EMPLOYMENT TRIBUNALS

Claimant: Mr S Donnelly

Respondent: PQ

Heard at: Liverpool **On:** 6, 7 and 8 February 2023

Before: Employment Judge Horne

Members: Mr R Cunningham
Mrs A Ramsden

Representatives
For the claimant: Mrs Holliday, friend
For the respondent: Mr P Maratos, consultant

Judgment was sent to the parties on 21 February 2023. The respondent has requested written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. Accordingly, the following reasons are provided.

REASONS

Introduction

1. This is a sensitive and difficult case. It engages two important values in our society. One is respect for a person's privacy and dignity in the provision of intimate personal care. The other is equality of treatment between men and women in the world of work. These values do not often come into conflict, but when they do, all concerned must try to achieve a balance. Employment tribunals seeking to strike that balance must do so within the framework of the Equality Act 2010 ("EqA").

Overview

2. The respondent is a woman. She is physically disabled and requires intimate personal care. The claimant is a man. He was employed as one of her carers. During the claimant's probationary period, the respondent decided that she could not employ the claimant to provide the intimate care that she needed, at least not for the time being. She was not comfortable with him having that responsibility because he was a man. She decided to extend his probationary period. Before telling the claimant her real reason, she sought to justify the extension of his

probation by raising unfounded concerns about his attendance and performance. Shortly after discovering the respondent's real reason, the claimant resigned.

The claim

3. By a claim form presented on 13 April 2022, the claimant complained that the respondent had directly discriminated against him because of his sex. Direct discrimination is defined in section 13 of EqA. Section 39 of EqA contains various provisions prohibiting an employer from discriminating against an employee. Schedule 9 of EqA makes exceptions for occupational requirements.
4. The claimant also brought a complaint of indirect sex discrimination within the meaning of section 19 of EqA.
5. The claimant also complained that he had been wrongfully constructively dismissed and that a deduction had been made from his wages.

The issues

6. On 16 August 2022 the parties telephoned into a preliminary hearing before Employment Judge Ross. They discussed the issues in the case. The issues were recorded in a case management order sent to the parties on 17 August 2022.

Indirect discrimination

7. The complaint of indirect discrimination was based on an alleged provision, criterion or practice (PCP) which was "to allow only female carers to care for the respondent".
8. That complaint was allowed to go forward to a final hearing but, in reality, it was always hopeless. The alleged PCP was incapable of being applied to women and could never satisfy section 19(2)(a) of EqA. To make the same point another way, the PCP was directly discriminatory. As Lady Hale put it in *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15 (para 57)

> "Direct and indirect discrimination are mutually exclusive. You cannot have both at once."

9. We have therefore dealt with the indirect discrimination complaint briskly at this stage, the better to concentrate on the direct discrimination complaint, which is what this case is really about.

Direct discrimination

Less favourable treatment

10. According to EJ Ross' case management order, the direct discrimination complaint consisted of three allegations of less favourable treatment. (We have added formatting for ease of reference.) The allegations are:

> **LFT1 -** At his job interview, the respondent asked the claimant if he was familiar with caring for females. The claimant avers that in asking him this question respondent treated him less favourably than she treated or would have treated female job applicants.
>
> **LFT2 -** On 19 February [2022], the respondent sent an email to the claimant to say that his probation was being extended; no reason was given. The claimant asked for reasons and on 21 February [2022] the respondent sent another email confirming that the extension to the claimant's probationary period was

because he was her first male carer and that she needed to be comfortable with a man caring for her. The claimant avers that is probationary period was extended because he was a man and that this was less favourable treatment of him by the respondent that she treated or would have treated female carers.

LFT3 - The respondent also told the claimant in her email that she would understand if you wanted to look further work the claimant avers that by suggesting that he should look further work the respondent treated less favourably than she treated or would have treated female carers."

11. At the start of the final hearing, we discussed the issues that the tribunal would have to decide.

12. So far as LFT2 and LFT3 were concerned, there was no dispute about how the respondent had treated the claimant.

13. It was also common ground that there had been some conversation during the claimant's interview (LFT1) about his caring experience, but there was a dispute about:

    13.1. precisely what question the respondent had asked the claimant; and

    13.2. whether asking that question amounted to less favourable treatment.

Jurisdiction issues

14. The claimant notified ACAS of his proposed claim on 25 March 2022 and obtained a certificate on 28 March 2022. This meant that the claim was presented within the statutory time limit for any act of discrimination that was done on or after 26 December 2021. LFT1 was alleged to have taken place in November 2021.

15. We therefore have to determine the following issues ("jurisdiction issues") in order to know whether we had jurisdiction to consider LFT1 is a complaint of discrimination. The jurisdiction issues were:

    15.1. Was LFT1 part of conduct extending over a period which ended on or after 26 December 2021?

    15.2. If not, would it be it just and equitable to extend the time limit?

Reason for the treatment

16. In each case, the tribunal has to decide:

    What was the reason why the claimant was treated as he was? Was it because he is a man, or was it wholly for other reasons?

17. The respondent submitted that, when answering this question, the tribunal should imagine how the respondent would have treated a woman who had a caring responsibility for a person of the opposite sex. In this hypothetical scenario, either:

    17.1. The respondent would have to be a man; or

    17.2. The respondent would be employing the comparator to care for someone else.

    We have to decide whether these imagined facts would make the circumstances of the hypothetical comparator materially different from those of the claimant.

Occupational requirement exception

18. Before we began to hear the evidence, the respondent applied to amend her response. She asked permission to rely on the occupational requirement exception in relation to LFT2.

19. The proposed amendment read (word-for-word):

> "Schedule 9. Part 1 (1) of the EqA allows the discrimination to occur where a job holder needs to of a certain protected characteristic requires a legitimate aim and the proportionate means test to a legitimate aim is used to assess if reasonable.
>
> The legitimate aim
>
> Being a vulnerable person carrying a very serious disability the requirement is that the respondent should be allowed to refuse to confirm that a trial / probation period for a new employee has been passed, in the absence of refences from previous employers, and in light of conduct issues, having regard to doubts originally voiced, in order to feel completely comfortable given the private and personal nature of the intimate care required."

