds.

87. When bringing a complaint, the worker should rely upon a full-time comparable worker and at the time of the alleged treatment, regulation 2(4) both workers should be employed by the same employer under the same type of contract and engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience. Additionally, the full-time worker should work or be based at the same establishment as the claimant, or if none available, a worker based at a different establishment but who satisfies the other requirements of regulation 2(4).

88. These regulations are subject to a time limit for presenting a complaint to the Tribunal. Regulation 8(2) states that a Tribunal shall not consider a complaint unless it is presented before the end of the period of 3 months of the less favourable treatment or detriment to which the complaint relates, or if part of a series of similar acts, the last of them. A Tribunal may consider a complaint that is out of time, if in all the circumstances, it believes it is just and equitable to do so.

Direct discrimination (section 13 EQA)

89. Under section 13 EQA, a person will discriminate against another if because of a protected characteristic (sex in this case), that person treats the other less favourably than they would treat others.

90. Section 39 EQA, provides that an employer must not discriminate against an employee of theirs by, amongst other things, subjecting them to a detriment.

Indirect discrimination (section 19 EQA)

91. Section 19 EQA provides that a person discriminates against another if they apply a provision, criterion or practice (known as a 'PCP') which is discriminatory in relation to the relevant protected characteristic of the other person.

92. The PCP is discriminatory if a person applies it to persons who do not share the claimant's protected characteristic, it puts persons with the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that protected characteristic and, it would put the claimant at that disadvantage. Finally, the person discriminating, may succeed in defending such a claim of discrimination if they can show that the PCP complained of, is a proportionate means of meeting a legitimate aim.

Reasonable adjustments (ss20 &21 EQA)

93. Sections 20 and 21 provide that when an employer applies a PCP which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under

a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

94. Paragraph 20 of Schedule 8 of the EQA provides that an employer is not expected to make reasonable adjustments if they do not know and could not reasonably have been expected to know that the employee had a disability and was likely to be placed at the disadvantage in question.

Time limits (s123 EQA)

95. A complaint relating to discrimination at work will not be accepted by the Tribunal if it is presented after the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

96. Section 123(3) provides that conduct extending over a period is being treated as done at the end of that period and a failure to do something is the person in question decided on it.

Burden of proof (s136 EQA)

97. Section 136 provides that when where there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened the relevant provision of the EQA, the Tribunal must hold that the contravention occurred. This will not be the case if the person concerned can show that they did not contravene the relevant provision.

Holiday pay

98. Regulations 13, 13A and 16 of the Working Time Regulations 1998 (as amended), when read together provide that a worker is entitled to 5.6 weeks (up to a maximum of 28 days) paid leave in any leave year. A worker's contract may provide an entitlement in excess of this statutory minimum. Regulation 14 provides that a worker is entitled to be compensated for accrued but untaken leave upon the termination of their employment. The leave entitlement may only be taken in the leave year in which is due, subject to any relevant workforce agreement.

Unlawful deduction from wages

99. Section 13 ERA provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signed their written agreement or consent to the making of the deduction in question.

Transfer of Undertakings (Protection of Less Favourable Treatment) Regulations 2006 (TUPE)

100. Regulation 4 of TUPE provides the effect of a relevant transfer upon a contract of employment. Regulation 4(1) a relevant transfer operates so that

a contract of employment is not terminated by the transferor (first respondent in this case), but instead transfers to the transferee (second respondent in this case).

101. Under regulation 4(2) (amongst other things), all transferors' rights, powers, duties and liabilities under or in connection with an employee's contract transfer to the transferee.

102. Regulation 4(3) says (amongst other things), that the provisions of regulation 4(1) applies to an employee employed immediately before the transfer, but who is dismissed before that transfer and for reasons connected with the transfer, read in conjunction with regulation 7.

**Discussion**

Preliminary matters

103. Firstly, and for the avoidance of doubt, it is worth reminding ourselves of the previous decision in the preliminary hearings which took place on 10 May 2021 and 8 November 2021.