20. We allowed the amendment, giving our reasons orally at the time. Written reasons for that decision will not be provided unless a party makes a further request in writing within 14 days of the date when these reasons are sent to the parties.

21. We further clarified the issues during final submissions. On the assumption that the respondent had directly discriminated against the claimant in **LFT2**, the issues raised by the occupational requirement exception were these:

    21.1. Was LFT2 the application to the claimant a requirement to be woman in relation to the work of being a personal assistant for the respondent?

    21.2. If so, would it be a contravention of any part of section 39 of EqA to which the occupational requirement exception would not apply? (If so, the occupational requirement defence would fail.)

    21.3. If not, would it be a contravention of any part of section 39 of EqA to which the occupational requirement exception was available?

    21.4. Was the requirement an occupational requirement, having regard to the nature or context of the claimant's work?

    21.5. Was the application of the requirement a means of achieving the aims asserted by the respondent?

    21.6. Were those aims legitimate?

    21.7. Were the means proportionate?

Remedy issues – causation of loss

22. When the tribunal finds a complaint of discrimination to be well founded, it may award damages to compensate the claimant for losses directly caused by the discriminatory act. Sometimes, as here, the respondent alleges that the loss would or might have been suffered in any event even the contravention of EqA had not occurred. The parties agreed that we should consider these questions at the same time as deciding whether the complaint of discrimination was well-founded. In particular, we were asked to imagine the counterfactual scenario in which the

respondent's actions had been limited to those which Schedule 9 of EqA permits. What would have happened then? Would, or might, the claimant have resigned in any event? Was the injury to his feelings caused by the unlawful discrimination divisible from the damage to his feelings that would have been caused in any event?

Wrongful dismissal

23. EJ Ross' CMO pithily summarised the claim for damages for wrongful dismissal in this way:

> "The claimant terminated the contract under which he was employed without notice in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct. He avers that he was dismissed; section 95(1)(c) Employment Rights Act 1996 ["ERA"].
>
> The conduct that forced him to resign was the claimant's breach of the implied term of trust and confidence that subsisted within his contract of employment [the CMO cited *Malik,* which we have also cited below]. For or the avoidance of doubt, the breach was the extension of the probation because the claimant was a man and suggesting he should look for other work.
>
> In the absence of a written statement of main term setting out any notice period, the statutory provisions would apply the claimant will be entitled to a week's notice: section 86 [ERA]."

24. The issues were:

    24.1. Did the respondent extend the claimant's probationary period because he was a man? Did she suggest that he look for further work?

    24.2. Did the respondent have reasonable and proper cause for that conduct?

    24.3. Was that conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

    24.4. Did the claimant resign in response to the breach?

25. The respondent did not try to argue that the claimant had affirmed the contract. But Mr Maratos did submit on the respondent's behalf that the claimant had lost the right to resign without notice by committing a breach of contract himself. That struck us as a novel submission, and we were not quite sure of the legal principle on which it was based. We did our best to apply the law to it.

Wages

26. The claimant claimed 27 hours' pay, as recorded in EJ Ross' CMO. The wages were said to have been properly payable as wages for work that he had done (as opposed to some other form of wages such as holiday pay or sick pay).

27. We returned to the issues in the wages claim periodically during the hearing. The claimant asked for time to find some time sheets. We reached the point where the claimant accepted that he had been paid for all the wages properly payable for his work up to and including 22 February 2022. It appeared at that point that the issue for us to decide was whether or not the claimant had done any work for the respondent after 22 February 2022. During the claimant's oral evidence, however, he accepted that he had not done any work after that date. We therefore dismissed the wages complaint. The claimant was no longer saying that there was

any occasion on which he was paid less than the wages that were properly payable to him. On his own evidence, no deduction had been made from his wages.

Other remedy issues

28. If any of the claim succeeded, we would also need to decide whether to make an additional award to the claimant of 2 or 4 weeks' pay under section 38 of the Employment Act 2002. There was no dispute that the respondent had created a written contract of employment containing the information required in section 1 of ERA. The contract had been given to the claimant for long enough for him to sign it. Nor was it in dispute that what then happened was that the respondent took the signed contract and stored it in a cupboard without giving the claimant a copy to keep for himself. The issues were:

    28.1. Whether the statement had been given to the claimant in those circumstances;

    28.2. If not, whether there were exceptional circumstances making an award (or increase) unjust or inequitable; and

    28.3. If not, whether it would be just and equitable to award 4 weeks' pay rather than 2 weeks' pay.

Evidence

29. We read a 140-page bundle of documents prepared by the respondent.

30. The claimant and respondent each gave oral evidence on their own behalf. Additionally, the respondent called Susan Clarke and Jacky Crawford as witnesses. All four witnesses confirmed the truth of their written statements and answered questions.

Facts

31. The respondent is a woman. She has a condition known as spinal muscular atrophy. She uses a wheelchair and has very limited movement of her arms and hands. She needs personal care around the clock. Her care needs include hands-on help with washing and bathing. She needs to be lifted onto the toilet. Once she has used the toilet, she needs someone to wipe her and clean her. For those care needs and others, she employed a team of personal assistants.

32. At the time with which this claim is concerned, the claimant had a son who lived at home.

33. For many years, the respondent has relied on the support of an organisation called Disability Positive to find suitable candidates for personal assistant roles. Disability Positive checks the records of newly recruited personal assistants with the Disclosure and Barring Service ("DBS"). Being vulnerable, the respondent also relies on references from the previous employers of newly recruited carers, but leaves it up to the employee to provide a copy of the reference. She does not personally chase the referees if they do not provide a reference.

34. The claimant is a man. He has experience of providing personal care to his disabled mother who sadly died in 2022. He has a qualification in providing care for people with autism and brain injuries. He was employed by two local authorities as a Care Manager. His role included coordinating packages of care for disabled people and ensuring that carers received the necessary training. After that, he worked for a private care company, again organising packages of care.

35. In 2021 the respondent was struggling to find a full team of suitable personal assistants. Her regular personal assistants included Mrs Clarke and Mrs Crawford. Disability Positive placed an advertisement on Indeed. The claimant applied for the role. He had previously applied unsuccessfully for the role at least once. He submitted an application form giving the names and email addresses of three referees. His application form mentioned that he had a pre-booked holiday between 20 and 30 December 2021.

36. Up to that point, the respondent had only ever employed female personal assistants. Nevertheless, she was prepared to try out a male carer. She thought that having a male carer might have some advantages. The way she saw it, a man might be less emotional and more pragmatic than a woman, with the benefits that might bring.

37. The respondent sent the claimant a text message stating that the role would be to enable a female and asking, “Are you comfortable with this?”. The claimant replied that he would be fine with personal care. The respondent invited the claimant for interview, which took place on or about 11 November 2021.

38. Mrs Susan Clark, one of the respondent’s personal assistants, was present at the interview. There is a dispute about what was said. The claimant's evidence is that he was asked briefly what he had done and, once he had explained about his history of working with autism and brain injury he was asked, “have you done males and females?” to which he replied, “yes”. This is denied by the respondent, but we find that the interview question was asked in that way. We accept the claimant's version because it is consistent with the text message that the respondent had already sent.

39. Following the interview, the respondent offered to employ the claimant subject to a probationary period of three months. The claimant accepted and his employment started on 15 November 2021.

40. The claimant signed a written contract of employment.

41. Clause 2.2 stated:

> “The first three months of your employment shall be a probationary period and your employment may be terminated during this period at any time on one week's prior notice. During this probationary period your performance and suitability for continued employment will be monitored. I have the discretion to extend your probationary period should I feel it necessary and if I do so I shall inform you of this in writing. At the end of your probationary period you will be informed in writing if you have successfully completed your probationary period. Your probationary period has been spent."

42. Clause 15.1 stated:

> ...After successful completion of the probationary period referred to in clause 2.2, the prior written notice required from the Employer to terminate your Employment shall be one months’ [sic] notice in the first four years of employment..."

43. At the time of signing his contract, the claimant knew that his employment was subject to a probationary period, but did not realise that this would affect the contractual notice period. He was not given a copy of his contract of employment. The original signed copy was kept in a cupboard. There is a dispute about whether the cupboard was locked or unlocked. We did not find it necessary to resolve that dispute. The claimant asked more than once for a copy of his contract, and he was told that the respondent would get it printed for him.

44. The claimant's employment began with shifts where he "shadowed" an existing carer.

45. There is some confusion over exactly what shifts the claimant worked and when. The payslips did not give us the definitive answer. There is a dispute about when the claimant first started regularly working. He says his employment started on 15 November. A late disclosed timesheet suggests that the first shadowing shift was on 19 November 2021. That does not appear to be consistent with the payslips.

46. In the end we decided not to determine the dispute about exactly when the regular shifts started. It is clear from the evidence that the claimant (prior to his pre-planned holiday on 20 December) worked four or five weeks of regular shifts. He then missed five or six shifts in December because of his pre-booked holiday. In January 2022 he took another further 1½ weeks' holiday and four days of compassionate leave to which we will return.

47. The respondent had reservations about allowing the claimant to assist her with her toilet care. Sometimes the respondent needed the toilet whilst the claimant was the only personal assistant on shift. Whenever that situation arose, she allowed the claimant to lift her onto the toilet, but as soon as she had finished using the toilet, she asked him to pull her underwear up without wiping her. She deliberately did not do any bowel movements in the claimant's presence. This was because she did not want the claimant to wipe her clean afterwards. Her reluctance to move her bowels meant that she became constipated. She told Mrs Crawford that this was happening when Mrs Crawford was helping to bathe her. Mrs Crawford had to administer two suppositories. Following this incident, the respondent and Mrs Crawford agreed on an arrangement to keep to a minimum the occasions when the respondent would need the claimant's assistance to go to the toilet. Mrs Crawford would help the respondent to the toilet just before the claimant came on shift.

48. The respondent alleges that the claimant offered money to other personal assistants specifically for the purpose of attending to the respondent's toilet needs. We believed the claimant when he told us that this did not happen. We did not understand how that could be made to work in practice. That is not to say that we reject the respondent's witness evidence entirely. The claimant may well have offered money to personal assistants to work his *shift.* That would not be uncommon in the care industry.

49. Despite the awkwardness over toilet care, the working relationship between the claimant and respondent was initially good. On 29 November 2021 the respondent emailed the claimant thanking him for his kindness and relentless support and describing him as a "gift" and a "treasure".

50. On or about 8 December 2021 the claimant gave the respondent a scented candle. The respondent thanked him for "the thoughtful gift which was so sweet". The claimant also gave the respondent a Christmas present of a Swarovski bracelet. The respondent believed that it was a genuine bracelet based on an internet search of that brand. She concluded that it must have cost him in the region of £200. We did not have to decide how much the bracelet actually cost the claimant to buy; the respondent thought it was expensive and this made her feel uncomfortable.

51. On 7 January 2022, the claimant learned that his mother had died. It almost goes without saying that he was too upset to work that day. He telephoned the respondent in the morning and emailed later that day. The respondent replied supportively. The claimant then was given four days' compassionate leave.

52. By 23 January 2022, the respondent had discussed with the claimant the possibility of a new lead personal assistant role. The claimant had introduced the respondent to a male acquaintance who he believed would be suitable. The holder of the lead role would not only be responsible for directly providing care, but also for ensuring that suitable carers were rostered to cover every shift.

53. The claimant and respondent exchanged messages on 23 January 2022. The tone remained positive. The respondent made a gentle attempt to discourage the claimant from giving further gifts, saying "you'll have to stop spoiling me".