104. Mrs Matthews was at all material times an employee of the first respondent.

105. Mrs Matthews was disabled within the meaning of section 6 EQA by reason of impairments connected with Covid 19.

106. Mrs Matthews' employment did not transfer to the second respondent on 6 July 2020 or thereafter. However, in relation to this, the first respondent reserved the argument that her resignation on 1 July 2020 was connected with her knowledge that she would transfer to the second respondent.

Part-time worker detriments

107. The Tribunal noted that one allegation related to a course in 2017 and concluded that Mrs Matthews was probably refused attendance. However, it noted that no grievance was raised at the time, and it appeared unrelated to other matters.

108. The detriment complained of clearly took place more than 3 months before the claim form was presented on 12 August 2020 (and when early conciliation began on 7 August 2020). Based upon the information before it, the Tribunal did not consider it just and equitable to extend time to allow the complaint in relation to this allegation because the proceedings arose from the events of 2020 which led to Mrs Matthews' resignation and it would not be in the interests of justice to expect the first respondent to answer to allegations which happened a number of years previously and which did not result in a grievance or ongoing challenge at the time which indicated how significant Mrs Matthews found the refusal which she complained of at the time it arose.

109. In relation to the Christmas 2018, Mrs Matthews was expected to work normal hours over Christmas 2018 period. But given that there was a mutual belief that she was self-employed meant that her attendance was dependent upon her having customers coming into the salon so that she could earn. As it happened, she did not work the so called 'normal hours' and Mrs Matthews did not suggest that she was compelled to work on 30 December 2018 and we found that the recorded entry was an error as it fell outside of her normal working pattern. In terms of less favourable treatment, we were unable to conclude that these events amounted to her being treated less favourably because of her part time status given that Mrs Matthews was compelled to work more hours than she was contractually expected to work. For these reasons we do not consider this allegation proven. In addition, we noted for similar reasons given in relation to the previous 2017 allegations (above), this complaint was presented out of time, and it is not just and equitable to extend time and accept the complaint for those reasons given.

110. There was an agreement between Mrs Matthews and the first respondent that from June 2019 to March 2020 she would work 4 days instead of her usual 3 days. We found that this was effectively an agreed extension to her part time working days in return for her being allowed to attend the L'Oreal colour course which ran from January 2019 to April 2019. There did appear to be a disingenuous behaviour on part of Mr Roberts in relation to this proposal but were unable to find that it was connected with Mrs Matthews' part time status. Rather, it was simply a means of the first respondent seeking to acquire additional availability in colour qualified stylists once she had completed her training. This may have been with a view to increase capacity in the salon with her new skills, but we also accept that by being self-employed for 4 days instead of 3, Mrs Matthews could potentially find that her existing work was spread over more days with no additional new business being acquired. That said, she would have been available to provide these services if the work arose on the additional day worked. Her unpaid status only arose when she was in work and she did not with a paying a client, but it was not the case she was being made to come in with no possibility of earning. We were unable to find this allegation proven that she was treated less favourably by reason of her part time status because of the perceived nature of her self-employed status at that time and balancing of a salon investing in training balanced against ensuring there was a return to the salon in Mrs Matthews being available to provide the additional skills once trained.

111. However, in any event, we found that these additional hours ended by March 2020 and the complaint was not made to the Tribunal until more than 3 months following the end of that period. It did not appear to be connected with her decision to resign later in the year and for the reasons already provided above, it is not just and equitable to extend time to allow this complaint.

112. Mrs Matthews also alleged that she was ridiculed on 25 October 2019 by Mr Roberts in relation to the L'Oreal Colour Specialist competition. While we found on balance of probabilities that Mr Roberts said that her two male colleagues (JP and DS) were the stronger members of the team which

justified their being placed in the colour and cutting roles, we were unable to accept that his reason for making this decision and the statement when challenged was motivated by sex and/or part time status. It was simply an expression of opinion and while the comparators were two men, who the first respondent said were engaged on a self-employed basis and we understood worked longer hours, that was not enough to persuade us that this should shift the burden of proof.