54. On 14 February 2022 the claimant went to his GP, saying he was anxious about everything, that he was snapping at people at work and that he did not want to go to work. He went a week later to his GP saying he had had a positive weekend and that work was a welcome distraction.

55. In the meantime, on Friday 18 February 2022 the respondent asked the claimant to speak to her in the front room of her home. The respondent had not given the claimant any advance warning of this conversation or told him what it was going to be about. There were no witnesses present. During the conversation, the respondent told the claimant that she was happy with the relationship that the claimant had built up with her son, told him that he had been brilliant in the job role but that he had not been at work enough. She said that she was disappointed that he had not brought in enough new team members. She told him that his probationary period was going to be extended for a further three months.

56. The claimant observed that he could not help the bereavement of his mother. He asked the respondent what the real reason was for the extension of his probation. She replied that she would put it in writing and email it to him soon. The claimant was upset about the probation period being extended. He felt aggrieved by the lack of notice. He took the extension of his probation to be an implied vote of no confidence in him as an employee.

57. Later that day, Mrs Clark observed the claimant telling the respondent, "you're nasty". Mrs Clark did not think he said it in a joking manner. Nor did the respondent, who felt uncomfortable. She did not at that time think that she was unsafe. Had she thought that, she would have reported it. She told us that she made a record in her own private notes, but he has not disclosed those notes to us.

58. The same evening, the claimant suggested to the respondent that they go out for fish and chips. The respondent agreed. She felt that she had no choice because she was dependent on the claimant to provide her evening meal. It was especially important for the respondent to eat regularly at that time, because she was underweight. They drove to various takeaways. For one reason or another, they did not buy any food. The respondent believed that the claimant was making excuses. By the time they returned home, it was too late for the respondent to have her evening meal. The personal assistant on the night shift informed Mrs Clark the next day of what had happened and that it was important for the respondent to have a good breakfast.

59. On Saturday 19 February 2022 at 14:48 the respondent e-mailed the claimant to confirm the extension of the probation period in writing. Her e-mail did not explicitly give any reasons for her decision. It did, however, cite paragraph 2.2 of the contract of employment in full. (That paragraph is quoted at paragraph 41 of these reasons.) This included the sentence, “Your performance and suitability for continued employment will be monitored,” which implied that performance concerns were the reason for extending the probationary period.

60. At 16:11 the same day, the claimant emailed with “a number of questions to which I would like answers”. He asked what areas of performance had caused sufficient concern for her to extend his probation. He explained the reasons for the time off work that he had taken.

61. The respondent discussed the claimant’s e-mail with Mrs Crawford. As well as trying to work out how to respond, they also decided to check the claimant’s references. They telephoned an organisation that the claimant had mentioned in the referee section of his application form. They did not speak to the named referees. The person on the end of the telephone did not know who the claimant was and said that their organisation had not employed him. This information led the respondent and Mrs Crawford to conclude that the referee details on the claimant's application form were false. We did not reach a definite conclusion as to whether the information was genuine or not. What was clear from Mrs Crawford's evidence was that the respondent's reference enquiries did not begin until she had already made up her mind to extend the claimant's probationary period.

62. On 21 February 2022 at 2.00pm, the claimant had a further conversation with the respondent. He asked her about her reasons for extending his probation period. The respondent said it was not because of his performance, but because of his profession. The claimant replied that he had always been professional. The respondent told the claimant that she would send an e-mail to the claimant explaining why she had extended his probation. The claimant expressed his disappointment. He asked the respondent whether she wanted him to resign or give notice, and the respondent replied that she did not want him to resign.

63. The respondent sent her promised email to the claimant at 20.56 the same evening. It read:

> "... The letter is merely to put in writing my intention to extend your probation period. Please be assured this has nothing to do with your

performance as a PA neither due to the leave taken as a result of the sad passing of your mother.

The reason for the extension of your probation is based on "suitability for continued employment" as stated in your contract.

While I appreciate your professionalism and the work that you do as a PA, you are the first male carer that I have employed.

As can be appreciated due to the extent and level of the care that I need, the nature, scope and degree of intimacy involved in the work, I need to feel comfortable with a male carer.

For the above reason I have always had reservations employing a male and had hoped that I would be comfortable with it this time.

As stated, this is not about your performance but with my being comfortable with the situation, at this moment I am not 100% sure that it is a suitable fit, and therefore my decision to extend your probation stands, in the hope that we can get there.

I trust that you understand the sensitivity of my situation. I do appreciate where you stand and if you feel that you cannot continue under the probation period and would prefer to find a more secure employment, I will understand.

I trust this clarifies my position."

64. The claimant worked on Tuesday 22 February 2022. That was his last day that he worked for the respondent. Shortly afterwards he took sick leave. He obtained a fit note on 28 February 2022 and never returned to work.

65. On 11 March 2022 he resigned by email with immediate effect. His resignation e-mail stated:

> "You extended my probation simply because of my sex. I regard that as sex discrimination and you made me feel terrible about myself. You've upset me so much that I no longer want to work for you. I hereby resign from my employment with immediate effect..."

Relevant law

Direct discrimination

66. Section 13(1) of EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

67. Sex is a protected characteristic.

Less favourable treatment

68. An employer does not treat an employee "less favourably" than others merely by treating them differently. The treatment has to be less favourable: *Schmidt v. Austicks Bookshops Ltd* [1978] ICR 85, EAT.

69. The test is not wholly subjective. It is not enough that the employee believes that the treatment is less favourable: *Burrett v. West Birmingham Health Authority* [1994] IRLR 7. The subjective view of the recipient of the treatment is still highly relevant, however. It is less favourable treatment to deprive a person of a choice that is valued by them on reasonable grounds, even if others might take a different view: *R v. Birmingham City Council ex p Equal Opportunities Commission* [1989] AC 1155, HL.

Comparators

70. Section 23(1) of EqA provides, relevantly,

> "(1) On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case."

71. In *Home Office v. Saunders* [2006] ICR 318, a female prison officer was obliged to search male prisoners, but there was no requirement that male officers should search female prisoners. The Employment Appeal Tribunal held that the correct comparator was a man who was required to search a female prisoner. To adopt the Home Office's formulation of the comparator (a male officer searching a male prisoner) would be to ignore a material difference between the claimant and her comparator, namely the embarrassment specifically caused by having to search a person of the opposite sex. The EAT also emphasised that the Home Office's formulation would defeat the underlying purpose of the legislation, which was to prevent discrimination on the ground of sex.

72. We admit that we did not find it particularly easy to identify the proposition of law for which *Saunders* is authority. One of the defining characteristics of the hypothetical male prison officer (as approved by the EAT) was that he would be required to search a person of the opposite sex. If he were subject to that requirement, he would be treated no more favourably than Ms Saunders. The relevance of the difference between the sexes of the prisoner and prison officer was to how the men and the women were treated. Women had to search opposite-sex prisoners, but men did not. The reason for the less favourable treatment was that they were women.

73. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

"Because"

74. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

Burden of proof

75. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

76. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

77. We are bound by at least two Court of Appeal authorities to hold that the initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913 and *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18. The Supreme Court has recently heard an appeal against the Court of Appeal's decision in *Efobi.* Judgment on that appeal is currently awaited.

78. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

<u>Prohibition of discrimination - work</u>

79. Section 39 of EqA provides, so far as is relevant:

> "(1) An employer (A) must not discriminate against a person (B) -
>
> (a) in the arrangement A makes for deciding to whom to offer employment
>
> (b) as to the terms on which A offers B employment;
>
> (c) by not offering B employment.
>
> (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.

80. We have used *italics* and square brackets in section 39(2)(b) to show that the Schedule 9 occupational requirement exception does not apply to that part of that paragraph. See Schedule 9, Part 1, para 6(5) below.

The occupational requirement exception

81. Schedule 9 to EqA is headed, "Work: Exceptions". Part 1 of that schedule has the heading, "Occupational Requirements."

82. The following provisions of Part 1 appear to us to be relevant:

> 1. General
>
> (1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work-
>
> (a) it is an occupational requirement,
>
> (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
>
> (c) the person to whom A applies the requirement does not meet it...
>
> (2) The provisions are-
>
> (a) sections 39(1)(a) or (c) or (2)(b) or (c);
>
> ....
>
> 6. Interpretation
>
> (1) This paragraph applies for the purposes of this Part of this Schedule.
>
> (2) A reference to contravening a provision of this Act is a reference to contravening that provision by virtue of section 13.
>
> …
>
> (5) A reference to section 39(2)(b)... is to be read as a reference to that provision with the omission of the words "or for receiving any other benefit, facility or service".
>
> (6) A reference to section 39(2)(c) … (dismissal, etc) does not include a reference to that provision so far as relating to sex."

Constructive dismissal

83. An employee seeking to establish that he has been constructively dismissed must prove:

> 83.1. that the employer fundamentally breached the contract of employment; and
>
> 83.2. that he resigned in response to the breach.
>
> (*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

84. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between

employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

85. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> 12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> > "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

86. The respondent argues that an employee who is in repudiatory breach of contract cannot accept his employer's repudiatory breach. If that submission were correct, it would mean that an employee who has committed gross misconduct resigns in response to his employer's fundamental breach of contract, he is not constructively dismissed. Mr Maratos could not find any authority to support that proposition and we do not think it is the law.

<u>Increase in compensation under section 38 Employment Act 2002</u>

87. Section 38 of the Employment Act 2002 applies to claims under jurisdictions including unlawful discrimination and claims for damages for breach of contract.

88. Subsection (3) provides, relevantly,

> (3) If in the case of proceedings to which this section applies-
>
> (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) … of [ERA],
>
> the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

89. The minimum amount is two weeks' pay and the higher amount is four weeks' pay.

90. Subsection (5) disapplies the requirement in subsection (3) "if there are exceptional circumstances which would make an … increase under that subsection unjust or inequitable".

91. Section 1(1) of ERA provides:

> "
>
> (1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment."

92. We are not aware of any authority on the question of what is meant by the word "give" in section 1(1). In the absence of authority, we consider that:

    92.1. A gift is open-ended. An employer does not give a written statement to the worker simply by allowing the worker to take possession of it for long enough to sign it.

    92.2. Making a written statement available for inspection is not giving it to the worker, because the worker cannot take it away, mark it or keep it.

    92.3. Making a copy available for collection may amount to giving that copy to the worker, but the more the employer requires the worker to go looking for the copy, the less likely it is that the copy will properly be regarded as giving it.

Conclusions – sex discrimination

<u>LFT1</u>

93. We start with the first allegation of less favourable treatment, which was asking the claimant in interview, "Have you cared for women as well as men?"

94. The claimant has proved facts from which we could conclude that the reason why the respondent asked that question was because the claimant was a man. These include:

    94.1. The respondent always had reservations about employing a man in certain aspects of her care from the time she recruited the claimant; and

    94.2. The respondent later confided in Mrs Crawford that she was not confident having the claimant to her toilet needs;

95. The burden therefore shifts to the respondent to prove that her reason for asking the question was not motivated to any significant extent by the fact that the claimant was a man.

96. We find that the respondent has discharged that burden.

97. We are satisfied, on the evidence, that the respondent would also have asked a man the same question. She was about to employ someone to help her with toilet care. Women need different help to use the toilet than men need. The respondent needed to check that her personal assistant was experienced in delivering the kind of toilet care that was unique to a female client. She needed to be satisfied of that, regardless of the sex of the person who was providing the care.