113. On the face of it, the comments made were a simple statement of opinion and inevitably there was only one job available for each skillset required in the exercise and the team leader, (who doubtless would want to win the event on behalf of the event), would make decisions based on his perception of ability. As it was, it did not connect with other findings of fact that we have made which might suggest an underlying discriminatory motive and nobody likes to be described as not being the strongest candidates, it appeared to be an honest answer to an expression of disappointment, although in the competitive environment of the salon, it perhaps might have been said in less delicate way than might be encountered with larger employers.

114. However, this again is an allegation which we must find as being out of time for the reasons given above and cannot be accepted even if it was well founded in terms of the substance of the allegations made.

115. Mr Marshall argued in final submissions that this complaint *'fell at the first hurdle'* as she relied upon comparators who were both self-employed and who could not be considered as lawful comparators in which to bring this complaint. Having considered this submission and regulation 2(4) of the part time worker regulations, the Tribunal must agree with Mr Marshall. The claimant relies upon two comparators JP and DS and although both of these male comparators were understood to work full time and at the same establishment as Mrs Matthews. However, there was no dispute that they were both engaged on a self-employed and we did not see any evidence to the contrary. The difficulty for Mrs Matthews, therefore, is that she is relying upon comparators who are not employed (as either employees or workers) under the same type of contract. It has been determined that despite a misunderstanding between the first claimant and first respondent, Mrs Matthews remained an employee. However, the same analysis has not taken place in relation to the comparators and as a consequence, the asserted self-employed status for JP and DS is understood to be the correct employment status. As a consequence, we must conclude that Mrs Matthews has failed to satisfy the necessary requirement of the part time worker regulations that the comparators relied upon are employed by the employer under the same type of contract. JP and DS and not comparable full-time workers and regardless of the findings above, this complaint must fail.

<u>Direct sex discrimination (s.13 EQA)</u>

116. It should be noted that Mrs Matthews repeats the allegations made in relation to the complaint of less favourable treatment by reason of her part time status.

117. In broad terms, the alleged treatment occurred, and it was largely done by Mr Roberts on behalf of the first respondent. Mrs Matthews compares herself with JP and DS, who were both male and therefore did not share her protected characteristic of sex, i.e. being female. She does not rely upon hypothetical comparators. Section 23 EQA requires no material difference in the circumstances between the claimant and comparator. Apart from the alleged ridicule, there was little evidence that JP and DS found themselves in circumstances to Mrs Matthews.

118. There was a refusal to allow Mrs Matthews on the course in 2017 while taking place, did not appear to result in less favourable treatment, but in any event, it was presented out of time and for the reasons given above in relation to the part time regulations above, it is not just and equitable to extend time.

119. The Christmas 2018 working however, was not a detriment as it was simply an expectation that Mrs Matthews work normal hours with the extra day as described above being a genuine error rather than a less favourable act. Additionally, this allegation was presented out of time and for the reasons given above in relation to the part time regulations above, it is not just and equitable to extend time. Evidence was not provided that the comparators JP and DS were treated any differently and were not appropriate comparators for this complaint.

120. The allegation that Mrs Matthews work an extra day from 2019 to 2020 arose from a misunderstanding between employer and employee that she was at that stage, engaged as a self-employed worker. Accordingly, the additional day that she was asked to work was not intended to be unpaid, because she was available to take customers on the day when she was in the salon. We appreciated that this could effectively amount to not being paid if the additional custom did not appear. However, based upon the evidence that we heard as self-employed workers, JP and DS were also self employed and would have attended their working days without being paid, but on the basis that they were available to take paying customers, from which they would derive income. Accordingly, we were not persuaded that Mrs Matthews was subject to less favourable treatment in relation this allegation as she has not been able to identify comparators who would have been treated differently in no less different circumstances.