98. We have imagined a scenario in which we are held to have reached the wrong conclusion about that. It might be held that the only conclusion open to us was that the respondent asked the question because the claimant is a man. In anticipation of such a finding, we have also considered whether, by asking the question, the

respondent treated the claimant less favourably than she would treat a woman. We do not think she did. It is one thing to say that the respondent treated the claimant differently to others because of his sex. It is another thing to say that the difference in treatment was "less favourable" to the claimant. He could not reasonably think himself to be in any worse position than a candidate who had not been asked the question at all. This was a perfectly appropriate question. It was not at all onerous to answer. It did not imply any pre-judgement. The claimant must have known that it was a relevant question, because it was about his experience in performing an essential part of the role for which he was applying.

99. We do not therefore need to consider the statutory time limit issues that arise in relation to that interview question, nor do we need to consider whether it comes within the occupational requirement exception.

LFT3

100. We move to the third allegation of less favourable treatment. The final paragraph of the respondent's 21 February 2022 email included this sentence, "I do appreciate where you stand and if you feel that you cannot continue under the probation period and would prefer to find a more secure employment, I will understand." Why did the respondent include these words?

101. The burden shifts to the respondent to prove that the inclusion of those words was not in any way motivated by the fact that the claimant is a man. The facts from which we could conclude such motivation include the respondent's confession in the same email to having always had reservations about employing a man.

102. That said, we are persuaded that the respondent's decision to include those words in the e-mail had nothing to do with the claimant's sex. The reason for the wording of this part of the e-mail was simply because of what the claimant had said earlier that afternoon. He had said, "Do you want me to resign or give notice?", to which the respondent had replied that she did not want him to resign. Here, in her e-mail, the respondent was attempting to demonstrate empathy with the claimant's position that the extension of his probationary period had made him consider resigning. It was not an attempt to persuade him to leave, and was not motivated by the fact that he is a man in any sense whatsoever.

LFT2

103. That leaves one allegation of less favourable treatment, namely LFT2 - the extension of the probationary period.

Direct discrimination

104. An extension to the probationary period had adverse consequences for the claimant. As a probationary employee, the claimant had a reduced contractual notice entitlement. The extension decision also implied that the respondent was not fully confident in the claimant's suitability for the role, something which she then expressly confirmed by e-mail.

105. We have asked ourselves what was the reason why the respondent decided to extend the claimant's probation. Here we are able to make a positive finding without recourse to the burden of proof provisions. The reason was because the claimant is a man. The respondent was not comfortable with the idea of a man providing the full range of toilet care that she needed.

106. When coming to this decision, we have considered the contrary argument presented by Mr Maratos on the respondent's behalf. Mr Maratos says that the respondent treated the claimant the same as she would treat a woman whose role it was to care for a person of the opposite sex. He says that such a woman would be the appropriate comparator.

107. We approached this argument in two stages. First, we imagined ourselves to be free from any binding authority in *Saunders* and asked ourselves what our conclusion would be. Second, we asked ourselves whether the *Saunders* decision bound us to reach a different conclusion.

108. Applying the words of the statute free from any authority in *Saunders,* we consider that the respondent's argument is ill-founded. The circumstances of Mr Maratos' hypothetical female personal assistant would be materially different from those of the claimant. The material differences were the sex and identity of the person who needed the care. It is not helpful to try and imagine what decision the respondent would have made if she had been a man. For one thing, her toilet care needs would have been materially different. More fundamentally, however, a person's sex has to be at least capable of influencing the decisions that they make. We have no way of knowing what the respondent would have been thinking if she were a man. We do know what the respondent was actually thinking. That is a material difference in circumstances.

109. We have also imagined a hypothetical scenario in which the respondent had employed a woman as a personal assistant to provide care, not for herself, but for a disabled male relative such as her father. Is it appropriate to consider how the respondent would have treated the female personal assistant? In our view it is not appropriate. Again, the problem for the respondent is that the circumstances would be materially different from her own case. The male relative's toilet needs would not be the same as those of the respondent herself. Moreover, much would depend on the wishes of the male relative. It is of course possible that he would feel the same way about having an opposite-sex carer as the respondent felt, but he might well be much more comfortable with that idea than she was.

110. Finally, we looked at *Saunders.* For the reasons we have given, we are not sure quite what the proposition is that we must derive from *Saunders* and then follow. If the rule established by *Saunders* is merely that comparators must not be constructed so as to defeat the purpose of the legislation, that proposition is consistent with our decision. But even if *Saunders* goes further, and would otherwise be binding on us, we would distinguish that case from ours. In *Saunders,* the discriminator was not the person being searched. It would make no difference whether the Home Office policymakers, or the governors who implemented the policy, were men or women. The circumstances of the claimant and the hypothetical male officer would be identical. In this case, by contrast, the fact that the respondent was a woman matters fundamentally. The claimant was not employed to care for anybody else. The respondent extended his probation period because he is a man.

111. The respondent therefore directly discriminated against the claimant.

Contravention

112. The next question is therefore whether the direct discrimination in LFT1 would amount to a contravention of EqA.

113. In our view, there was no contravention of section 39(1) of EqA. The decision to extend the claimant's probationary period was not part of the arrangements made by the respondent for deciding whom to offer employment. It was not a refusal to offer employment. Nor can it properly be said that the extension of probation was part of the terms of an offer of employment.

114. We have considered which, if any, provision of section 39(2) the direct discrimination would contravene. This exercise is important, because the Schedule 9 exception authorises an employer to do some of the things mentioned in section 39(2), but not others.

115. Another reason why identification of the precise contravention of section 39(2) is particularly important is because of the structure of section 39 itself. Section 39(2)(d) prohibits discrimination by subjecting an employee to "any other detriment". This is a residual category. Discrimination falls into the category of "other" detriment if:

115.1. it was in the employment sphere (which LFT2 clearly was)

115.2. it was reasonably understood by the employee to be detrimental to him (as was the case here) and

115.3. it does not fall within one of the categories in section 39(2)(a), (b) or (c).

116. Unless the discrimination fell within sections 39(2)(a), (b) or (c), it fell into the residual category (d). The occupational requirement exception does not apply to discrimination falling in that category.

117. During the respondent's closing submissions, Mr Maratos advanced a submission that LFT2 gave rise to a constructive dismissal and therefore came within section 39(2)(c). That submission necessarily involved making a positive case that the respondent fundamentally breached the claimant's contract. But in any case, that submission could not help the respondent, because Schedule 9 does not permit an employer to dismiss an employee because of his sex, no matter how compelling the occupational requirement for the employee to be a woman: see paragraph 6(6).

118. Another possibility was that the extension of the probationary period was discrimination as to the terms of the claimant's employment within the meaning of section 39(2)(a). If it was, the occupational requirement defence would not be available to the respondent. The respondent's discriminatory decision certainly had the *effect* that the claimant's terms were different than they would have been had the claimant successfully completed his probation. Nevertheless, we have decided that the respondent did not contravene section 39(2)(a). We reach this conclusion for two reasons:

118.1. The claimant's contract envisaged two distinct stages of employment, with different terms (notice periods) applicable to each. The first stage was the probationary period. The extension of the probationary period was essentially a refusal by the respondent to afford the claimant access to the opportunity to progress from the probationary stage to the next stage. The consequence was that he remained on the same inferior terms as before, but that will also be the consequence where, for example, an employee is refused a promotion to a more highly-paid role. That would be a paradigm case falling within section 39(2)(b).

118.2. A narrower interpretation of section 39(2)(a) is more likely to give effect to the statutory purpose. Schedule 9 was plainly intended to create a carefully-balanced scheme. The purpose was to enable an employer lawfully to refuse to employ a worker in a particular role, or promote a worker to that role, on the ground that a person of the opposite sex was justifiably required for that role. But an employer does not always know whether to offer employment to a candidate or refuse it. Where an employer is undecided, they may opt to offer employment subject to a probationary period. That gives the employee an opportunity to demonstrate that they are suitable for the role by proving themselves through their work. In the context of Schedule 9, it gives a male employee the chance to prove that the role does not need to be done by a woman. If the extension of a probationary period fell within section 39(2)(a), that would mean that the employer would effectively be penalised for continuing to give the employee that chance. To have any chance of availing herself of the occupational requirement defence (on the wider interpretation of section 39(2)(a)), the employer would be forced into taking the harsher step of not employing the man the in role in the first place. We do not think Parliament would have intended such an outcome.

119. This leaves section 39(2)(b). Here, we must consider whether or not LFT2 was discrimination in the way the respondent afforded the claimant access to an opportunity for promotion, transfer or training. (If it was any other benefit, facility or service, the occupational requirement defence would fail: see Schedule 9 paragraph 6(5).)

120. The claimant was not denied access to training.

121. It would usually be a stretch to the wording of section 39(2)(b) to regard successful completion of a probationary period as a "promotion" or "transfer". Nevertheless, we have decided that a denial of a promotion or transfer is apt to describe what happened in LFT2. This is because:

121.1. The purpose of the claimant's probationary period was to see if the claimant was suitable for the full requirements of the role, including intimate toilet care. Successful completion of the probation went hand-in-hand with the respondent being prepared to let the claimant provide that care. Successful completion of the probationary period would have involved not just a more favourable notice period, but an increased responsibility. It can properly be said that the claimant would be promoted to that responsibility or transferred to that responsibility.

121.2. For the same reason as we have given above, we do not think it was Parliament's intention to exclude decisions on probationary periods from the ambit of Schedule 9.

122. The direct discrimination in LFT2 did not contravene any part of section 39 except section 39(2)(b). We are therefore prepared to consider the schedule 9 exception on its merits.

Occupational requirement exception

123. It was an occupational requirement for a personal assistant to be a woman to carry out the full requirements of that role. The particular part of the role for which a woman was required was assisting the respondent to use the toilet and cleaning her private parts afterwards.

124. When recruiting the claimant, the respondent was open to persuasion about whether sex was an occupational requirement of the role or not. On 18 February 2022, however, she applied the occupational requirement to the claimant by extending the claimant's probationary period on the ground that she believed that only a woman could carry out the full range of tasks that she needed a personal assistant to perform.

125. The application of that requirement was a means of achieving the aim of privacy and dignity. It spared the respondent the embarrassment and awkwardness of a person of the opposite sex wiping and cleaning her private parts after she had used the toilet. That aim is plainly legitimate.

126. We have compared this legitimate aim with the rather convoluted aim on which the respondent relies. In our view, our characterisation does not alter the respondent's case; it just simplifies it. There is no need for any further amendment to the response.

127. What we must now do is ask ourselves whether the application of that requirement by extending the probation period a proportionate means of achieving that aim.

128. In our view, the extension was not proportionate. The aim was undoubtedly important, as we have acknowledged in our introductory paragraph. But the importance of the aim has to be balanced against the stark discriminatory impact on the claimant. The respondent could have preserved her own privacy and dignity in ways that were less discriminatory. She could have spoken to the claimant long before his probation period ended and given him the opportunity to complete his probation successfully. They had worked together for at least four weeks before his December holiday during which time the relationship was undoubtedly good. She could have told him that she would need her carer to wipe her private parts clean when she used the toilet. She could have told him openly that they would have to build up a relationship of sufficient trust to enable that to happen before he could carry out his full responsibilities as a personal assistant. She could have mentioned the occupational requirement at the probation review meeting on 18 February, instead of disguising it with other reasons which were not the real reason for her decision. These are difficult conversations to have at the best of times. It required sensitivity on both sides, but it was a conversation that would have had to have happened for the extended probation period to work, just as it was a conversation that would have helped the initial probation period to work. It would have given the claimant a chance to suggest ways to build the relationship of trust that was needed. It would also have given the claimant an opportunity to suggest alternatives to an extension to his probationary period. Those could have included arranging overlapping shifts, to reduce the likelihood of the claimant needing the most intimate toilet care whilst the claimant was the only personal assistant on shift.

129. Being disproportionate, the direct discrimination in LFT2 did not satisfy the requirements of Schedule 9 paragraph 1 and was therefore a contravention of section 39(2)(b).