121. In terms of the alleged ridicule relating to Mr Roberts reply when Mrs Matthews was given the stylist role rather than one of the other two more hairdressing focused roles, the actual alleged comment was not in our view *ridicule*, but an honest (albeit blunt), comment. However, it did not amount to a detriment. The comparators JP and DS were male, were part of the same selection exercise and were arguably able to be selected for the better jobs in the team than was offered to Mrs Matthews.

122. For the purposes of section 136 EQA, the Tribunal did acknowledge that this would suggest that Mrs Matthews gave evidence of facts which could demonstrate in the absence of any explanation that Mr Roberts working on behalf of the first respondent contravened section 13 EQA, by treating her

less favourably than JP and DS. Both male hairdresser comparators were selected for the more prestigious roles in the competition team, namely the cutting and colouring. However, having heard the evidence during this hearing, we did conclude that the decision and the comment made was based upon his genuine belief that JR and DS were the better candidates and this was a decision of ability rather than bias on grounds of sex. The words used did not amount to ridicule but a rather frank opinion as to Mrs Matthews.

123. However, in accordance with s123 EQA, whether or not there was direct discrimination, we concluded for the reasons given in relation to the part time working less favourable treatment allegations, that the claimant failed to notify ACAS of early conciliation or present her claim form within 3 months of the allegations of direct discrimination taking place. Each incident was separate from the other and was not subject to an ongoing grievance or complaint. Like the part time worker regulations, we also considered the question an extension on just and equitable grounds but felt it was not just and equitable to grant the extension for the reasons given above.

Indirect sex discrimination (s.19 EQA)

124. In relation to this complaint the PCP identified, namely that Mrs Matthews was required to attend the salon for an additional working day every week for a period of 12 months over and above the previously agreed working hours was something which was applied to her alone and was not applied to colleagues who did not share her protected characteristic, namely sex. This is a fundamental requirement for an indirect discrimination complaint to succeed. It may have been that a more general practice existed in relation to working hours, but this was not what the Tribunal was asked to consider. It is perhaps an argument that falls better as alleged treatment under s.13 EQA and or course that complaint is considered above.

125. Accordingly, this complaint must fail, but even if the Tribunal had been confronted with a PCP which fell better within the requirements of s19 EQA, if it related to those matters alleged in relation to part time working/direct discrimination, we would have nonetheless rejected them by reason of their being presented out of time for the reasons given above in relation to the other discrimination complaints contrary to section 123 EQA.

Reasonable adjustments (s20 & s21 EQA)

126. This complaint of course can only relate to the protected characteristic of disability under s6 EQA and Mrs Matthews is considered disabled by reason of the decision of EJ Johnson at the previous preliminary hearing.

127. In terms of the PCP relied upon, Mrs Matthews asserted that the first respondent required her to comply with their instructions that she attend the salon on 4 days each week following the lifting of the first lockdown restrictions in the summer of 2020. Effectively, this was a return to work based upon her pre lockdown and pre disability hours.

128. In terms of whether this requirement amounted to Mrs Matthews facing a substantial disadvantage, we have evidence that her GP advised reduced hours for at least the first 4 weeks of her return to work, being fewer than 3 or 4 days a week, initially at least. Naturally, this could have been reviewed over time, but the first respondent was on notice at this point of the difficulties that Mrs Matthews faced in returning to work following Covid.

129. The first respondent offered Mrs Matthews phased return to work over 4 weeks working back to 4 days a week or alternatively, a return to work with 1 day a week until she was well enough, with no fixed time limit where a return to work was expected. We did not hear evidence from Mr Roberts as to why these proposed adjustments were considered reasonable, but there was evidence that some flexibility was being offered. Mrs Matthews wanted 2 days for 4 weeks with a review thereafter and of course there was no explanation by the first respondent as to why 2 days not a reasonable proposal. We accept that Mrs Matthews was seeking a reasonable adjustment and the first respondent simply failed to demonstrate either during employment or in evidence during hearing, to rebut the allegation.