Causation of loss

130. We now turn to the agreed issues concerning the claimant's remedy for unlawful discrimination. Had there been no contravention of the Equality Act 2010

by the respondent, would the claimant have remained in employment? Might he have remained in employment? Would his feelings have been hurt in any event?

131. Our conclusions on these issues are as follows:

131.1. We imagined that the claimant's probationary period had not been unlawfully extended. In that scenario, the respondent would inevitably have tried to address the problem some other way. The problem was that, because the claimant was a man, the respondent was uncomfortable with him providing the full range of toilet care for her. We have concluded that it would, in principle, have been proportionate for the respondent to explain the difficulty to the claimant, to give him an opportunity to establish the necessary relationship of trust, and to restrict that aspect of his responsibilities in the meantime, possibly with the aid of overlapping shifts. The respondent would, in those circumstances have had the protection of the Schedule 9 occupational requirement defence.

131.2. Had the respondent taken these steps, or taken any other lawful measure to address the problem, the claimant's feelings would still have been significantly hurt. He believed strongly that, as a man, he was equally as capable as a woman of providing all aspects of personal care with dignity and skill. He was fundamentally opposed to any suggestion that his sex should be seen as a barrier to him providing that care to a woman. Any attempt by the respondent to broach the subject would have been upsetting for him. His sense of hurt would have been felt more deeply by him because of the other distressing events that were happening in his life at the same time, in particular the death of his mother.

131.3. It is not inevitable that the claimant would have resigned had the respondent acted lawfully. There was a period during November and December 2021 when the working relationship between the claimant and respondent was good and the claimant was working regular shifts. Had the respondent raised the subject of toilet care at that time, there is a chance that the claimant and the respondent could have reached a practical solution that would have allowed the employment relationship to progress beyond the probationary period. Had the respondent have waited until after 7 January 2023 to have the conversation, it would almost certainly have led to the claimant's resignation. It is very unlikely that, between 7 January 2023 and 18 March 2023, the claimant and the respondent could have built the relationship of trust that would have enabled the claimant to provide the full range of toilet care. This is because the claimant worked so few shifts during that period.

131.4. We have also factored in the possibility that, even if there had been no discriminatory extension to the probationary period, the respondent might have dismissed the claimant for reasons unconnected to the fact that he is a man. His behaviour towards the respondent on 18 March 2023, as witnessed by Mrs Clark, was such as to make the respondent feel uncomfortable, albeit not unsafe. The respondent was unhappy, and observed to be so by Mrs Crawford, when the claimant took the respondent out supposedly to buy an evening meal and returned to the house hungry. It is likely that the unlawful extension to his probationary period had contributed towards his behaviour on

those particular occasions, but there is a significant possibility that some other trigger would have caused the claimant to behave on some other occasion in a way that was sufficiently concerning to the respondent to lead her to terminate his employment. On his own confession to his GP, he had been snapping at people at work before he knew his probationary period was being extended.

131.5. Overall, we find that had there been no unlawful discrimination there is a 75% chance that the claimant's employment would have terminated in any event by 11 March 2023, either by lawful dismissal or by the claimant's resignation.

132. Overall we find that had there been no unlawful discrimination there is a 75% chance that the claimant's employment would have terminated in any event, either by lawful dismissal or by the claimant's resignation.

Conclusions – wrongful dismissal

133. We now turn to the complaint of wrongful constructive dismissal.

134. In our view, the respondent fundamentally breached the claimant's contract. Our reasons are as follows:

134.1. The discriminatory extension of the claimant's probationary period, without any prior warning or consultation, and initially obfuscating about the real reason, was conduct that was likely to damage seriously the relationship of trust and confidence.

134.2. The respondent did not have reasonable and proper cause for her conduct. We do not go as far as to say that there will never be circumstances in which an employer has reasonable and proper cause for sex discrimination by extending a probationary period. To determine the wrongful dismissal complaint in this case it is sufficient to conclude that there was no reasonable and proper cause for the manner in which this respondent did it. She did not have reasonable and proper cause for making that decision without prior warning or consultation or giving the claimant an opportunity the of addressing the matter of concern during his initial probationary period.

134.3. The respondent therefore breached the implied term of trust and confidence.

134.4. A breach of that term is always fundamental.

135. The claimant resigned in response to that breach. We accept that the reason given by the claimant in his resignation e-mail of 11 March 2022 was the real reason why he left.

136. The claimant did not lose the right to resign by his conduct towards the respondent on 18 February 2022. Assuming that the claimant was himself in repudiatory breach of contract, he was still entitled to accept the respondent's repudiation by resigning. The respondent's remedy for any alleged gross misconduct on the claimant's part would have been to accept his repudiation by dismissing him. She did not do that.

137. The constructive dismissal was wrongful. The claimant was not given the week's notice to which he was entitled. The claimant is therefore entitled to damages for that breach of contract.

Conclusions – Employment Act 2002 increase

138. The respondent did not comply with section 1 of ERA. Whilst she made a statement of particulars of employment, she did not give it to the claimant. At best, she made the original version available for inspection in a filing cabinet, where the claimant would have to go looking.

139. The respondent was still in breach of section 1 of ERA at the time the claimant presented his claim.

140. It is inevitable that there will be at least some award to the claimant in respect of the complaints which were determined in his favour.

141. The respondent is an individual who is not in business for profit. We do not regard this fact as an exceptional circumstance that would make it unjust or inequitable for the tribunal to increase the award of compensation. The respondent has a number of employees and had access to advice from Disability Positive. Even if she was initially unaware of her duty to give her employees a statutory statement, she ought to have known when the claimant specifically asked to be given a copy. She still did not provide him with one.

142. We have considered whether it would be just and equitable to increase the claimant's award by the higher amount. Such an increase would not be just or equitable because the respondent is such a small employer.

_____

Employment Judge Horne

27 April 2023

SENT TO THE PARTIES ON

28 April 2023

FOR THE TRIBUNAL OFFICE