130. Accordingly, we concluded that there was a failure to make reasonable adjustments and it seems unfortunate that this treatment arose as it appeared that further conversations with Mrs Matthews and perhaps with her GP's involvement could have given rise to a mutually acceptable solution.

131. In relation to this allegation, Mrs Matthews was relying upon a continuing discussion regarding her return to work and which effectively ended when she resigned. Accordingly, this was a continuing act which was brought as a reasonable adjustments complaint within 3 months of the last act taking place on 1 July 2020 when she resigned.

Unfair dismissal

132. Mrs Matthews was an employee with more than 2 years continuous service at the effective date of termination of employment on 1 July 2020 and therefore is qualified to bring an unfair dismissal complaint.

133. We were unable to conclude that there was a continual bad treatment from management over 24 months as alleged. There were issues raised in this claim and which have been discussed above beginning in 2017 with the course refusal, the 2018 competition 'ridicule' issue, the Christmas 2018 issue and additional days worked. But these had concluded before the Covid pandemic reached the UK in March 2020. Some of these matters did not appear to be poor treatment that struck at the heart of the contract, but at their highest, amounted to lesser blows that an employee was expected to tolerate and which at the time, which Mrs Matthews clearly did, because she did not challenge them. Even the additional days allegation had concluded by March 2020 and were not the subject of challenge or grievance brought by her. All of these matters are therefore isolated from the reason to resign and out of time if relied upon. The real issues arose with the first lockdown coming to an end and the discussions concerning a return to work and this was the second allegation made in relation to the constructive unfair dismissal complaint.

134. In terms of whether or not there was a repudiatory breach in relation to the second allegation, the Tribunal noted that Mrs Matthews relied upon a number of matters which led to her decision to resign. Her email dated 26 June 2020 provided clear exasperation on her part with the first respondent. We found that it was insufficiently clear to indicate her resignation, but demonstrated it was something she was beginning to contemplate. Her reference to relinquishing her hairdryer might be seen implicitly as a resignation decision, but on balance the context of letter overall suggested that she was teetering on the edge of resignation. The first respondent created a difficulty for themselves however, by failing to react to the issues raised and instead, appeared to ignore the serious matter raised and which could effectively be construed as a grievance by Mrs Matthew.

135. A reply was eventually sent when Mr Roberts replied to Mrs Matthews on 29 June 2020, effectively offering 1 day or 4 day return to work with the absence of any flexibility given that he used the words *'if that doesn't work for you I'm sorry'.* We accept that Mrs Matthews concluded that the reasonable implication to draw from this email was that she should return to work using one of these two provided options or alternatively she should not expect to come back to work. It gave her an ultimatum and there was an absence of a window being provided for any further discussion.

136. The email (p223) made clear that Mrs Matthews wished to resign on 1 July 2020 because she felt that she was being treated badly. She noted the refusal by the first respondent to accept the reasonable request made by her GP concerning the way in which she returned to work. Instead, there was an insistence that she return to work on the basis that they proposed without any discussion. Given that the first respondent believed at that time that Mrs Matthews was self-employed, the first respondent may have believed it could handle this matter in the way that they did. However, Mrs Matthews was self-employed and despite being aware of her ongoing health issues, the first respondent was unwilling to cooperate. We did conclude therefore, that this amounted to a fundamental breach of contract and that this was the principal reason for Mrs Matthews decision to resign.

137. Moreover, we concluded that Mrs Matthews did not delay following the first respondent's failure to resign.

138. The first respondent did not appear to argue potentially fair reason for the dismissal, but given their belief that Mrs Matthews was self-employed, they would not have followed processes expected for the termination of an employee's employment. Accordingly, this complaint must fail.

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Breach of contract/wrongful dismissal

139. Mrs Matthews resigned without notice. However, we found that she was entitled to do so without working her contractual notice period because of the fundamental breach of contract on the part of the first respondent for the reasons given above in relation to constructive unfair dismissal.

140. In relation to wrongful dismissal, we do of course have to consider that there was conduct that amounts to repudiatory breach of contract by the first respondent and this complaint succeeds.

Holiday pay/unlawful deduction from wages

141. Our approach relating to these two complaints was clearly affected by the misunderstanding concerning Mrs Matthews' employment status and this was reflected in the list of issues. However, these complaints together with 'other payments' formed part of the complaints advanced in section 8.1 of the claim form. They were not properly set out in the list of issues but given that the Tribunal has found that Mrs Matthews was an employee and that she was entitled to resign without notice, there may well be successful complaints of holiday pay and unpaid wages. We would emphasise that at this stage, these complaints succeed on an *'in principle'* basis and are subject to hearing evidence at the remedy hearing which will consider the quantification of the successful complaints and whether there were any losses under these complaints. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

Transfer of undertakings

142. Mrs Matthews has been able to successful argue that she was employed by the first respondent (transferor under TUPE) immediately before the transfer of its business to the second respondent (transferee under TUPE) immediately before the transfer on 6 July 2020.

143. The transfer from the transferor to the transferee on 6 July 2020 was a relevant transfer for the purposes of regulation 3 TUPE and this potentially triggers the effects on contracts of employment identified in regulation 4.

144. Mrs Matthews has successfully argued that she was constructively unfairly dismissed by the first respondent. The conduct of the repudiatory breach related to a failure by the first respondent to cooperate in agreeing an appropriate way of returning to work.

145. This decision to resign could in no way be considered as a reason connected with the transfer whether or not it was an 'ETO' reason under TUPE Regulations. The decision arose from failures to engage with reasonable adjustments and a return to work and Mrs Matthews was not aware of the imminent transfer and it was not the case that the real reason behind her resignation could be considered as relating to the transfer.

146. Accordingly, Mrs Matthews resignation and termination of employment do not involve circumstances where any of her claims passed as a matter of law from the first respondent transferor to the second respondent transferee as her employment did not end by reason of the transfer in accordance with regulations 4(1) to (3) TUPE.

Conclusion

147. Mr Marshall submitted that this was a complicated claim, and the Tribunal would agree with him. It has been at times confusing covering a lengthy timeline, complicated business arrangements, misunderstandings as to employment status, time limits and a transfer of business with unfortunately one party declining to assist at the Tribunal hearing.

148. However, while some of the allegations made were not well founded, there was the basis of a claim arising from the first respondent's failure to engage with Mrs Matthews when the first lockdown restrictions relaxed and when they were looking to reopen. While it was a stressful and time-consuming experience for those involved with businesses, there was still a need to behave appropriately towards employees and that included those like Mrs Matthews who had suffered from was would not be described as long Covid and who needed support and adjustments to return to work.

149. Accordingly, Mrs Matthews was able to demonstrate the following complaints should succeed:

a) Constructive unfair dismissal under s95(1)(c) ERA
b) Reasonable adjustments under ss20 &21 EQA.
c) Breach of contract/wrongful dismissal

150. The complaints of holiday pay and unlawful deductions from wages are also in principle successful, but on the understanding that Mrs Matthews will need to prove actual losses at the remedy hearing in relation to these complaints now that her employment status has been confirmed. It now appears that the complaint of 'other claims' identified under section 8.1 of the claim has not been pursued and it is not necessary to consider this matter further.

151. The complaints of direct and indirect sex discrimination and less favourable treatment on grounds of part time status are not successful and this relates to the treatment not being discriminatory, the qualification of the asserted comparators and significantly, that the complaints were presented out of time.

152. The case will now proceed to a remedy hearing before a full Tribunal with a hearing length of 1 day to consider the successful complaints and to determine whether there is actually evidence of a loss of accrued holiday and/or unlawful deduction from wages. Further case management orders will be provided in due course, but the parties are invited to propose suggested case management orders for consideration within 14 days of this judgment being sent to the parties.

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Employment Judge Johnson

Date 27 March 2023

JUDGMENT SENT TO THE PARTIES ON
28 March 2023

FOR THE TRIBUNAL OFFICE